DWR Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd [2006] APP.L.R. 05/26

JUDGMENT : Mr Justice Hart : Chancery. 26th May 2006.

1. The claimant ("DCWW") is the water undertaker, appointed under section 6 of the Water Industry Act 1991 ("the 1991 Act") for an area comprising most of Wales and certain adjoining parts of England. The defendant ("Corus") operates steel processing businesses at three sites within that area, namely Shotton in North Wales, Llanwern near Newport, Gwent, and Trostre near Llanelli in South West Wales (together the "Corus Sites"). DCWW's claim is for payment of outstanding charges for water it has supplied since 1st April 2004 to the Corus sites in Wales and a declaration as to its continuing entitlement to charge Corus at its applicable non-potable industrial tariff (the "Non-potable IT") for water supplied to the Corus Sites.

2. This is an application for summary judgment under CPR r.24.2 brought by the claimant ("DCWW") against the Defendant ("Corus") in respect of the whole of DCWW's claim on the ground that Corus' defence and counterclaim have no real prospect of success.

3. By virtue of section 142 of the 1991 Act DCWW has power to fix charges for its services and to demand and recover charges so fixed: see s. 142(1). Such powers are exercisable either by or in accordance with a charges scheme made under section 143 of the 1991 Act or by or in accordance with agreements with the persons to be charged: see s. 142(2).

4. Prior to 1st April 2004, the price for water supplied to each of the Corus sites was set pursuant to special agreements between DCWW and Corus for each of the sites. Those agreements each came to an end on 31st March 2004. It is DCWW's contention that in respect of the two years commencing respectively on 1st April 2004 and 1st April 2005, Corus is liable to pay for water supplied at its applicable non-potable industrial tariff ("the non-potable IT") as incorporated in the annual charges schemes made in respect of those years under section 143 of the 1991 Act.

5. Section 143(6) of the 1991 Act provides that a charges scheme "shall not take effect unless it has been approved by the Director." The Director is the Director General of Water Services provided for (until 1st April 2006) by section 1 of the 1991 Act. In exercising and performing his powers and duties under the Act he has to do so in the manner that he considers is best calculated, inter alia "(a) –to ensure that the interests of every person who is a customer or potential customer of a company which has been or may be appointed …to be a relevant undertaker are protected as regards the fixing and recovery by that company of water and drainage charges and, in particular- (i) that the interests of customers and potential customers in rural areas are so protected and (ii) that no undue preference is shown, and that there is no undue discrimination, in the fixing of those charges". The Director (until 1st April 2006) was also the "regulator" for the purposes of the Competition Act 1998: see section 54 of that Act.

6. Each of the charges schemes for the relevant years was approved by the Director and Corus does not dispute that the charges for water supplied to it at the Corus sites have been correctly calculated in accordance with the non-potable IT. Corus, however, submits that it has a real prospect at trial of establishing that it is not liable to pay those charges for one or more of the following reasons. First, it is said that charges schemes do not apply to the sites; secondly that they are invalid schemes; and, thirdly, that in promulgating the schemes and seeking to apply the non-potable IT to the Corus sites DCWW has abused a dominant position in a way which may affect trade in the United Kingdom or part of it contrary to the Chapter II prohibition in the Competition Act 1998.

The Llanwern 1993 agreement

7. In the case of the Llanwern site Corus has a particular argument for saying that the charges schemes should be construed as not applying to it. The argument is based upon the terms of the special agreement which, until 31st March 2004, governed the supply. That agreement was dated 20th December 1993 and included the following terms: by Clause 1, DCWW agreed to supply such quantity of water to British Steel as it might require during the term of the Agreement, up to a maximum of 91 megalitres a day, and to reserve that quantity for such supply; by Clause 5, the quality of the water was specified; by Clause 6, the charges for the water were agreed; by Clause 8 British Steel was required to maintain a storage reservoir; by Clause 12(1), the Agreement was for a fixed term ending on 31 March 2004.

