FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 37
CA47/15

Lord President
Lord Brodie
Lord Woolman

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the reclaiming motion

by

LC MANAGEMENT SERVICES (SCOTLAND) LTD & ORS
Pursuers and Reclaimers

against

HIGHLANDS AND ISLANDS ENTERPRISE
Defenders and Respondents

Reclaimers: O'Neill QC, Welsh; Balfour +Manson LLP
Respondent: M Ross QC; E Campbell; Dentons UK

30 June 2020

Introduction

[1] From the 1970s onwards, Nigg Yard provided fabrication services to the oil and gas industry. That included the repair of off-shore drilling rigs. Over time the volume of work diminished. Plans emerged to transform the site. The aim was to stimulate the local economy.

[2] In October 2011 a company within the Global Energy group ("Global") purchased part of the site. It proposed to convert the yard into "Nigg Energy Park". Subsequently

Global received significant awards of public money for the re-development. The precise total appears to have been between €10.8m and €14.4m. Most of the money came from Highland and Islands Enterprise ('HIE').

[3] LC Management Services Limited ('LCMS') was part of a consortium that made a rival bid for the site. It contends that the awards to Global were unlawful state aid. LCMS' main argument is that HIE failed to notify the awards to the European Commission. LCMS submits that the notification threshold was €11.25m and (on its arithmetic) the sums exceeded that figure. LCMS also argues that a particular tranche of the aid, amounting to £1.64m, did not comply with the particular scheme under which it was awarded.

[4] LCMS seeks declarator that HIE breached European Competition law. It also claims £25m damages and recovery of the awards.

[5] HIE offers a simple defence to the main branch of the action. It maintains that the notification threshold was €15m. Accordingly, it was not obliged to notify the Commission. It argues that the £1.64m award did comply with the scheme in question. As the awards were lawful, no question of financial remedies arises. HIE also submits, however, that the claim for damages is fundamentally lacking in specification.

[6] We conclude that the notification threshold was €15m. We also hold that the £1.64m award was lawful. We therefore refuse the reclaiming motion and adhere to the interlocutor of the commercial judge dated 25 September 2019, although for slightly different reasons. Had it been necessary to do so, we would have dismissed the claim for damages on the footing that LCMS has failed to give fair notice of how the awards caused it loss and how it arrives at a figure of £25m.

[7] The Scottish Ministers were originally the first defenders in this action. After the commercial judge dismissed the action, they reached an extra-judicial settlement with

LCMS. Accordingly, they played no role before this court.

European Union State Aid Law

Treaty Scheme

[8] Free competition lies at the heart of the European Union. Member States commit to an open market economy. That is why the Treaty on the Functioning of the European Union ('TFEU') imposes strict controls on cartels and monopolies.

[9] An award of state aid runs the risk of distorting the market. The higher the sum, the greater is the risk. Such awards may, however, be justified by the EU common interest. That applies particularly in cases of "market failure", where local conditions do not allow the market to operate freely and competitively.

[10] Special rules apply to state aid:

> "a body of law has been developed by the Commission and the Court of Justice distinct to articles 107-109 both in substance and procedure. It is an important, highly sensitive and complex area of competition law tightly bound up with industrial and regional policies (both national and Union), and raises fundamental economic questions of the viability and desirability of public services and public support for, for example, crisis industry, 'sunset' industries and remote industry".
> *European Union Law* (2013) Edward and Lane para 13.164

Article 107

[11] Article 107 begins with a general prohibition:

> "(1) Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

[12] Certain categories of state aid are deemed to be compatible with the internal market under Article 107(2). Other categories may be so deemed under Article 107(3). The

exception relevant to the Nigg Energy Park states:

> "(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. "

Article 108

[13] Who polices state aid? The TFEU assigns that important task to the Commission. It must keep such aid "under constant review": Article 108(1). If the Commission finds after an investigation that the aid is not compatible with the internal market, or is being misused, it shall require such aid to be abolished or altered: Article 108(2).

[14] Article 108(3) gives teeth to these provisions. Member states must (i) inform the Commission "in sufficient time to enable it to submit its comments, of any plans to grant or alter aid"; and (ii) "not put its proposed measures into effect until this procedure has resulted in a final decision."

[15] These twin obligations are referred to as the notification requirement and the standstill provision.

Article 109

[16] Article 109 allows regulations to be made in respect of these matters. They may specify any categories of aid exempted from the Article 108(3) procedure.

