Neutral citation [2012] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1166/5/7/10

Victoria House
Bloomsbury Place
London WC1A 2EB

23 April 2012

Before:

VIVIEN ROSE
(Chairman)
TIM COWEN
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Claimant

- v -

DŴR CYMRU CYFYNGEDIG

Defendant

Heard at Victoria House on 30 March 2012

RULING ON VARIOUS APPLICATIONS MADE AT A CASE MANAGEMENT CONFERENCE ON 30 MARCH 2012

APPEARANCES

Mr. Tom Sharpe Q.C. and Mr. Matthew Cook (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Claimant.

Mr. Meredith Pickford (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant.

Introduction

1. At the case management conference on 30 March 2012 ("the CMC") the Tribunal was asked to rule on interlocutory applications relating to:

   (a) security for costs sought by Dŵr Cymru;

   (b) the award of costs reserved from two earlier contested applications concerning the pleadings and disclosure;

   (c) disclosure of documents relating to the matters covered by the witness statement of Ms Janine White lodged on behalf of Dŵr Cymru; and

   (d) passages in the first witness statement served by Dr Bryan on behalf of Albion Water that Dŵr Cymru alleges are inadmissible and/or incompatible with previous rulings of the Tribunal.

2. This ruling sets out our decisions on all the issues that were raised and also deals with the timetable for the further conduct of the claim. All the decisions set out in this judgment are the unanimous decisions of the Tribunal. This ruling follows the Glossary that was attached to the Tribunal's ruling of 9 June 2011 (([2011] CAT 18) ("the 9 June Ruling")).

Security for costs

3. The Tribunal's jurisdiction to order security for costs is conferred by Rule 45 of the Tribunal's Rules. One of the conditions which, if satisfied, provides a basis for an order is that there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so. Albion Water has accepted that this ground is made out here. The Tribunal may therefore make an order if we are satisfied, having regard to all the circumstances of the case, that it is just to do so.

4. The parties referred us to the two earlier rulings of the Tribunal dealing with applications for security: *BCL Old Co & Ors v Aventis AS & Ors* [2005] CAT 2 ("*BCL v Aventis*") and, more recently, *2 Travel Group plc (in liquidation) v Cardiff City Transport Services*

Limited [2011] CAT 30 ("*2 Travel*"). In the latter case, the Tribunal cited the principles set out by Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Limited* [1995] 3 All ER 534 ("*Keary Developments*"). *Keary Developments* concerned the exercise of the court's discretion to order security pursuant to section 726(1) of the Companies Act 1985 but we consider that the same principles should apply to the exercise of our discretion here. Those principles emphasise the balance that the court must strike, weighing the injustice to the claimant if he is prevented from pursuing a proper claim against the injustice to the defendant if no security is ordered, the claim fails and the defendant finds himself unable to recover his costs. The factors which are relevant here include:

(a) the possibility that the claim will be stifled because the claimant will not be able to provide security: this is one factor, but is not, without more, a sufficient reason for not ordering security;

(b) the claimant's prospects of success, though the court is not required to delve into the merits in detail; and

(c) the timing of the application and the fact that costs, already incurred by the claimant without the respondent having requested security, would be wasted if the proceedings were to come to an early end.

5. As regards the possibility that the claim will be stifled, Dŵr Cymru accepted that the evidence from the financial accounts disclosed by Albion Water and by its parent company, Albion Water Group ("AWG"), showed that neither of those companies would have sufficient funds to meet an order for security of more than a nominal amount. However, Dŵr Cymru complained that the evidence did not establish that there were no other sources of funds to which Albion Water could turn if security were required. Mr Pickford, appearing for Dŵr Cymru, cited the passage in *Keary Developments* where the court said (at page 540):

> "…the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff

> to satisfy the court that it would be prevented by an order for security from continuing the litigation…"

Mr Pickford submitted that Albion Water had failed to discharge the burden of proving that the directors of Albion Water could not provide the funds to meet any order for security since there had been no statements lodged detailing their income and assets. He also said that Albion Water had not provided evidence of what efforts it had made to seek alternative funding.

