Neutral citation [2013] CAT 27

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos.: 1222/6/8/13
1223/6/8/13

15 November 2013

Before:

ANDREW LENON Q.C.
(Chairman)
DR CLIVE ELPHICK
JONATHAN MAY

Sitting as a Tribunal in England and Wales

B E T W E E N:

LAFARGE TARMAC HOLDINGS LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

HANSON QUARRY PRODUCTS EUROPE LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

RULING (EXPEDITION AND STAY)

A P P E A R A N C E S

Mr. Daniel Jowell QC and Mr. Gerard Rothschild (instructed by Kirkland & Ellis International LLP and Slaughter and May) appeared for Lafarge Tarmac Holdings Limited.

Mr. Richard Gordon QC and Mr. Tony Singla (instructed by Pinsent Masons LLP) appeared for Hanson Quarry Products Europe Limited.

Mr. Daniel Beard QC and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Commission.

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THE CHAIRMAN:

1. This is the case management conference in two applications brought respectively by Hanson Quarry Products Europe Limited ("Hanson") and Lafarge Tarmac Holdings Limited ("Lafarge"). Both applications arise out of an ongoing market investigation being conducted by the Competition Commission (the "Commission") into the markets for the supply and acquisition of aggregates, cement and ready-mixed concrete in Great Britain (the "Investigation").

2. In summary, Lafarge's application alleges that:

   (i) the Commission has acted in breach of its duty to consult by reason of a failure to permit Lafarge to see in fair conditions important parts of the evidence forming part of the alleged adverse effect on competition, referred to in its Provisional Findings published on 21 May 2013; and

   (ii) following publication of the Provisional Decision on Remedies and a press release on 8 October 2013, it is too late to remedy these failures because, to be fair, consultation must take place at the formative stage and these documents show that the Commission no longer has an open mind.

3. Lafarge is asking for an order quashing the Commission's decisions to decline its requests for access to unredacted documents and to proceed to publish the provisional decision on remedies and the press release, with the effect that the Investigation should cease. Alternatively, it is asking for a direction to the Commission to remedy the procedural defects complained of.

4. Hanson's application is, in summary, that the Commission failed to carry out a fair and lawful consultation exercise in relation to an aggregate produced by Hanson known as 'ground granulated blast furnace slag' ("GGBS"). Hanson alleges that the first occasion on which the Commission published a proper detailed analysis of its views relating to GGBS was in an Addendum published on 8 October 2013, the

same day as the publication of its Provisional Decision on Remedies, which included an order for divestment with two of Hanson's GGBS plants as a measure to promote competition in the supply chain for GGBS. Hanson is seeking to set aside the Addendum and the Provisional Decision on Remedies insofar as it relates to GGBS with the effect that the Investigation, insofar as it relates to GGBS, ceases.

5. Both applications have been brought in the light of the recent decision of the Competition Appeal Tribunal in *BMI Limited Healthcare v Competition Commission (No. 1)* [2013] CAT 24 which was handed down on 2 October 2013. In that case, the Tribunal held that the terms on which the Commission permitted the applicants to have access, in the course of a market investigation, to certain sensitive material held in a data room, were unfair and in breach of the rules of natural justice. In its Judgment, the Tribunal held that it was appropriate for the applicants to have sought a review of the Commission's decisions when they did, in other words, before the Commission's final report, and that an even earlier application might have been desirable.

6. Based on that Judgment, Lafarge, represented by Daniel Jowell QC and Gerard Rothschild, submitted that its application should also be decided as a matter of urgency. It submitted, first, that an order for expedition would potentially save substantial time and costs. If the application succeeded in its entirety, the costs of the Commission continuing its Investigation fruitlessly would be saved. If it succeeded only on the issue of failure to consult, there might still conceivably be time to remedy the situation and provide the necessary disclosure and exchange of representations prior to the statutory deadline. Secondly, Lafarge submitted that it would suffer damage to its business if a final decision was made which was later found to have been the result of an unfair process. Mr. Jowell referred to a planned Initial Public Offering ("IPO") of Lafarge's business. He said that a final report and an order for proposed remedies would throw everything up in the air as regards the IPO and would introduce delay and uncertainty. If Lafarge was right in its challenge and the Investigation ceased, that prejudice would be avoided. Thirdly, Lafarge submitted that if the application was not expedited, it might have to go to the time

and costs of seeking a review of the Commission's final report when published. If Lafarge is right in its current grounds and challenge, the final report might be knocked out in its entirety and that time and those costs would be saved.