8. Clause 16 of the Agreement provided: *"The terms and conditions contained herein constitute the entire agreement between the parties and shall supersede all previous written or oral agreements between or binding on the parties."*

9. Clause 17 of the Agreement, under the heading "Renewal Clause" provided: *"On expiry of this Agreement British Steel shall continue to have the right to be supplied non-potable water for the purposes associated with iron and/or steel production or processing at the works. The terms of such supply shall be those agreed between British Steel and Dwr Cymru at that time, or, in the event of failure to agree, determined by the Director General of Water Services under Section 56 of the Water Industry Act 1991 or any succeeding Act."*

10. Corus' argument, shortly put, is that Clause 17 of the 1993 agreement gave it a contractual right to insist upon having a fresh special agreement for its supply on terms which, if not agreed, would be fixed by the Director on the basis of what appeared to him to be reasonable on the specific facts and circumstances of the Llanwern supply at that time. The effect of introducing a charges scheme based on a standard tariff was to deprive the parties of any opportunity to agree the charges, and to deprive Corus of its right to seek the Director's determination of the charges in the absence of agreement. Accordingly, so ran the argument, the introduction of a charges scheme represented a breach of contract by DCWW or, alternatively, the charges scheme should be construed as not applying to the Llanwern site.

11. Section 56 of the 1991 Act applies where an undertaker has come under an obligation to provide a non-domestic supply as a result of a request by the owner or occupier of any premises pursuant to section 55 of the 1991 Act. Section 56 provides (so far as material)

> *"56 Determinations on requests for non-domestic supplies*
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> *(1) Subject to subsection (3) below, any terms or conditions or other matter which falls to be determined for the purposes of a request made by any person to a water undertaker for the purposes of section 55 above shall be determined—*
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> *(a) by agreement between that person and the water undertaker; or*
>
> *(b) in default of agreement, by the Director according to what appears to him to be reasonable. ……..*
>
> *(5) The charges in respect of a supply provided in compliance with any request made for the purposes of section 55 above—*
>
> *(a) shall not be determined by the Director or a person appointed by him, except in so far as, at the time of the request, no provision is in force by virtue of a charges scheme under section 143 below in respect of supplies of the applicable description; …*
>
> *(6) To the extent that subsection (5)(a) above excludes any charges from a determination under this section, those charges shall be fixed from time to time by a charges scheme under section 143 below, but not otherwise."*

12. DCWW contends that clause 17 of the 1993 agreement conferred no independent contractual rights on Corus but was simply a recital or record of the statutory rights and mechanisms which would arise on expiry of the contractual rights under the 1993 agreement: the Director's powers and functions are wholly a matter of statute and it would be wrong to suppose that the parties were seeking to thrust upon him the role of an extra-statutory arbitrator. Corus' riposte is that such an interpretation renders the clause mere surplusage, when it was plainly intended to have some contractual effect. Moreover recourse to the factual matrix in which the 1993 agreement was concluded provided, it was contended by Corus, strong support for the proposition that the Clause 17 had been intended to have contractual effect: in particular the agreement which the 1993 agreement itself replaced (an agreement between Corus' predecessor on the one hand and Newport County Borough on the other made in 1960 and which expired in February 1990) had contained a provision that *"This agreement shall be for a period of thirty years with the right of renewal on terms to be agreed or settled by arbitration."*

13. It was argued on behalf of Corus that Clause 17 of the 1993 agreement was a private law agreement of precisely the same type.

14. It seems to me that the point is a short one suitable for determination by summary judgment. In my judgment the submissions of DCWW are to be preferred. Clause 17 refers expressly to the Director's determination under that clause as being a determination under section 56. A determination under section 56 will determine all aspects of the supply, including charges, except where a charges scheme is in force and applicable. In that case the Director's jurisdiction to determine charges is expressly excluded. Clause 17 cannot therefore have been contemplating that the Director would fix charges "under" section 56 in a case where a charges scheme had been lawfully made. However unlikely it may have appeared to the parties in 1993 that such a scheme would be in place following the expiry of the agreement, it cannot be said that the language they have used (with its express reference to section 56) excludes the possibility. Moreover I cannot see any room for an argument that Clause 17 gives rise to an implied term that DWCC will do nothing to prevent the Director from having a jurisdiction to fix charges. Such an implied term is neither necessary nor obvious. The validity of the charges scheme is itself dependent on the Director's approval. Although the parties may not have thought the matter through in 1993, there is no reason to suppose that Corus would not have regarded itself as sufficiently protected by its ability to argue, at the appropriate time, that the Director's approval of a charges scheme be withheld.