6. On this point, we accept the submissions of Mr Sharpe QC that the evidence lodged by Albion Water is sufficient for us to conclude that Albion Water, its parent company and its supporters have access to only limited funds. In his second witness statement, sworn on 19 March 2012, Dr Bryan describes the financial contribution that he and the other two directors have already made to Albion Water and the group. He states that by mid-April 2003 his own financial resources were exhausted and that both he and his fellow directors have on a number of occasions agreed to significant salary sacrifices to assist the company's cash flow. He also sets out in a table the remuneration that the directors have received each year since 2004/2005. We regard those amounts as modest given the amount of time that Dr Bryan and his colleagues have clearly spent managing Albion Water's business and conducting the litigation before the Tribunal in Case 1046. In our judgment it would be unjust to expect the directors to put whatever limited private resources they may still have at risk in this litigation.

7. Further, Dr Bryan's evidence is that Albion Water has applied to a third party funder for litigation funding and after the event insurance. Counsel for Albion Water told us that the outcome of that application is unlikely to be known before May 2012 at the earliest. If that funding and insurance is available, then Dŵr Cymru's position may be protected to some extent without the need for an order for security. If it is not available, we do not see what other person in the water industry is likely to be sufficiently interested in the outcome of this claim to agree to support Albion Water.

8. We are therefore satisfied that an order for security for any non-trivial amount will effectively prevent Albion Water from pursuing this claim for damages. That is an important factor but, as we have said, it does not of itself mean that we should not order security to be given.

9. As regards Albion Water's prospects of success, it suffices to say that the Tribunal has rejected previous applications made by Dŵr Cymru to strike out much of Albion Water's claim. Mr Pickford argued that Albion Water has, because of interim relief provided by the Tribunal and support from Shotton Paper, earned the same profit margin on its supply to Shotton Paper over the period since the abuse took place as it would have done if it had entered into a common carriage arrangement with Dŵr Cymru. Mr Pickford argued that this shows not only that Albion Water is unlikely to be able to show at trial that it has suffered any loss but also that Albion Water's impecuniosity cannot have been caused by Dŵr Cymru's abusive behaviour. However, this calculation depends on an assumption that Albion Water would have paid 9p/m^3 for water from United Utilities whereas the primary pleaded case is that it would have paid only 3p/m^3 or something less than 9p/m^3. That is one of the key issues the Tribunal will ultimately decide and is certainly not an issue that we can assume for the purposes of this application will be decided in Dŵr Cymru's favour. We therefore reject the suggestion that there is a "high degree of probability of success or failure" as regards Albion Water's claim, to adopt the wording of Peter Gibson LJ in *Keary Developments* (at page 540).

10. The issue of whether Albion Water's financial difficulties have been caused by Dŵr Cymru's conduct is also closely bound up with the merits of important elements of the claim. We echo the comment that the Tribunal made in *2 Travel* (paragraph 22) that we are concerned that making an order for security for costs would risk extinguishing a genuine claim by an impecunious company in circumstances where it cannot be excluded that the Tribunal might ultimately conclude that Albion Water's impecuniosity has been caused by Dŵr Cymru.

11. As regards the stage of proceedings at which security for costs is sought, Mr Sharpe argued that it is unsatisfactory that this application is made after Albion Water has already spent a great deal of money on the claim and that it must have been clear all along to Dŵr Cymru that the claimant had limited means. Although we see some force in that argument, we accept the evidence of Ms Kim on behalf of Dŵr Cymru that Dŵr Cymru's concerns about Albion Water's ability to pay costs arose when Albion Water made clear in correspondence with Ofwat that it was unable to pay sums that had fallen due as a result of other proceedings that have been progressing in parallel to this claim. We do not

consider that the timing of this application speaks either for or against the making of the order sought.

12. In *BCL Old v Aventis* the Tribunal noted that it was faced on the one hand with "infringers of a public law prohibition" and on the other hand with a claimant who *prima facie* had a good claim which might, however, be defeated by the "passing on" defence raised by the Defendant: paragraph 43. In Albion Water's case there is no doubt that Albion Water was the target of Dŵr Cymru's abusive conduct in March 2001 and if, as Dŵr Cymru assert, it is established at trial that Albion Water has not in fact suffered any of the loss and damage that it is claiming, that would be as a result of extraneous events, namely a combination of the charges set by United Utilities and the interim relief granted by the Tribunal in Case 1046.

13. Taking all these factors into account, our unanimous decision is that it would not be just to order Albion Water to provide security for costs in this case. We therefore dismiss Dŵr Cymru's application.