Jurisprudence

[17] The Court of Justice of the European Union has provided guidance about state aid in a line of cases: *Pearle BV* v *Hoofdberijfschap Ambachtan* [2004] 3 CMLR 9; *Administración del Estado* v *Xunta de Galicia* [2006] 2 CMLR 6; Case C-349/17 *Eesti Pagar AS* v *Ettevõtluse Arendamise Sihtasutus* ECLI:EU:C:2019: 172. The following points are relevant to this case.

a. Interested parties have a direct right of action. They can apply to a national court to enforce 'the notification requirement' and 'the standstill' provision.

b. Even if the Commission declares aid compatible with the common market, that does not validate aid that was not properly notified.

c. The criteria for applying an exemption must be "clear and easily enforceable by the national authorities".

d. Exemptions must be strictly construed.

e. The Commission has a wide discretion in deciding questions of compatibility.

f. If the Commission finds that there has been an unlawful award of state aid, it can order its recovery as far back as 10 years under Council Regulation (EU) 2015/1589.

General Block Exemption Regulation (EC) No 800/2008

[18] Plainly it would be cumbersome if the Commission had to review every award of state aid. A system of block exemptions emerged to prevent it being overwhelmed. In the case of regional aid, the Commission produced a set of internal guidelines in 2006, generally known as the Regional Aid Guidelines ("RAG").

[19] Two years later, the Commission adopted the General Block Exemption Regulation (EC) No 800/2008 ("GBER"). The GBER aimed to streamline the whole state aid system. A system of block exemptions confers widespread benefits. Member states do not have to notify and obtain prior approval in every case. The Commission can efficiently allocate its resources. Recipients know that, if the requirements are met, the state aid is lawful.

[20] The recitals to the GBER reflect its purposes in detail. Three are worth noting. The Commission now had sufficient experience both to simplify its approach and to monitor state aid more efficiently. It would continue to assess large amounts of aid due to the increased risk of market distortion. The aid thresholds had been fixed at a level to strike the appropriate balance between minimising distortions of competition and tackling the market problem concerned.

What is the notification threshold in this case?

[21] Article 6 is the key provision. It is headed "Individual notification thresholds".

> "(2) Regional investment aid awarded in favour of large investment projects shall be notified to the Commission if the total amount of aid from all sources exceeds 75 % of the maximum amount of aid an investment with eligible costs of €100 million could receive, applying the standard aid threshold in force for large enterprises in the approved regional aid map on the date the aid is to be granted."

[22] The parties agree certain important matters. The awards in question constituted "regional investment aid". Nigg Energy Park is a "large investment project". Global is a "large enterprise". They also appear to agree that the approved map fixed the standard aid threshold at 20 %.

[23] The critical part of the formula is therefore "if the total amount of aid from all sources exceeds 75 % of the maximum amount of aid an investment with eligible costs of €100m could receive".

[24] That unpacks into two questions. *(1) What is the maximum amount of aid that such an investment could receive?* The answer is €20m. It derives from multiplying 20% (the standard aid threshold) with €100m (the notional cost). *(2) What is the notification threshold?* The answer is €15m, because the formula only allows 75% of the first figure.

[25] In our view the formula is straightforward and admits of a simple calculation.

[26] Mr O'Neill advanced the following argument. Footnote 1 on p 275 of the regional map states that "for large investment projects with eligible expenditure exceeding €50m, this ceiling is subject to adjustment in accordance with para 67 [of the RAG]". That permitted a large investment project to receive state aid up to 20% on the first €50m expenditure on eligible costs (€10m) but only 10% on the next €50m. Accordingly, the Nigg Energy Park could only have received a maximum of €15m by way of state aid. That resulted in a notification threshold of €11.25m (75% of €15m). Mr O'Neill added that it made sense to set a lower notification figure to enable the Commission to investigate the state aid in question.

[27] We reject his argument. It bends the wording of Article 6(2). Instead of carrying out the calculation by reference to the *standard* aid threshold, it uses an *adjusted* aid ceiling ("threshold" and "ceiling" are synonyms). Reliance on para 67 is mistaken. That provision addresses the maximum aid allowable for large investment projects, but says nothing about notification thresholds. Put short, Mr O'Neill's construction requires the critical part of Art. 6(2) to be read as follows:

> "the maximum amount of aid an investment of eligible costs of €100m could receive, applying the ~~standard~~ *adjusted* aid ceiling in force for large ~~enterprises~~ *investment projects*."

[28] We see no warrant for adopting that approach. It abandons the text and substitutes terms with different meanings. Further, it results in applying the 75% deduction twice.

