Neutral citation [2022] CAT 30

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 July 2022

Before:

SIR MARCUS SMITH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN

DAVID COURTNEY BOYLE AND EDWARD JOHN VERMEER

Applicants / Proposed Class Representatives

-and-

(1) GOVIA THAMESLINK RAILWAY LIMITED
(2) THE GO-AHEAD GROUP PLC
(3) KEOLIS (UK) LIMITED

Respondents / Defendants

-and-

SECRETARY OF STATE FOR TRANSPORT

Proposed Intervener / Objector

Heard remotely on 5 July 2022

RULING (APPLICATION TO AMEND THE COLLECTIVE PROCEEDINGS CLAIM FORM)

APPEARANCES

Mr Charles Hollander QC and Mr David Went (instructed by Maitland Walker LLP) appeared on behalf of Messrs Boyle and Vermeer.

Mr Paul Harris QC, Ms Anneliese Blackwood and Mr Michael Armitage (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Govia Thameslink Railway Limited, The Go-Ahead Group PLC, and Keolis (UK) Limited.

1. Mr Boyle and Mr Vermeer apply, as proposed class representatives, for a collective proceedings order in these proceedings against, amongst others, Govia Thameslink Ltd, as proposed defendants. That application has been listed, for some time, for hearing over three days commencing 13 July 2022. I shall refer to Mr Boyle and Mr Vermeer as the **Applicants**, and the proposed defendants as the **Respondents**.

2. On 24 June 2022, the Applicants applied for permission to re-amend their claim form. On any view, this was a late application, but the parties have helpfully narrowed the areas of contention, by agreeing some amendments and withdrawing others.

3. There remains a dispute about the introduction of claims by proposed class members when purchasing single-brand and dual-brand fares for the harm suffered through their having their travel rights withheld. That (new) claim is supported by additional expert evidence from a Mr James Harvey of Economic Insight Ltd. Mr Harvey has been providing expert evidence throughout these proceedings, and this is his fourth report (**Harvey 4**), which has (unsurprisingly) also only recently been adduced.

4. There is history here. Both sides have very different versions as to why these matters have been so lately introduced. Mr Hollander QC, for the Applicants, says that is because the points in issue and being taken by the Respondents were insufficiently clearly articulated until a rejoinder was served. Mr Harris QC, for the Respondents, says the diametric opposite. He says these are late and somewhat opportunistic amendments which severely prejudice his clients. For those reasons, the introduction of this new claim is opposed by the Respondents as is the adduction of Harvey 4.

5. The position of the Respondents is that the proposed amendments and the new expert evidence cannot fairly be dealt with at the forthcoming hearing. Either the certification application will have to be adjourned or it will have to be argued and determined on the basis of the pleadings and the evidence, excluding these new claims and excluding Harvey 4.

6. This objection only became truly apparent yesterday, 4 July 2022. I directed that a case management conference take place today, 5 July 2022, so that the question of what would be live at the certification hearing could be determined before – and not at – that hearing. It is, to my mind, very important that both sides know exactly where they stand and what approach the Tribunal will take next week.

7. Of course that has meant that this hearing has come on at very short notice, and I am grateful to both the Respondents and the Applicants for making themselves available and for their written submissions produced at very short notice. Another consequence of the short notice is that I am sitting alone. It has been fortuitous that this dispute came on in a gap in the case I am currently trying (which resumes tomorrow), but it has simply not been possible to make the other Tribunal members available. I am satisfied that I have jurisdiction to deal with these case management matters on my own, but I am inclined to do as little as I possibly can, consistent with efficient case management, and to leave as many questions over to the main hearing as I can, when I will be sitting with my two colleagues.

8. My initial view, on considering the correspondence and the pleadings, was that there was a straightforward answer to the problem of the late amendments and evidence: this was to permit the amendments subject to a later opportunity to strike them out. Although I appreciate that this is not the ordinary course – demurrable amendments should not be permitted – it would have been the expedient way of dealing with the issue. However, the Respondents contend that this course does not meet their concerns. Paragraph 2 of the written submissions of the Respondents for today's hearing states:

> "Nor would this unfairness be remedied by the Tribunal's provisional indication that it may permit the new claim re-amendments but afford the proposed defendants an opportunity to apply to strike out or summarily dismiss the new claim at a later stage. That is because the proposed defendants are entitled to a proper opportunity to consider whether the new claim, as supported by the new expert evidence, satisfies the statutory requirements for certification, which is a distinct question from the question whether the new claim is strikeable in the sense of not having a realistic prospect of success on the merits. The proposed defendants simply do not have adequate time before the commencement of the CPO hearing on 13 July to consider and respond, with the assistance of, and potentially evidence from, their own expert advisers

> to the new claim and the new expert evidence of Harvey 4 by reference to the statutory certification requirements."

9. As is clear from the materials before the Tribunal – including the written submissions for the certification application, which I have read – it is a matter of dispute, for resolution by the Tribunal, as to whether the two conditions for the grant of a Collective Proceedings Order have or have not been met.

10. As regards these two conditions, I adopt the description of these conditions contained in *Michael O'Higgins FX Class Representative Limited v. Barclays Bank plc*, [2022] CAT 16 at [50]*ff* (the **Authorisation Condition**) and [55]*ff* (the **Eligibility Condition**).