14. As we mentioned earlier, Dr Bryan's evidence was that Albion Water is waiting to hear whether its application for third party funding and after the event insurance has been successful. We do not consider it appropriate to adjourn this application until the outcome of that is known. However, we expect Shepherd and Wedderburn LLP, acting for Albion Water, to continue to pursue the application and that, if it is granted, the offer of insurance will be taken up and the premiums paid for the duration of these proceedings. Mr Sharpe indicated at the CMC that this was their intention. The Tribunal and Dŵr Cymru must be informed promptly if, for any reason, this is not how matters proceed.

Costs

15. The costs in issue are those arising from the contested applications which gave rise to the 9 June 2011 Ruling and to the ruling handed down on 16 December 2011 (([2011] CAT 42) ("the 16 December Ruling")). We refer to both those rulings for details of the issues that were in dispute between the parties. The Tribunal's power to award costs is conferred by rule 55 of the Tribunal's Rules. That rule provides that the Tribunal may at

its discretion at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of part of the proceedings. That order may direct the payment of a lump sum by way of costs or all or such proportion of the costs as may be just. The Tribunal also has power under that rule to assess the sum to be paid rather than send the matter for detailed assessment.

16. We consider that both parties were partially successful in the applications disposed of by the 9 June Ruling. The Tribunal rejected some of Dŵr Cymru's challenges to the Particulars of Claim: see paragraphs 7, 8 and 12. The Tribunal also ruled that one of the ways in which Albion Water wished to plead its claim was doomed to failure so that permission to make that amendment was refused: see paragraph 18. The costs should lie where they fall.

17. The position with regard to the 16 December Ruling is different. There we consider that Dŵr Cymru was substantially successful in its challenge to certain passages of the Amended Particulars of Claim and in its submission that it should not be required to give disclosure in respect of the allegations made in paragraphs 70 and 78 of the Amended Particulars, of which further details were set out in the letter from Albion Water of 8 July 2011. Although the Tribunal did direct Dŵr Cymru to give disclosure of documents created after July 2004, that was a minor issue compared to the point about the temporal scope of the abuse and the other directions as to disclosure. In our judgment, Dŵr Cymru is entitled to the bulk of its costs for the applications that were disposed of by the 16 December ruling.

18. Dŵr Cymru have asked for a summary determination of the costs and provided the Tribunal with details of costs amounting to £41,353.55. Having regard to the extent to which Dŵr Cymru were successful we consider that Albion Water should pay Dŵr Cymru £30,000 in respect of those costs.

Disclosure of documents supporting Ms White's witness statement

19. As was mentioned above, one of the factual issues that the Tribunal will have to decide in quantifying what damage, loss or harm (if any) Albion Water has suffered is what price Albion Water would have had to pay United Utilities for the water to be supplied to

Shotton Paper. That will be an important element in constructing the counterfactual, namely, what would have happened if Dŵr Cymru had offered Albion Water a non-abusive common carriage price in March 2001 and Albion Water had wished then to supply Shotton Paper with water bought directly from United Utilities. Dŵr Cymru has filed a witness statement from Ms Janine White who was the Competition Strategy Manager for United Utilities at the relevant time. She gives evidence about the history of the discussions that have taken place since 1999 between United Utilities and Albion Water in relation to the price that United Utilities was prepared to charge Albion Water in 2000/2001. She says that most of the matters deposed to are within her direct knowledge but that for the period between 1999 and October 2000 she has relied on contemporaneous evidence and accounts provided by colleagues at United Utilities. In her witness statement, Ms White refers to her work refining the calculation of a price based on regional average long run marginal cost and of the Board approval given to a particular price. She also refers to the price that Dŵr Cymru were paying for water under the Heronbridge Agreement as being "non-cost reflective" and as "at odds with the prevailing regulatory policy and legislation…".

20. Albion Water complains that Ms White has not exhibited to her witness statement any of the background documents on which she based her calculations. She has also not disclosed any internal United Utilities documents which show what discussions about this took place, for example at the Board meeting which she says approved the price to be offered to Albion Water. Such internal documents may well shed important light on the issue that the Tribunal will need to decide, namely whether United Utilities was likely to have accepted, once a common carriage agreement between Albion Water and Dŵr Cymru was in place, that it would supply the water to Albion Water at the same price as it had hitherto been selling it to Dŵr Cymru.