General arguments as to invalidity of the Charges Schemes

15. The arguments which Corus wishes to advance at trial are most easily summarised by reference to paragraph 16 of its defence and counterclaim, which is in the following terms:

> *"16. If, which is denied, the Charges Schemes were, properly construed, intended to apply to supplies of non-potable water to the Sites, it is, without prejudice to the burden of proof, denied that the Charges Schemes were lawfully and/or fairly made and/or it is asserted that they are anti-competitive and/or it is further denied that they are valid in relation to charges for the supply of water to the Sites. The Defendant will rely in particular on the following:*
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> *16.1.1 It is wrong in principle to apply a large user upper band to the Sites or any of them. The Defendant will rely in particular on the following:*
>
> *16.1.1 Such a band takes no or no adequate account of the unique features of the Sites. The Sites are not comparable in relevant respects to other sites covered by the Band, as appears further below.*
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> *16.1.2 Such a band makes no or no adequate allowance for the cost impact of scale of use at the Sites.*
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> *16.1.3 Such a band fails to take account of the fact that for non-potable water there is nothing like a potable supplies costs structure.*
>
> *16.1.4 Such a band fails to take account of the costs and infrastructure contributed by the Sites.*

16.2 Application of the large user upper band to the Sites is discriminatory because it fails to take any or any proper account of the discounts attributable to scale savings higher up the band.

16.3 Application of the large user upper band to the Sites fails to take account of the fact that the Sites are not standard consumers:

16.3.1 As set out above, the Defendant has contributed significant amounts to the costs of the infrastructure used for Llanwern. The contribution of such costs makes it entirely inappropriate that a standard charge should be applied to the Site. A standard consumer would not have made such contribution, and it is discriminatory and unfair for a like charge to be levied.

16.3.2 At the Shotton Site the Defendant supplies lagoons for use by the Claimant. The supply of such lagoons makes it entirely inappropriate that a standard charge should be applied to the Site. A standard consumer does not supply such lagoons, and it is discriminatory and unfair for a like charge to be levied. The Claimant has indeed implicitly recognised that the lagoons makes the Shotton Site non-standard. The Claimant unilaterally decided to pay £6100 per month to the Defendant for use of the site, for the period April 2004 to April 2005. Such amounts have never been decided by the Director or agreed by the Defendant. They have been accepted by the Defendant without prejudice to the issues raised in this Defence and Counterclaim.

16.3.3 The Defendant supplies a reservoir at the Trostre Site. A standard consumer does not supply such reservoirs, and it is discriminatory and unfair for a like charge to be levied.

16.4 The Claimant has calculated the applicable cost in the upper band using a distribution cost of about 16p per cubic metre. That cost is discriminatory and unjustified for the following reasons:

16.4.1 The reasons alleged by Albion Water in its appeal to the Competition Appeal Tribunal, and, in particular, the fact that the figure of 16p per cubic metre was based on an unjustifiable comparison with the distribution costs of potable water.

16.4.2 It bears no proper relation to the actual costs of distribution for the Sites. The estimated costs of distribution in respect of the Sites is far lower than 16p per cubic metre. The present cost estimates per cubic metre (which are not the final best estimates) are as follows:

16.4.2.1 Llanwern 4.8p.

16.4.2.2 Shotton 3.7p.

16.4.2.3 Trostre 4p.

16.5 The application of the band fails a critical test. The costs exceed the stand alone cost of supply at the Sites.

16.6 In deciding to apply the Charges Schemes to the Sites (if it did) the Claimant wrongfully (and unduly) discriminated against the Defendant and acted anti-competitively, and in breach of Condition E of the Licence. The Defendant draws attention to the fact that the Director had in 2004 approved special agreements relating to the Sites as complying with condition E. In the light of such approval, the large Llanwern site charge increases, for example, could not have been justified very shortly thereafter.

16.7 The Claimant failed to inform the Director of all relevant information concerning the supply of water to the Sites when inviting him to approve the Charges Schemes. The Claimant failed to inform the Director of the fact (if it be a fact) that the Charges Schemes were intended to apply to the Sites and of the facts and matters set out above which meant that the application of the Charges Schemes to the Sites was unjustifiable. The Claimant in fact misled the Director: Paul Hope of Ofwat told Stephen Barker and Louise Davies of the Defendant at a meeting on 28 May 2004 that the Claimant had told Ofwat that the capital contributions to the infrastructure at Llanwern were made by Newport Borough Council, so that it would not be equitable for the Welsh community to subsidise the Defendant with lower prices. In fact, as set out above, significant capital contributions for the treatment and delivery of water to the Waltwood reservoir were made by RTB, the Defendant's predecessor. In the premises, without prejudice to the burden of proof, the Director approved the Charges Schemes without taking into account relevant considerations and/or taking into account irrelevant considerations.