[29] Both counsel made submissions ranging over a wide range of topics in support of their rival arguments. Mr O'Neill pointed to the fact that at the time that HIE made the awards, it appeared to proceed on the basis that the notification threshold was €11.25m. Miss Ross made three points. First, she said that LCMS' oral argument was at odds with its written pleadings. Second, she referred to the fact that the 2014 regulation

that supplanted the GBER clearly set the notification threshold at €15m. Third, she relied on correspondence between the relevant departments of the UK and Scottish governments that also agreed with that figure.

[30] We regard all these matters as extrinsic to our task. The issue involves the interpretation of Art. 6(2). It identifies the standard aid threshold for a large enterprise. By contrast para 67 identifies of "maximum allowable aid" for a large investment project. That is a separate calculation. It is irrelevant when considering the notification threshold in Art. 6(2).

Market failure

[31] HIE granted £1.64m of state aid to Global Energy Nigg Ltd on 11 December 2012. Before doing so, it took professional advice from Graham & Sibbald, chartered surveyors, and Torrance Partnership, civil engineers.

[32] HIE made the award under the Scottish Property Support Scheme 2009-2013 ("SPSS"). The purpose of the SPSS was to support the development of industrial property by the private sector. Under the scheme, HIE could only make an award if it had formed the view that there had been a "market failure". Such a situation might arise, for example, if development was thwarted, because there was not enough private capital available.

[33] The SPSS was registered under the GBER, which allowed national governments to set up aid schemes to make awards that would be exempt from notification and approval.

[34] The GBER itself says little about what terms should be included in aid schemes. Its main requirement is that the member state should publish the full text of the scheme

on the internet.

[35] Mr O'Neill contended that the award should not have been made. His main argument was that there had been no market failure. That was attested by the £13.25m bid for the yard made by a consortium (including LCMS) in late 2010. As the criteria for an SPSS grant had not been met, it followed that HIE had breached Articles 107 and 108 TFEU by failing to notify the Commission.

[36] Mr O'Neill argued various other points. HIE knew that the Graham & Sibbald valuation was incorrect because of (a) the rival bid, and (b) Knight Frank had valued it at £25m. As a result HIE could not have reached the view that there was a market failure that required SPSS funding. Further the SPSS precluded awards when there was a competitor.

[37] These arguments are not well founded. It was a matter for HIE to determine whether there was market failure. It acted having taken the advice of two reputable firms. The existence of a rival bid or another valuation does not render HIE's view unreasonable or irrational. There is no offer to prove otherwise. A past unsuccessful bid cannot be determinative of market value. The bid was not acceptable. There is no offer to prove that a price of £13.25m would have been achieved.

[38] Further, it is not possible to convert an alleged breach of a particular provision of an aid scheme into a breach of Articles 107 or 108 TFEU. Where a member state chooses to include an extra condition in a scheme, such as market failure, that is a matter of national law.

Relief from business rates

[39] We can deal briefly with this branch of the case, which now proceeds on a different basis from that presented to the commercial judge. LCMS asserts that Global

received rates relief in respect of the Nigg Energy Park in excess of £1.3m in the years from 2011/12 to 2014/15 and that sum should be included in the figure for notification purposes.

[40] Miss Ross concedes that, if the case had been proceeding, there should be a proof on this point. But we agree with her that the total would still be below €15m. It is not therefore necessary to dwell further on this issue, given our decision on the principal grounds of appeal.

Damages

[41] The commercial judge indicated that, if he had not dismissed the action, he would have been minded to grant a proof on liability. If LCMS was successful, he would have dealt with questions of specification by way of case management.

[42] We take a different view. A claim for damages of this type must satisfy certain criteria: (a) the law in question must confer rights on individuals; (b) the breach must involve manifest and grave disregard by the member state of its discretion; and (c) there must be a direct causal link between the breach and the damage sustained by the injured party: *Francovich* v *Italy* [1993] 2 CMLR 66; *Brasserie du Pêcheur SA* v *Germany* [1996] QB 404 and [1996] 1 CMLR 889.

[43] While LCMS has extensive pleadings they do not give fair notice in relation to points (b) and (c). This case has now been in court for five years. The pleadings should disclose how an award of state aid caused a loss of £25m. Abbreviation is encouraged. But these pleadings do not perform their essential function. It is unfair to assign a lengthy proof on liability when there is a serious gap in the causation and loss averments. Accordingly, had it been necessary to do so, we would have dismissed the

damages claim.

Conclusion

[44] We refuse the reclaiming motion. We see no need to refer this case to the Court of Justice of the European Union ("CJEU") for guidance under Article 267 TFEU.