21. United Utilities' initial offer to Albion Water of 9p/m^3 for the water was three times the price they were charging for the supply of that water to Dŵr Cymru at the relevant time. Given that Dŵr Cymru relies on Ms White's evidence as establishing that United Utilities would not have moved downwards from that initial offer during the course of negotiations with Albion Water, it is important that the Tribunal be given the full picture to assess how realistic such a stance would have been at the time. Further, we note that in her statement, Ms White refers to the price of 9p/m^3 offered to Albion Water and says that

she cannot recall any internal discussions about the possibility of offering a lower price (see paragraphs 18 and 19 of her statement). The Tribunal is unclear whether this simply means that Ms White cannot now, over a decade later, remember any such discussions or whether her evidence is that there are no contemporaneous documents currently available from United Utilities referring to such internal discussions.

22. Mr Pickford submitted that it was not appropriate for the Tribunal to make an order for disclosure for these documents because they are documents belonging to United Utilities which is not a party to this action. For the moment we will not order disclosure but simply indicate, as we did at pages 58 to 60 of the Transcript of the CMC, the documents that we would expect to see disclosed if Ms White's evidence is going to be more helpful to the Tribunal's deliberations on this issue.

Dr Bryan's first witness statement

23. Dr Bryan's first witness statement dated 29 February 2012 and served on behalf of Albion Water comprises 626 paragraphs of which Dŵr Cymru seeks to strike out about 230 paragraphs in whole or in part – some on more than one ground. We made it clear at the CMC that we considered the witness statement to be unwieldy and unhelpful, and we agreed with Dŵr Cymru that parts of it were inadmissible. As explained further below, some passages were inadmissible because they refer to incidents which the Tribunal has previously ruled are outside the scope of the issues which Albion Water is entitled to pursue in these proceedings. Some passages are inadmissible because they comprise Dr Bryan's commentary on documents disclosed by Dŵr Cymru in these proceedings; documents of which Dr Bryan can have had no contemporaneous knowledge and as to which he cannot give evidence properly so called. Similarly, paragraphs which simply set out quotations from the Tribunal's judgments in Case 1046 are not evidence: those judgments are a matter of public record and whatever submissions Albion Water wishes to make about them should be made in submissions and not in a witness statement.

24. A large part of the statement, headed "Quantum Issues", is in fact a recasting of Albion Water's quantification of its loss. This, Mr Sharpe accepted, needs to be re-worked to form part of a draft re-amended version of the Particulars of Claim and properly pleaded

having regard to the points that we made during the course of the hearing: see page 49 of the Transcript.

25. The Tribunal has wide powers to control the evidence served in proceedings: see rule 19(2)(e) and (f), and rule 22 of the Tribunal's Rules, applied to follow-on damages claims by rule 44. In our judgment, it is not sensible to go through Dr Bryan's witness statement paragraph by paragraph striking through passages to leave what is likely to be a largely incomprehensible residue. Instead, we direct that Dr Bryan's statement is withdrawn and that it then be re-served in accordance with the procedure set out in the order accompanying this ruling.

26. As regards what matters can properly be included in that re-served witness statement we make the following observations.

27. First, many of the interlocutory disputes between the parties have focused on the scope of the claim for exemplary damages. The Tribunal rejected an application to strike out the claim for exemplary damages ([2010] CAT 30) but limited the scope of the issues that can be raised in support of that claim. The Tribunal has from the start of these proceedings been concerned to ensure that the claim for exemplary damages is not used by Albion Water as a hook on which to hang a variety of contentious allegations of misconduct by Dŵr Cymru or others. The Tribunal ruled in its 16 December Ruling that allegations relating to Dŵr Cymru's conduct before the Tribunal in the course of Case 1046 were not to be explored in these proceedings. Similarly, allegations about Dŵr Cymru's alleged denigratory or aggressive stance in the years following the abuse in March 2001 are outside the scope of the issues that it is proportionate for the Tribunal to consider.

28. Given the content of Dr Bryan's first witness statement, it is appropriate for the Tribunal now to circumscribe more precisely the scope of the allegations we are prepared to consider in this claim. The focus of the Tribunal's attention must be on the conduct and motivation of Dŵr Cymru at the time it provided the First Access Price in March 2001. Evidence dating from that period about Dŵr Cymru's state of mind is relevant to that issue. In addition, there may be contemporary documents which post date March 2001 but which directly relate back to the March 2001 period by referring to the position of the company at that date.

