

COMPETITION LAW

FOLLOW-ON CLAIMS - WHEN IS A FINDING OF FACT NOT A FINDING OF FACT? WHEN IT IS A MATTER OF MERE ARGUABLE INFERENCE

ENRON COAL SERVICES LIMITED v ENGLISH WELSH & SCOTTISH RAILWAY [2011] EWCA CIV 2

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Enron Coal Services Limited's follow-on claim against English Welsh & Scottish Railway has done much to define the CAT's jurisdiction over follow-on claims under section 47A of the 1998 Act. The case was the first of its kind to reach a full trial before the CAT, and has now generated two appeals to the Court of Appeal. The most recent appeal, [2011] EWCA Civ 2, contains some encouragement for would be claimants under section 47A, by finding that section 58 of the Act does apply to follow on claims in the CAT. However, overall, the case confirms that section 47A is not quite the fast route to compensation for infringements of competition law that many hoped or expected it would be.

Enron's claim followed a decision by the ORR that EWS had abused its dominant position in the UK market for coal haulage in various respects. The relevant finding concerned price discrimination against Enron. Enron was principally a seller of coal, and was EWS's customer for haulage. However, Enron and EWS were also rivals, because Enron's main business model was to sell coal and haulage in a bundle, under what were called "End to End" or "E2E" contracts. The ORR found that EWS regarded Enron as a threat to its market position, and so conducted a deliberate campaign of discrimination against Enron.

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Enron claimed damages for a loss of profit on an E2E contract which Enron had hoped to secure for a particular power station owned by Edison Mission. Enron claimed that it had lost a chance of securing such a contract because of EWS's discriminatory behaviour. It relied on findings by the ORR that (1) Enron had in fact been seeking an E2E contract from Edison and (2) that Enron was at a competitive disadvantage in bidding to Edison as a result of the price discrimination, arguing that both findings bound the CAT. Enron claimed that the ORR's findings necessarily meant that it had lost a material chance of winning an E2E contract.

EWS denied that Enron had bid on an E2E basis at all. It said that Enron had actually only bid for a haulage contract, on which it would have made no profit. EWS also denied that the finding of competitive disadvantage had any implications for the question of causation. Its case was that, on the facts, Enron had no chance of winning a coal contract from Edison, regardless of EWS's conduct.

The CAT accepted EWS's arguments. In doing so, it found that section 58 of the 1998 Act, under which all findings of fact by the UK competition authorities are binding on the Court unless otherwise directed, did not apply to follow-on claims in the CAT.

The Court of Appeal overturned the CAT's finding on the point of statutory interpretation, and held that section 58 did apply to claims under section 47A. However, it did not follow that Enron's appeal was successful. The Court rejected Enron's arguments that the ORR had made a finding of fact that it bid on an E2E basis. Thus a passage in the ORR's Decision which said "*ECSL (on an E2E basis)... bid for the contract*" was not regarded as a "*clearly identifiable finding of fact*", but was rather characterised as a finding from which the inference might be drawn that Enron bid E2E. That was not enough to engage section 58.

Having reached that conclusion, the Court went on to find that the ORR's finding of competitive disadvantage did not relate to an E2E bid. The Court also concluded, applying ECJ and CFI authority, that a finding of competitive disadvantage did not necessarily mean that Enron had suffered any loss of a chance, because a finding of competitive disadvantage did not depend on proof of actual harm.

The Court of Appeal's approach to section 58 avoids, and indeed was intended to avoid, the anomaly that would have resulted if the regulator's findings of fact had been binding in the

High Court but not in the specialist CAT. That would certainly have acted as a disincentive – some would argue a further disincentive – to bring claims for damages in the specialist jurisdiction established to deal with competition law matters.

Section 58 is the subject of a “*safety valve*”, in that the Court can direct that a particular finding of fact should not be binding. The Court recognised that this “*safety valve*” would not apply to findings which were directly relevant to the infringement found – such findings are irrevocably binding on the CAT under section 47A(9). The Court commented that this difference in treatment, between directly relevant findings and other “*peripheral or incidental*” findings is a “*comprehensible regime*”.

However, the Court of Appeal’s conclusion that the ORR made no finding of fact that Enron’s bid was E2E might be seen as setting the bar for reliance on section 58 high. The result will surely be much debate as to what is a finding of fact and what is a mere matter of potential inference. That will be the case both in the CAT and in the High Court where section 58 has the same effect.

Had the Court reached a different conclusion as to the basis on which Enron bid, important differences as to what was irrevocably established by the ORR’s Decision would have followed. That is because it was part of the infringement found by the ORR found that Enron incurred a competitive disadvantage when bidding to Edison. If Enron bid E2E, then it would seem to follow that the competitive disadvantage it suffered related to an E2E bid, and not simply a bid for haulage.

This illustrates the importance of defining which findings of fact form part of the finding of infringement, and which do not. In this regard, it is interesting to note that, whatever the ORR found, the Court was clearly of the view that the bid was not properly to be read as an E2E bid. Under section 58, it would have been entitled to substitute its view for that of the CAT. If section 47A applied to the finding, it was not.

The Court also provided observations on various practical matters, such as the need for a clear pleading of any findings of fact which the claimant will say are binding under section 58; the need for an express application by the defendant to disapply any such findings; and the need for brief reasons to be given by the CAT in determining any such application. Had section 58 applied, the Court would seemingly have rejected EWS’s argument that the CAT could have disapplied certain findings of fact as a matter of necessary implication.

Finally, the Court noted that the limited jurisdiction of the CAT in respect of claims for damages, contrasted with the unlimited jurisdiction of the non-specialist High Court, may seem “*somewhat anomalous*”. The Court went so far as to say that that the interrelationship between the two jurisdictions may merit reassessment in light of experience to date. There is obvious force in the Court’s observations. However, it may also be said that the Court’s judgment on Enron’s appeal has exacerbated rather than reduced the extent of any anomaly which may exist.

***Paul Lasok QC and Daniel Beard represented Enron in the CAT
and Court of Appeal.***

Rob Williams also represented Enron in the CAT.