7. Hanson, represented by Richard Gordon QC and Tony Singla, also submitted that substantial time and costs could be saved by dealing with its application as a matter of urgency because the Commission would be forced to abandon a significant part of its Investigation. Expedition would also be in the interests of legal and commercial certainty because otherwise the Commission would purport to produce a final report dealing with GGBS at the time when there was an outstanding challenge. Mr. Gordon submitted that Hanson's case was factually straightforward; it essentially raised a question of law and would not require any, or any significant, evidence on the part of the Commission. He also submitted that, if there was no order for expedition, there was a risk that the illegality which had been alleged in relation to the Investigation would be compounded on a day-to-day basis. He also submitted, by reference to the decision of the Court of Appeal in the case of *Morrison v AWG Group Limited* [2006] EWCA Civ 6, that disruption and burden on a party's resources was irrelevant when a foundational procedural defect was being raised. As to that latter point, it seems to us that *Morrison v AWG* decides that, where there is an issue as to whether or not a judge should be disqualified, that is not a case management matter to be weighed in the balance with disruption and costs. However, the issue we are considering today is not one of judicial disqualification, but it is a case management issue as to expedition, in relation to which, it seems to us, costs and disruption are potentially relevant.

8. The Commission, represented by Daniel Beard QC and Rob Williams, resisted the applications for expedition essentially on the following grounds:

   (i) An expedited timetable would create overwhelming practical difficulties for the Commission at a time when it is finalising the final report. The final report has to be published by the statutory deadline of 17 January 2014, imposed by section 137(4) of the Enterprise Act 2002. The same team of

staff would be involved in defending both pieces of litigation and working on the final report. There was no scope for postponing matters relating to the Investigation until after the litigation was over. Mr. Beard submitted that both the issues of failure of consultation and pre-judgment would be issues requiring witness evidence, as well as consideration of documents. It would be necessary, amongst other things, to investigate the state of mind of the personnel involved in the Investigation.

(ii) An expedited hearing would result in no, or minimal, savings in time and costs. The Commission's working would be essentially completed by the time of any judgment, and the parties' contributions would also be complete. The only remaining costs and work would be borne by the Commission.

(iii) The Commission disputed Mr. Jowell's submission that the publication of the final report would cause significant damage to Lafarge's business. Mr. Beard pointed out that the business prejudice which was relied on by Mr. Jowell was not mentioned in Lafarge's evidence, or in its submissions, or in the correspondence and, insofar as Mr. Jowell expressed concern about the possible appointment of a monitoring trustee over Lafarge's business, that was entirely speculative at this stage.

(iv) Neither Lafarge's primary claim, nor Hanson's claim to set aside all or part of the Investigation, were time sensitive. They could be dealt with after the publication of the final report. The Tribunal should not proceed on the basis that there had been any illegality.

(v) It was not realistic to assume that Lafarge's alternative case (in other words that the Commission committed procedural failings) could, in practice, be remedied before the statutory deadline. There would probably be need for further disclosure, further representations by Lafarge, and further representations in response by the Commission. All that could not be

accommodated in the time available. There was therefore no real advantage to be gained from dealing with the alternative part of the case before the publication of the final report.

(vi) Hanson's concern as to a possible need to protect itself against a time bar was also immaterial. The Commission confirmed that the time between the lodging of the application and the hearing would not be material to any argument that the application was brought at the wrong time.

