Claim against liner conferences for damages for anti-competitive practices

Yeheskel Arkin v Borchard Lines Ltd & Others
[2003] EWHC 687 English Commercial Court

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CLAIM AGAINST LINER CONFERENCES FOR DAMAGES FOR ANTI-COMPETITIVE PRACTICES

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Facts

The claimant, X, brought a claim for damages against the defendants for breach of Article 82 EC. X was managing director of a liner company ('BCL') which operated routes between the United Kingdom and Israel and northern Europe (the relevant market) in 1988. The defendants were members of two liner conferences which also operated those routes. BCL relied on the bottom end of the market but, as alleged by BCL, the conferences saw even that as a threat and swiftly took anti-competitive measures against BCL. The measures were potentially contrary to Article 81 which prohibits all agreements or concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The defendants, however, argued that those practices were legitimised by Regulation 4056/86, the block exemption applicable to concerted practices by liner conferences.

Considering the difficulty in proving that the block exemption did not apply, the claimant's principal claim was based on Article 82. That Article provides that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited'. X contended that the conferences had abused their dominance by:

(a) their rate-setting policy in the course of a rate war which involved predatory pricing;
(b) their use of 'fighting ships' which involved the conferences setting reduced rates for individual ships that were to sail on similar dates and routes to BCL's ships; and
(c) spreading rumours that BCL was insolvent or would have to leave the relevant market.

Decision

The Commercial Court held that the two conferences were sufficiently connected, and their decision-taking as to price levels was sufficiently connected, for them to be treated as a collective entity for the purposes of determining whether they were guilty of abusing a dominant position. Although there had been some market share diminution following the entry into the market by a new shipping line (MSC, a third party), the position held by the conferences (of between 50 and 60 per cent) was substantial enough to be characterised as dominant.

As far as the question of abuse was concerned, Colman J held that a distinction must be made between the alleged abusive conduct and the purpose for which such conduct was pursued. The court held that the law as laid down in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] 5 CMLR 32 required the assessment to be made in two stages; stage one entailed an objective inquiry as to whether the measures taken were abnormal conduct of a dominant party, while stage two required the court to assess subjectively, despite the finding that the conduct was not abnormal, whether the intention of the measure was to hinder or eliminate competition. The court found in the present case that there was no eliminatory intent.

As for Article 81, the court held that the block exemption applied because the defendants did in fact charge 'uniform and common freight rates' (as required by Article 1(3)(b), Regulation 4056/86 for the defendants to qualify as liner conferences for the purposes of the block exemption).

Comment

This case is important; for the first time, a claim for damages has been brought in an English court founded on Article 82 EC and, significantly for maritime lawyers, for the first time, a complaint in competition law before an English court against liner conferences. The transcript runs into about 130 pages and it is impossible to do justice to the full judgment in this short note, which will thus highlight only a few interesting aspects of the case.

Article 81 and the block exemption

An issue of some significance to maritime lawyers is the court's application of the definition of 'liner conferences' as set out in Article 1(3)(b), Regulation 4056/86. Article 1(3)(b) provides that:

> 'liner conference' means a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.

Key to this definition is the charging of 'uniform or common freight rates and other agreed conditions'. It was clear from the fact that there was no obvious uniform or common charge *per se* in that there was no uniform tariff list but the court considered that the question of uniformity must be evaluated contextually.

The typical circumstances of the relevant market in question were that when a shipper approaches his agent for a shipping rate for a particular commodity, the agent would ascertain the rate charged to that shipper by BCL and would then approach his liner company and ask for authority to charge that customer for that commodity a rate lower than the conference's emergency tariff. The liner company might then make a special rate application to the Special Lines Committee. If the Committee approved the special rate, the liner company would then authorise its agent to quote the reduced rate to the shipper in question. The rate was likely to be slightly higher than the competitor's rate and would usually be applicable to future shipments on the same route of that same commodity, with a minimum quantity qualification. Notice of the special rate commitment would then be circulated to all the conference members and that rate would be applicable to all shipments of precisely the same commodity on that route and subject to the same minimum quantity requirement. The list of special rates would not, however, be published to shippers in the same way as a tariff. It would be kept secret from them in case shippers of similar but not identical commodities attempted to negotiate down the rates for their cargoes. However, the result was that:

> all shippers of the precisely same commodity on the exactly same route in the same quantity would be charged the same rate except that there might occasionally be a case where a liner company charged a particular shipper of a particular commodity a rate designed to preserve or regain the customer from a competitor which was not charged to other shippers of the same commodity, either because that commodity was unique to the shipper or because the rate had not been approved by the Conference.

Accordingly, although the special rates were not published to shippers in the same way as a tariff, they would very soon come to know of them due to the transparent market of the Israeli shipping industry. The effect of this regime was therefore not that there would be multiple conference rates for the same service but that there would be a single (inadequately published) rate for the same service. Hence, the defendants must be said to be liner conferences protected by the block exemption.