16.8 Unfairly and in breach of the Defendant's legitimate expectation, the Claimant and the Director failed properly to engage with the Defendant in an open minded consultation regarding the Charges Schemes and their application to the Sites. The Schemes and their application were simply presented as a fait accompli.

16.9 In the premises, without prejudice to the burden of proof, the Director's approval of the Charges Schemes, if and insofar as they apply to the supply of non-potable water to the Sites, was invalid."

16. As appears from the above, several points are taken. It does not seem to me to be necessary to examine them in detail since Mr Phillips QC, on behalf of DCWW, accepted in the course of his speech in reply that the issue in relation to the figure for distribution costs of 16p per cubic metre did arguably go to the validity of the charges schemes and the Director's approval of those schemes, and that, insofar as that argument could be raised at all in proceedings of the current nature, it could not be said that Corus had no real prospect of success at trial for the purposes of CPR 24. Accordingly while I heard considerable argument from the parties on the issues of invalidity, the real debate before me was as to the procedural propriety of Corus seeking to challenge the validity of the charges schemes in these proceedings.

17. It was submitted on behalf of DCWW that it was an abuse of process for Corus to seek to do so. The process which led to the incorporation into the charges scheme for 2003-2004 of Non-potable IT is described by Mr Jones of DCWW in his witness statement of 14th October 2005. That process resulted in an approval decision of the Director dated 20th March 2003. The practical effect of that decision was that Non-potable IT would apply to supplies to the Corus sites following termination of the special agreements on 31st March 2004 unless DCWW agreed to conclude new special agreements with Corus. DCWW had in fact made it clear to Corus both that it intended to introduce Non-potable IT into the charges schemes for subsequent years and that it did not intend to conclude new special agreements with Corus well before that date. Corus was in due course informed of the Director's approval on 15th April 2003. Further discussions between Corus and officials of Ofwat (in August 2003) and between Corus and DCWW (in September 2003) confirmed the position that DCWW had no intention of concluding new special agreements with Corus and that Non-potable IT would therefore apply on the expiry of the existing agreements.

18. DCWW's submission was that, if Corus wished to challenge the Director's decision to approve Non-potable IT, it could and should have done so by proceedings for judicial review brought under CPR Part 54. Under CPR Part 54.4 judicial review proceedings must be brought promptly and in any case not later than 3 months after the ground to make the claim first arose. It was submitted that the Director's approval of the charges schemes was plainly a public law decision; that to allow it to be challenged years after the event in purely private law proceedings was clearly detrimental to good administration; and that it could not be right "to allow one defaulter to call into question a tariff based system for water charges, with the consequent effect on and uncertainty for other customers being charged under the same tariff, when a timely challenge could have been brought to the decision to approve the annual charges scheme."

19. Those submissions were of course based on the principles expounded and applied in the speech of Lord Diplock in ***O'Reilly v. Mackman*** [1983] 2 AC 237. In ***Clark v University of Lincolnshire and Humberside*** [2000] 1 WLR 1988 (CA), Lord Woolf MR gave the following guidance as to how those principles were to be applied under the CPR at 1997C-G:

> *"[34] The court's approach to what is an abuse of process has to be considered today in the light of the changes brought about by the CPR. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the overriding objectives which include ensuring that cases are dealt with expeditiously and fairly: CPR rr. 1.1(2)(d) and 1.3. They should not allow the choice of procedure to achieve procedural advantages. …*
>
> *[35] Whilst in the past, it would not be appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive this is no longer the position. While to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceedings are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by bringing an ordinary claim, the court in deciding whether commencement of the proceedings is an abuse of process can take into account whether there has been unjustified delay in initiating the proceedings."*

