



# Claimants have to prove causation of loss in follow-on damages claims

FIRST COMPETITION LAW FOLLOW-ON DAMAGES CLAIM TO REACH TRIAL IN THE COMPETITION APPEAL TRIBUNAL DISMISSED WITH NO DAMAGES AWARDED

Following the first trial of a follow-on damages claim before the Competition Appeal Tribunal (CAT), Enron has lost its claim against EWS (*Enron Coal Services (In Liquidation) v English Welsh & Scottish Railway* [2009] CAT 36). The CAT has emphasised that the decision is dependent on the particular facts of the case, but the judgment shows that the CAT will not simply award damages to claimants without proof that the losses claimed were caused by breaches of competition law found by the regulator. Mere assertion is not enough. This briefing outlines the decision's implications for businesses involved in follow-on damages claims.

## Background

In 2006, the Office of Rail Regulation (ORR) found that English Welsh & Scottish Railway (EWS) had abused its dominant position in the market for coal haulage by rail in Great Britain. One of the abuses found by the ORR was that EWS had engaged in discriminatory pricing against Enron Coal Services (Enron) in 2000.

In 2008, the liquidator of Enron brought a damages claim against EWS in the Competition Appeal Tribunal (CAT) under section 47A of the Competition Act 1998. Some aspects of Enron's claim were abandoned before trial. Others were struck out by the CAT (*Enron Coal Services (In Liquidation) v English Welsh & Scottish Railway* [2009] CAT 7) and by the Court of Appeal (*English Welsh & Scottish Railway v Enron Coal Services* [2009] EWCA Civ 47). Enron has sought permission to appeal the Court of Appeal strike-out decision to the Supreme Court. The decision on permission is pending.

The remaining part of Enron's claim was that EWS's discriminatory pricing had placed it at a competitive disadvantage (as found by the ORR) and had caused it to lose a tender for coal haulage issued by Edison Mission Energy in 2000, and that if it had won that tender Enron would have secured a contract to sell substantial volumes of coal to Edison over four years on an 'end-to-end' (E2E) basis (ie Enron would have purchased the coal and used EWS's haulage services to deliver the coal to Edison's power stations). As an alternative, Enron argued that EWS had caused it to lose an opportunity to win the four-year E2E coal contract.

The CAT rejected the claim, holding that ECS had failed to prove that EWS had caused the loss claimed. Although the ruling turns on the particular facts of the case, there are nevertheless a number of points of broader interest that arise from the judgment.

## Relevance of the regulator's decision

Enron argued that the CAT is bound by all of the findings of fact made by the ORR in its decision. The CAT did not agree. It relied on the Court of Appeal's decision referred to above, which confirmed that 'decisions' of the regulator are binding in follow-on proceedings, but implied that findings of fact are not to be treated in the same way as findings of infringement. Although the CAT carefully considered all findings of fact made by the ORR, it did not regard itself as formally bound by those findings where the parties adduced evidence that contradicted a statement by the ORR. The result is confirmation that claimants have to prove before the Tribunal factual findings made by the regulators that do not underpin the findings of infringement.

## Competitive disadvantage

Enron argued that, in light of the ORR's finding that EWS's conduct had placed Enron at a competitive disadvantage (a pre-requisite for the finding of price discrimination), it followed that EWS had caused it loss.

The CAT rejected this argument. A regulatory finding of competitive disadvantage does not relieve the claimant from the burden of proving that the competitive

disadvantage led to a demonstrable loss in order to obtain a damages award. They are two different concepts: a horse may be unfairly handicapped in a race, but the handicap (a competitive disadvantage) will not cause it loss if the horse is also lame and its lameness would have prevented it winning in any event.

## Expert evidence

As noted above, the central issue in the case was whether Edison would have awarded a four-year E2E coal supply contract to Enron in the hypothetical ‘but for’ world in which it was assumed EWS had not quoted discriminatory prices to Enron. Enron’s expert economist argued that, in determining this question, the CAT should consider what a rational economic operator in Edison’s position would have done in the ‘but for’ world.

The CAT rejected EWS’s application to have the expert evidence declared inadmissible. However, the CAT accepted EWS’s submission that the correct question was what the actual third party decision-maker, in this case Edison, would have done in the ‘but for’ world (as opposed to what a hypothetical rational economic operator would have done). On the facts of this case, the CAT found that the evidence showed that there were many reasons for Edison not to have entered into such a contract with Enron, irrespective of EWS’s prices to Enron.

## Implications of this decision

The CAT’s ruling lays to rest any concerns that claimants will be awarded damages in the CAT on the basis of mere assertion. The case makes clear the need for claimants bringing follow-on damages claims to consider carefully whether they can prove that the competition law breaches have caused them loss.

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