This approach taken by the court may not work in the favour of the complainant in the present case but it clearly coincides with the teleological approach of EU jurisprudence (Case T-395/94 *Atlantic Container Line & others v Commission* [2002] ECR II-875 (better known as the *TAA* (Trans Atlantic Agreement) case), judgment of the Court of First Instance, 28 February 2002). Additionally, if and when the block exemption is removed in the future, it seems to follow that the notion of 'liner conference' as applied by the court in this case would be particularly useful. A narrow definition would offer only limited protection (should the block exemption be removed) to a potential liner competitor.

Another issue of some importance is the clarification of the burden of proof. The court held that although it is for the liner conferences to prove that they are liner conferences for the purposes of the Regulation, it is for the claimant to show that the conferences did not satisfy the condition for the exemption under Article 4. Article 4 provides that the block exemption only applies if the agreement or concerted practice in question does not cause detriment to certain ports, transport users or

carriers by applying for the carriage of the same goods and in the relevant market, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified.

Article 82

The first issue in relation to Article 82 is that as there were two separate defendants, the claimant had to show that there was in fact joint dominance. It is noteworthy that in general the court (or Commission) will not allow the complainant merely to 'recycle' the facts which point to an infringement of Article 81 (concerted practice) for the purposes of Article 82 (Case T-68, 77-78/89 *Re Italian Fiat Glass* [1992] ECR I-1403) but an agreement or concerted practice may result in the parties being so linked as to their conduct on a particular market that they present themselves as a collective entity *vis-à-vis* their competitors, their trading partners and consumers (see Case C-395-396/96P *Compagnie Maritime Belge Transportes SA & others v Commission* [2000] ECR I-1365, commonly referred to as the CMB case). What is important to note, though, is that it is not enough to rely on evidence relating to Article 81 as a presumptive assertion of joint dominance.

The test of joint dominance to be applied has now been confirmed by the Court of First Instance in the recent Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585. The three-part test requires that:

(a) Each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. It is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving.
(b) The situation of tacit co-ordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market.
(c) To prove the existence of a collective dominant position to the requisite legal standard, it must be established that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

In the present case, the court held that it was not necessary for the defendants to know precisely what the cost base was, or for them to be engaged in a system of joint decision-making. It was enough that there was 'tacit co-ordination' in their conduct. Economic links need to be shown. It is not enough simply to look to the market structure in ascertaining whether there is joint dominance; reference should also be had to the special relationship (contractual or otherwise) between the parties. In the case of members of a single liner conference, that economic link is readily seen (*French West-African Shipowners' Committees*, OJ [1992] L134/1). In the present case which involves two defendants belonging to two liner conferences, it must be said that the economic link is a little more opaque. However, the court, in reliance on the test in *Airtours*, found that as the two conferences tended to mirror each other in the setting of prices and the changing of prices, it must be concluded that there was joint dominance. The interdependence between the defendants and the fact that there was a common policy which was known to them provided the requisite economic link.

As to the issue of abuse of dominance, the court considered that although the rates charged by the defendants were below the average variable cost, existing case law does not suggest that the need to ascertain whether there was eliminatory intent could be dispensed with (see Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359). Nonetheless, the court was careful to state that the methodology used to calculate the average variable cost was not satisfactory. On the issue of intention to exclude or eliminate competition, it may be recalled that in the *CMB* case, the ECJ had held that where a liner conference in a dominant position selectively cuts its prices in order deliberately to match those of a competitor, the presumption is that it will derive a dual benefit – the elimination of the principal competitor and continuing to require its users to pay higher prices for the

services which are not threatened by that competition. The question was whether that presumption applies in the present case.

The court considered that although there was some evidence of the predatory pricing, the intention was to win back customers and not to eliminate or exclude competition. It found that the market conditions in *CMB* were different in that the liner conference in that case controlled 90 per cent of the market share and there was only one other competitor. In the present case, the market share was smaller and there was another player (MSC) in the market. It was also apparent that BCL had itself taken very aggressive pricing measures against MSC and the defendants. The court was to some extent swayed by the defendants' contention that they needed to defend themselves. This is an interesting way of applying the presumption in *CMB*: the dual benefit presumption only applies where, in the words of Colman J, the claimant is a competitor with 'very fragile strength'. This confirms, to some extent, the view that abuse is integrally linked to the extent of the dominance (see for example, Case C-333/94P *Tetra Pak International SA v Commission* [1996] ECR I-5951) and perhaps, more controversially, the fragility of the competitor in question. The latter consideration is, to some extent, controversial because there is some suggestion that the concept of abuse of dominance is an objective issue (see for example Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215; Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791): the abuse is to be assessed from a market perspective not from the perspective of a specific claimant. Indeed, in a case of enforcement by the Commission, for example, there may not be a specific individual 'victim'.

There is no denying that much in the present case had depended on the cogency of evidence, both of the anti-competitive activities alleged and the economics of the pricing regimes. At the end of the day, the court was not convinced that there was abuse because BCL, the claimant, was not as weak and susceptible to bullying as they were hoping to make out. There are a few important clarifications of the law though: first, the notion of liner conferences; secondly, the burden of proof as regards the block exemption; thirdly, the issue of joint dominance; and finally, the subjective eliminatory intent required.

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