



Neutral citation [2011] CAT 1

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1166/5/7/10

Victoria House
Bloomsbury Place
London WC1A 2EB

21 February 2011

Before:

VIVIEN ROSE
(Chairman)
SHEILA HEWITT
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Claimant

- v -

DŴR CYMRU CYFYNGEDIG

Defendant

RULING
(FOLLOWING RULE 40 APPLICATION)

1. On 8 December 2010 the Tribunal handed down its judgment on Dŵr Cymru's application to strike out sections of Albion's Particulars of Claim ([2010] CAT 30) ("the Rule 40 Judgment"). The abbreviations adopted in this ruling and further details about these proceedings can be found in the Rule 40 Judgment. The parties have been unable to reach agreement as to form of order the Tribunal should make, or indeed whether the Tribunal should make an order at all. Dŵr Cymru submitted a draft order which would remove almost all of Albion's claim for damages and restitution as currently pleaded. Albion countered by applying to amend the Particulars of Claim and proposed that the consequences of the Rule 40 Judgment in effect be swept up by a subsequent order allowing the amendments to their pleading.
2. In our view, it is preferable to deal with the effects of Dŵr Cymru's strike out application as set out in the Rule 40 Judgment before hearing arguments about the application to amend the Particulars of Claim. However in determining what the consequences of the Rule 40 Judgment should be for the pleading as it stands, we have had some regard to what Albion has proposed in its draft Amended Particulars of Claim.

Paragraph 4

3. The objectionable words are only those in the last part of that paragraph because they imply that the abuse on which Albion bases its claim relates to the provision of the water itself rather than to the partial treatment and distribution of non-potable water. We therefore strike out the last 13 words so that the paragraph reads as follows:

"The claim arises as a result of the findings made by the Competition Appeal Tribunal ("the Tribunal"), endorsed in part by the Court of Appeal, in respect of abusive pricing practices engaged in by the Defendant."

Paragraph 6(2)

4. Dŵr Cymru proposes that we strike out the whole of paragraph 6(2) which comprises Albion's claim for restitution as an alternative or in addition to their

claim for compensatory damages. However, the Tribunal did not hear argument in the course of the Rule 40 application on the extent to which sums claimed as compensatory damages by Albion can also be claimed in restitution. Dŵr Cymru has accepted that there may well be a claim for damages which can be properly pleaded in this case. It has not thus far argued that any such properly pleaded claim for damages could not also be framed as a claim in restitution, either on the basis of the judgment in *Devenish* or because of something inherent in the claim. Paragraph 6(2) should therefore be allowed to stand.

Paragraphs 93 to 97

5. Dŵr Cymru wishes to strike out the whole of the claim for restitution for money had and received. As currently pleaded we consider that these paragraphs are problematic because they assert that monies *that have been paid* by Albion to Dŵr Cymru were excessive in some way which entitles Albion to recover them. As we explained in the Rule 40 Judgment, the only sums actually paid by Albion to Dŵr Cymru were paid under the Second Bulk Supply Agreement because Albion never entered into a contract incorporating the First Access Price. We do not see therefore how Albion can mount a claim to recover monies paid as being excessive since, as we also explained in the Rule 40 Judgment, there has been no finding that the Second Bulk Supply Price was abusive. We will not strike out paragraph 93, which is the general assertion that restitutionary claims are not ruled out by *Devenish*, because, as we have said, we did not hear argument as part of Dŵr Cymru's rule 40 application as to whether a restitutionary remedy could as a matter of principle be pleaded alongside a claim for damages. We do however strike out the more specific paragraphs 94 to 97.

Paragraphs 100 to 134

6. Dŵr Cymru wishes to strike out almost the whole of the section dealing with causation and quantum of loss, leaving only the two paragraphs (109 and 110) relating to Albion's claim regarding potential water supply to Corus at Shotton. Dŵr Cymru considers that the consequence of the Rule 40 Judgment is that Albion cannot quantify their loss in the manner currently pleaded, that is by multiplying the

amount of water supplied by Albion to Shotton Paper by the abuse differential (see paragraph [8] of the Rule 40 Judgment). From the draft Amended Particulars of Claim served by Albion, it is clear that they do not regard the Rule 40 Judgment as having that consequence, since the draft pleading still calculates the quantum of Albion's loss on that basis. In the draft Amended Particulars of Claim, Albion proposes to assert that if it had been able to operate under a reasonable common carriage arrangement with Dŵr Cymru, it (a) would have bought water from United Utilities at the same price as United Utilities were supplying Dŵr Cymru and (b) would not have incurred any additional overheads in supplying Shotton Paper. We do not of course know whether either or both of those assertions will be established by the end of these proceedings. But if they are, then Albion may be able to show that the correct measure of their loss is indeed 8.8 p/m³, not because it is the difference between the First Access Price and the reasonable common carriage price, but because it in fact represents the lost profit to Albion on its supply of water to Shotton Paper.