11. The question is whether – apart from any question of strike-out, which (as all parties accept) can be dealt with by way of a separate application, later on – the new claim and the new evidence materially affect consideration of the Authorisation Condition and/or the Eligibility Condition.

12. There is no question that <u>if</u> the Tribunal is satisfied that (as regards the existing pleadings and existing evidence) these conditions are met so far as those pleadings are concerned, it can certify the proceedings as collective whatever the position in relation to the new claims. In short, the new claim cannot affect the outcome in relation to the existing claims.

13. The question is whether the Authorisation Condition and/or the Eligibility Condition need to be considered separately where the claims that a class is seeking to bring are sought to be expanded. In the course of his submissions, Mr Harris accepted that the Authorisation Condition was not affected by the new claims but that the Eligibility Condition was.

14. My provisional view is that these are unitary concepts, and that if the Tribunal were to be satisfied in relation to the existing claims that the Authorisation Condition and the Eligibility Condition were met, that conclusion would also pertain in relation to the new claims. In other words, the only aspect where a claim-by-claim approach needs to be adopted is in relation to strike-out – and that can be catered for by making clear that a later application (say, made within

2 weeks of the hand-down of any judgment) to strike out would be entertained by the Tribunal.

15. So, my view is that the new claim and the new evidence ought to be before the Tribunal at the forthcoming certification hearing. In his submissions, Mr Harris QC did not mince his words. His position was that this would result in a mismanaged hearing. Given the force with which this submissions was advanced, it is important that I make clear what I am saying, and I want to be very clear that I am saying no more than this. I am merely defining the ambit of what the Tribunal will hear and take account of, nothing more. In particular:

(1) I have expressed a provisional view about the unitary nature of the Authorisation Condition and the Eligibility Condition. I make clear that that is a view I regard myself entirely at liberty to re-visit, and if I conclude that they are not unitary in nature, and that the new claim cannot properly be considered at the hearing, then the new claim and the new evidence will meet a certain fate on the determination of the certification application. What that fate will be I cannot say, but there will clearly be cost implications and at the very least the potentiality of those cost implications being visited on the Applicants and not the Respondents. It may then be necessary to have a further, limited, certification application to deal with the new claim on its own.

(2) As I say, my provisional view is that this will not be necessary, and it seems to me that (for case management purposes) it is right that I proceed on the basis that my provisional view is correct and that these matters can be dealt with at a single hearing. The alternatives are either to order two hearings <u>now</u> or an adjournment. An adjournment is out of the question – and neither party wishes it, and I am very disinclined to go down that road, even if the parties were so inclined. Two hearings can be accommodated if necessary: all I am doing, at the moment, is making directions on the basis that the second hearing can be avoided. If I am wrong about this – if my provisional view proves to be over-optimistic – then a further hearing can easily be directed.

(3) There is no question about allowing the amendments proposed today. I am making no such order – I am merely defining the scope of argument. I fully anticipate that Mr Harris QC will make the points that he has rightly made with force today: that his clients cannot respond to the new claim or to the new evidence. That must be right. He will therefore be entitled to full latitude to explain the extent of his client's prejudice, and it will be for the Tribunal to consider whether a fair hearing and a fair determination of the outcome in relation to the proposed amendments can, notwithstanding those submissions, be achieved.

(4) I want to be very clear, that we will be very much alive to the points that Mr Harris QC is taking. These are, on any view, late amendments, whatever the reason for them, and that is a factor which the Tribunal must bear in mind.

(5) I consider that taking this course – which effectively means hearing the amendments and the new evidence *de bene esse* – does not in and of itself involve any prejudice to the Respondents. What the Respondents are entitled to do is address the Tribunal as to the nature of the prejudice that would result if we were to reach a concluded view in respect of the new evidence and the new claims that are supported by that evidence. Whether the amendments can be permitted, in the teeth of the Respondents' opposition is not a matter for today, but for next week.

16. In these circumstances, I am making clear that we will hear argument in respect of both the new claim and the new evidence, as well as in relation to the "old" pleadings and evidence

17. There has been no winner or loser today. Or, more cheerfully put, everyone is a winner because the scope of the certification hearing is now clear. I will not, unless anyone wishes to argue the contrary, make any order as to costs.

18. There is one further matter which arises in relation to the written submissions that have been adduced by both parties. Mr Harris QC makes a point, and it is right, that his written submissions are limited and confined to the page numbers

stipulated by the Tribunal's Practice Direction dated 25 February 2021. They stand at 19 pages. The written submissions of the Applicants, it may be significant that they are unpaginated, but they run to 40 pages and so are in breach of paragraph 3 the Practice Direction.

19. There is a paragraph in the submissions seeking consent to extend the length of these submissions. That application is retrospective in the sense that it is sought made after the submissions have been filed and read by me. I make it clear that in the future it would be a courtesy, both to the other side and to the Tribunal, if prospective consent were sought. Nevertheless, I am going to permit the added length to come in, not least because I have read it and found it helpful for today's hearing as well as for next week, and also because these submissions to my mind helpfully address the new claim and the new evidence in relation to which we will now be hearing.

20. It goes without saying that if Mr Harris QC wishes to put in a response that will articulate in greater detail the prejudice his clients say they will suffer, in light of the course I have determined today, then Mr Harris QC is welcome to do so and I am not going to impose any page limit on those submissions.

Sir Marcus Smith
President

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

Date: 5 July 2022