20. Mr Beazley QC on behalf of Corus submitted that these principles had no application to a case where a private law right of action was itself dependent on the validity of an anterior public law decision. He submitted that it was no abuse for a defendant to such an action to defend himself by challenging the validity of the public law decision. He relied in particular on the decision of the House of Lords in ***Wandsworth LBC v Winder*** [1985] AC 461. In that case the respondent was the weekly tenant of the appellant council. Under section 40 of the Housing Act 1980 the council had a power to raise the rent which it purported to exercise in two successive years. The respondent refused to pay the increased rents on the ground that they were unreasonably high. The council took proceedings against him for arrears of rent and for possession which the respondent sought to defend by claiming that the council's decisions to raise the rent had been invalid as being unreasonable. The question before the House of Lords was whether the respondent had only been able to challenge those decisions by proceedings for judicial review (in relation to which he had lost his opportunity having been refused leave to apply for judicial review out of time) or whether he had been entitled to wait until he was sued by the council and then to defend the proceedings. The House held that he was entitled to take the latter course, notwithstanding the effect on third parties (the council's other tenants and its ratepayers) of a decision adverse to the council. In rejecting the contrary argument Lord Fraser said (at 509E):

> *"It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover, he puts forward the defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's action arises from a resolution which (on his view) is invalid … I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform."*

21. Mr Phillips submitted that there were two reasons why *Winder* should be distinguished from the present case. First, he submitted that the principle in *Winder* was limited to the kind of case where a public authority was bringing proceedings which could only succeed if a public law decision of its own (otherwise impugnable by judicial review) were valid: in such a case, and only in such a case, could a defendant seek to challenge the decision in ordinary civil proceedings. The present case, it was submitted, was different because the proceedings took the form of a suit between private parties in which a prior public law decision was sought to be impugned collaterally. As to that, I am unable to see anything in Lord Fraser's reasoning which so limits the principle in *Winder*, and such a limitation appears to be inconsistent with the well-recognised principle that, for example, a person charged with a criminal offence under a bye-law may raise the invalidity of the bye-law as a defence to criminal proceedings: see ***Boddington v. British Transport Police*** [1999] 2 AC 143, HL (E) where Lord Steyn summarised the effect of the authorities at 172 in the following language: *"The general rule of procedural exclusivity judicially created in* ***O'Reilly v Mackman*** *was at its birth recognised to be subject to exceptions, notably (but not restricted to the case) where the invalidity of the decision arises as a collateral matter in a claim for infringement of private rights. The purpose of the rule was stated to be prevention of an abuse of the process of the court, and that purpose is of prime importance in determining the reach of the general rule … Since O'Reilly v Mackman, decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision. Nor does it apply where a defendant in a civil case simply seeks to defend himself by questioning the validity of a public law decision."*

22. Moreover, I find it difficult to see how DCWW's power to make a scheme under section 142 of the 1991 Act differs in principle for this purpose from the council's power to raise rents under section 40 of the Housing Act 1980. It is true that the former is subject to the additional requirement that it be approved by another public authority (the Director), but I cannot see why that should prevent Corus from attacking the validity of the scheme propounded by DCWW *even though* the scheme has the Director's approval.

23. The second alleged ground of distinction was, I think, no more than a different way of expressing the same concept. This was that the respondent in *Winder* had a pre-existing private law right (namely a tenancy at a stated rent) of which the public authority was seeking to deprive him as a result of its arguably flawed decision, whereas Corus here had no such pre-existing private law right in respect of the post 1st April 2004 supplies of water. This way of putting the point was, I think, suggested by the distinction which Lord Fraser in *Winder* had drawn between that case and the earlier decision of the House of Lords in ***Cocks v Thanet District Council*** [1983] 2 AC 286 (where a homeless person was held not entitled to sue in the county court for a declaration that the council was under a duty to provide him with housing without first having challenged by judicial review the council's resolution that he had become "intentionally" homeless: that resolution did not deprive him of a pre-existing private law right but its existence prevented him from asserting one). The distinction does not, however, appear to me to be apt nor the analogy with *Cocks* at all precise. Corus' right to be supplied with water at the sites (whether one describes it as a public law right or a private law right) is not controversial. The question is as to the validity of the basis on which DCWW seeks to charge Corus for that right.

24. For those reasons I have not been persuaded that it is an abuse of process for Corus to seek in these proceedings to mount the public law challenge which it does to the charges schemes.

25. It follows that DCWW is not entitled to the summary judgment which it seeks. That conclusion renders it unnecessary for me to summarise, or express any view upon, the issues of competition law raised by paragraph 17 of the defence and counterclaim.

Mr Stephen Phillips QC and Mr Aidan Robertson (instructed by Geldards LLP) for the Claimant.
Mr Thomas Beazley QC and Miss Dinah Rose (instructed by DLA Piper Rudnick Gray Cary UK LLP) for the Defendant.