29. There may also be conduct which, although occurring after March 2001, casts light on what Dŵr Cymru's state of mind was at the time the First Access Price was devised and proposed to Albion Water. Mr Sharpe argued at the hearing that if Albion Water were able to show that Dŵr Cymru deliberately misled Ofwat in its submissions in support of the First Access Price during Ofwat's initial investigation of Albion Water's complaint, then that would tend to show that Dŵr Cymru must have realised as at March 2001 that the calculations underlying the First Access Price were insupportable. That in turn would support the allegation that the offer of that price in March 2001 had been a deliberate abuse. This is a point that can be made by Albion Water on the basis of the disclosed contemporaneous documents and any appropriate cost calculations without having to consider (i) whether Ofwat was in fact misled by Dŵr Cymru's calculations, (ii) whether that had any effect on Ofwat's ultimate decision rejecting the complaint, or (iii) whether the reason why Ofwat was misled (if it was) was because of inadequate staffing or expertise.

30. To the extent set out in the preceding two paragraphs – and only to that extent – we agree that evidence relating to Dŵr Cymru's conduct post-March 2001 may be relevant to the exemplary damages claim. Beyond that, we do not regard evidence about post-March 2001 events as relevant. To put it another way, Albion Water has sought to rely on allegations of misconduct over the years as showing a general hostility on the part of Dŵr Cymru against Albion Water and hence as showing the likely motivation of Dŵr Cymru at the time it proposed the abusive First Access Price in March 2001. In our judgment, any light that such alleged post-March 2001 misconduct might shed on Dŵr Cymru's earlier state of mind is unlikely to be sufficient to justify the time and resource it would take to untangle the highly contentious disputes about whether that alleged conduct took place at all and/or whether the alleged conduct was improper or not.

31. Secondly, Dŵr Cymru objects to the way Dr Bryan has expressed Albion Water's case as regards the price that United Utilities would have charged for the bulk supply of water. As the Tribunal made clear in the 9 June Ruling, the question for the Tribunal at the trial will be what United Utilities would have charged Albion Water if negotiations had been pursued to a conclusion. In so far as United Utilities' decision as to what price to charge was influenced by their own assessment of their regulatory obligations or their anticipation of what Ofwat might decide if the matter were referred to the regulator for

determination, that is relevant to our deliberations. What is not called for here is for the Tribunal to put itself in the shoes of the regulator as at 2001 either to work out what United Utilities' legal obligations were at the time as a matter of law or to determine the cost to United Utilities of supplying the water to Albion Water and hence the price that ought to have been charged.

32. Thirdly, as we have indicated, Dr Bryan's comments on contemporaneous evidence disclosed by Dŵr Cymru should not form part of his witness statement when he does not have first hand knowledge of their contents. We explored with the parties at the hearing whether it was useful for everyone to have such a commentary in advance of the trial but in some other form. If the parties are agreed that the production of such a commentary would be useful then that is something that the Tribunal could direct.

33. Finally, we agree with Dŵr Cymru that some other passages in Dr Bryan's witness statement stray into areas that have already been excluded from consideration in earlier interlocutory rulings.

    (a) At certain points Dr Bryan refers to incidents occurring after March 2001 as constituting abuses by Dŵr Cymru or others. These are irrelevant not only because of the points made in paragraph 30 above but also because the only losses that Albion Water is entitled to claim in these proceedings are losses flowing from the abuses found by the Tribunal in Case 1046. It is unsatisfactory for a witness statement to describe other conduct as 'abusive'; Dŵr Cymru cannot fairly be expected to refrain from challenging such an allegation of serious misconduct so that such wording simply generates irrelevant issues and satellite litigation.

    (b) Dr Bryan appears to give evidence in support of heads of damage that are not pleaded. He refers in a general way to the loss of support from Albion Water's joint venture partner, Pennon, and Albion Water's failure to achieve the results expected in the 2001 business plan. He also refers to the "personal toll" that the events since March 2001 have taken on Albion Water's directors. This last point, as Dŵr Cymru submits, appears to hark back to passages in the original

Particulars of Claim that Albion Water itself chose to omit from its amended pleaded case.

Next steps

34. Both parties submitted proposed timetables for the future conduct of these proceedings up to the date of trial. These include a period in which disclosure will be completed, a date by which Albion Water's application to amend the Amended Particulars of Claim will be made and, now a date by which Dr Bryan's revised first witness statement must be served. Thereafter there may be steps consequential on those matters and then the usual provisions relating to bundles and skeleton arguments for the trial. The trial of this matter is likely to take place in the second half of October 2012. Attached to this ruling is an order setting out the directions to give effect to this ruling and establishing a timetable for the future conduct of these proceedings.

Vivien Rose Tim Cowen Brian Landers

Charles Dhanowa
Registrar Date: 23 April 2012