(vii) There was no reason why appropriate case management directions could not be given after publication of the final report so as to avoid wastage of time and costs resulting from parallel applications in relation to the final report. There would possibly then be scope for directions for preliminary issues in relation to the matters raised in the current applications.

9. Having reflected on the parties' respective submissions, we have reached the clear conclusion that the two applications should not be expedited, and that the applications should be stayed until after the publication of the final report. Whilst it may be appropriate in some cases for challenges to the fairness of the Commission's procedures to be made and determined promptly, as noted in the *BMI* case, it seems to us that it would not be appropriate to expedite these two applications. This is essentially for the following reasons.

10. First, there would, in our view, be no significant advantage conferred by expedition. The main advantage contended for by Lafarge and Hanson in their skeleton arguments was, as I have noted, the possible saving of time and costs on the part of the Commission in the event that the applications succeed in stopping all or part of the Investigation. However, we accept the Commission's submission that there would not be a significant cost saving, and the wasted cost and work (if any) would be that of the Commission which is itself resisting expedition. The cost saving factor, therefore, does not carry any real weight in our view. Nor are we persuaded that the publication of the final report would cause significant damage to Lafarge's

business. It does seem to us to be material that the damage now adverted to was not the subject of evidence, and was not adverted to in the earlier submissions.

11. As to Mr. Gordon's submission about continued illegality, it seems to us that we cannot assume that any illegality has been committed. In any event, any illegality can be rectified in the near future after the final report has been published.

12. We are likewise satisfied that the rules of procedure of the Tribunal are sufficiently flexible to ensure that there will be no undue waste of time or cost resulting from applications for review of the final report. We believe there should be scope, if appropriate, for directing preliminary issues in relation to the applications that have been lodged to date.

13. Second, because of the impending statutory deadline for the final report, it seems to us that there is no real prospect of the failures to consult alleged by Lafarge (assuming that these are found to exist) being remedied in time so as to ensure the fairness of the Commission's investigative procedure, and to save the final report from a challenge to which it would otherwise be exposed. The possibility of rectifying procedural defects promptly, so as to ensure the fairness of an ongoing investigation, may well be an important factor in favour of expedition in cases where there is sufficient time to put things right, but that possibility is absent on the facts of the two applications before us.

14. Third, we accept the Commission's submission that, given the statutory deadline, the expedited determination of the applications would put a severe strain on its resources at the time when it is finalising the report. The same personnel would be required to work both on the report, to consider materials in order to give instructions and to provide evidence. That is, in our view, a significant factor against expedition.

15. Fourth, the challenges raised by Lafarge and Hanson would be best considered in the context of the conclusions reached in the final report, in particular given the Commission's indication that it would take into account Hanson's response to the

Addendum before reaching its final decision on remedies. For that reason, it does not seem to us that Mr. Gordon's fall-back position of directing that the applications should progress between now and the date of the final report is to be commended.

16. Fifth, there is at least the possibility that the applicants will, in due course, challenge the final report on grounds other than those raised in these applications. If so, and given that the final report is due to be served in less than two months, it would seem to make sense as a matter of efficient case management for all grounds of appeal to be considered together rather than in separate stages.

17. Sixth, Lafarge submitted that the pending judgment of the Tribunal in the Eurotunnel case (Case Nos.: 1216 and 1217) may be relevant to the question of disclosure of exculpatory documents. If so, there would be an obvious advantage in deferring any determination of the applications until after that judgment has been handed down, rather than expediting them. It is not yet clear when that judgment will be handed down.

18. For all those reasons, the Tribunal is not minded to order expedition in this case and directs that the applications be stayed until after the publication of the final report. It also seems to us that, in those circumstances, there is not a lot of point in making directions as to the other specific procedural matters raised in the agenda, but we will obviously hear from the parties as to whether they think that would be appropriate.

Andrew Lenon Q.C. (Chairman) | Dr Clive Elphick | Jonathan May

Charles Dhanowa O.B.E., Q.C. (Hon)
Registrar

Date: 15 November 2013