7. We therefore do not accept that the effect of the Rule 40 Judgment is to rule out the possibility that Albion's loss is the amount that is currently pleaded, albeit that the quantum would have to be arrived at via a different route from that currently pleaded. It would not therefore be correct to strike out the whole of paragraphs 100 to 134. Dŵr Cymru convinced us at the hearing that that level of quantum could not be asserted on the basis that the Second Bulk Supply Price was abusive. But it has not established that there are no facts which, if properly pleaded, could support an assertion that the correct quantum of loss in fact equates to the abuse differential.
8. Dŵr Cymru has argued that the Tribunal should not leave paragraphs "hanging" in the pleading - if the matter pleaded is not linked to any existing properly pleaded claim then, it argues, the paragraphs should be deleted, even if they could in due course be reinstated once supported by some subsequent properly pleaded case. We do not find that approach a helpful one in the present case.
9. Paragraphs 100 to 134 of the Particulars of Claim cover a number of different assertions:

- (a) The first assertion is the calculation of Albion’s loss in paragraphs 100 to 102. As we have discussed, we consider that these paragraphs should remain as we do not consider that the Rule 40 Judgment means that it is in all circumstances impossible for the loss to be properly quantified at that level.
- (b) Paragraphs 103 to 108 assert that Albion had no choice but to accept the Second Bulk Supply Price or else go out of business. This does not seem to be a contentious point and indeed we are not aware that Dŵr Cymru has argued that Albion should have walked away from the Shotton Paper supply instead of operating under the Second Bulk Supply Agreement. We do not see any reason to remove these paragraphs.
- (c) Paragraphs 109 and 110 relate to Corus. Dŵr Cymru has accepted that these paragraphs can remain in so far as they are consistent with the claim articulated at paragraph 24 of the Rule 40 Judgment.
- (d) Paragraphs 112 to 119 deal with the claim arising from excessive pricing. In our judgment, the effect of the Rule 40 Judgment is that paragraphs 115 and 116 must be struck out, in addition to the reference in the first sentence of paragraph 114 to Dŵr Cymru’s abusive conduct being the charging of abusive excessive prices. We also strike out paragraph 119 since it is tied in to the allegation that the payments in fact made were excessive and hence recoverable (i.e. excessive in some way which entitled Albion to recover them).
- (e) Paragraphs 120 to 123 deal with Albion’s assertion that it has not passed through to Shotton Paper the loss that it incurred as a result of the infringement. We do not consider these paragraphs should be struck out.
- (f) Paragraphs 124 to 127 appear to us to be a summary of the claim and are unobjectionable, apart from the reference in paragraph 124 to “all supplies of non-potable water from the Defendant to the Claimant”, because that

relies on the assertion that the price for the supply of water forms the basis of the claim. We therefore strike out those words.

(g) Paragraphs 128 to 134 describe the interim orders made by the Tribunal. We do not consider that these should be struck out.

Paragraph 137(1) and Annex 1

10. Dŵr Cymru asks the Tribunal to strike out the amount claimed (£4,328,696) for loss arising from the supply by Albion to Shotton Paper leaving only the Corus claim. However for reasons articulated earlier, we do not consider that Dŵr Cymru's approach is correct. We therefore propose to leave paragraph 137(1) and Annex 1.

Further matters

11. Two further matters raised by the parties require our attention at this stage. The first relates to the time for appealing against our decision on exemplary damages (see paragraphs [27] to [38] of the Rule 40 Judgment). Dŵr Cymru has requested an extension of the one month time limit set by rule 58 of the Tribunal Rules. Dŵr Cymru understandably wishes to defer deciding whether to appeal on the question of whether exemplary damages are available in this case until it has become clear whether the Tribunal will make any such award. Albion does not oppose the extension of time and we therefore grant an extension of time under rule 19(2)(i) of the Tribunal Rules in the terms sought.

12. The second matter is more contentious and relates to the costs of Dŵr Cymru's strike out application, to which both parties claim a partial entitlement. Dŵr Cymru submits that it should be awarded two thirds of its costs, an amount which, it says, gives Albion sufficient credit for succeeding in relation to exemplary damages. Albion however submits that it is entitled to a substantial proportion of its costs because Dŵr Cymru failed on the temporal and the exemplary damages points.

13. In both the written and oral submissions, the parties spent a substantial amount of time arguing the exemplary damages point, which we rejected in the Rule 40

Judgment. Significant time was also spent in relation to the temporal point, where we found in Albion's favour. On the other hand, Dŵr Cymru's application was at least partially successful. We therefore conclude that each side should bear its own costs.

Conclusions

14. For the foregoing reasons, the Tribunal is unanimous in its conclusions and orders that:

(a) The following passages of the Particulars of Claim lodged by Albion on 18 June 2010 are struck out:

- i. The last 13 words of paragraph 4, so that the paragraph ends "...by the Defendant";
- ii. Paragraphs 94 to 97;
- iii. The words "in charging abusive excessive prices" in paragraph 114;
- iv. Paragraphs 115, 116 and 119;
- v. The words "on all supplies of non-potable water from the Defendant to the Claimant" in paragraph 124.

(b) Pursuant to rule 19(2)(i) of the Tribunal Rules, the time limit to appeal the Rule 40 Judgment be extended until one month from the final determination of Albion's claim for exemplary damages or until further order, whichever is earlier.

(c) There be no order for costs.

Vivien Rose

Sheila Hewitt

Graham Mather

Charles Dhanowa
Registrar

Date: 21 February 2011