CO/498/2017

Neutral Citation Number: [2017] EWCA Crim 2169
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 29 June 2017

B e f o r e:

MR JUSTICE OUSELEY

Between:

THE QUEEN ON THE APPLICATION OF ASSOCIATION OF BRITISH COMMUTERS LIMITED

Claimant

v

SECRETARY OF STATE FOR TRANSPORT

Defendant

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(Official Shorthand Writers to the Court)

Mr J Hodivala and Mr D Patience appeared on behalf of the **Claimant**

Mr C Sheldon QC and Mr H Mussa appeared on behalf of the **Defendant**

Miss C Darwin appeared on behalf of the **Interested Party**

J U D G M E N T
(Approved)

1. MR JUSTICE OUSELEY: This is a renewed application for permission to apply for judicial review following refusal by King J.

2. The claim arises out of the longstanding problems which have been experienced by what is known as Southern Railway operated by Govia Thameslink Railway Limited, the First Interested Party, under the franchise agreement with the Secretary of State for Transport.

3. The difficulties relate to official and unofficial action by a number of trade unions or trade unionists, but there is scope for dispute about the extent to which that has affected some of the problems which have arisen in terms of cancellation, delay and short trains.

4. The Interested Party operates, as I have said, pursuant to a franchise agreement. That franchise agreement contains performance benchmarks. Where performance benchmarks are not met, the franchise operator can, within certain time limits, assert that this was caused by events which amount to force majeure as defined in the franchise agreement, of which strikes is one.

5. The structure of the franchise agreement means that it is the Secretary of State who has to decide whether the asserted force majeure caused the breaches of the performance benchmarks. If they account for all of what would otherwise be breaches of the performance benchmarks, there is no breach at all. To the extent that there are breaches not accounted for by force majeure, the Secretary of State has a number of remedial steps which he can require to be taken.

6. The Secretary of State has received over a period of some 14 months from 28 April 2016

claims by the operator that shortcomings in relation to the performance benchmarks are attributable to force majeure. This has been something of a rolling, intermittent and uncertain problem over the months since then, as evidenced by the reporting periods from 1 May to 12 November 2016.

7. The Secretary of State has been examining the material, but has not yet reached a decision as to whether there was force majeure or whether that force majeure accounts for all of the shortcomings in relation to the performance benchmarks, including whether the operator took all reasonable steps to minimise and mitigate the effect of the disruptive events on the provision of the required services. That all goes to the question of whether the events were truly force majeure in relation to shortcomings in the performance of the franchise obligations.

8. I am told that his decision on whether there was force majeure, including whether reasonable steps to minimise and mitigate the effects of force majeure have been taken and whether there were, notwithstanding force majeure, other breaches of the performance indicators, is imminent.

9. The Claimant is a company incorporated by guarantee which, putting it simply, takes up complaints on behalf of the disgruntled, to put it mildly, users of the services. They have contributed funds for the purpose of bring judicial review proceedings to try to advance the interests of those who actually use the services.

10. King J refused permission on a number of grounds, one of which was that the Claimant lacked standing or sufficient interest. I do not refuse permission on those grounds.

11. The primary basis upon which the Claimant challenges the action or inaction of the

Secretary of State relates to the period of time that has elapsed in which he has yet to make the decision promised imminently as to whether force majeure has been made out, including whether proper minimising and mitigating steps have been taken and, if not, to what extent there have been breaches of the performance benchmarks. The decision as to what remedial steps, if any, are to follow is not part of that decision.

12. At the beginning of the debate, Mr Hodivala for the Claimant faced a contention by Mr Sheldon QC for the Secretary of State, supported by Miss Darwin for the First Interested Party, that the claim is not justiciable. In essence, they contend that the Claimants are seeking as third parties to enforce the provisions of a contract, the franchise agreement, between the Secretary of State and the operator. That, says Mr Sheldon, they plainly cannot do. In that context, they lack standing, but that is simply another way of putting the point.

13. Mr Hodivala says that his contentions amount to no such thing. He is not seeking to enforce any part of the contract. He is not seeking an interpretation of the contract. There is no contractual issue which might exist between the Secretary of State and operator about which he is seeking to make submissions. His focus, he submits, is entirely upon a separate, albeit related, public law duty owed to the public by the Secretary of State, enforceable through judicial review.

14. He submits that the purpose of the franchise agreement is the provision of public transport through an effective franchise system, the performance benchmarks in which indicate, through, for example, requirements in relation to delay, cancellation and train capacity, the public importance of the agreement.

15. It is, of course, perfectly obvious that the provision of public transport for the benefit of the public travelling upon it is the purpose of the franchise agreement; but there is one other feature that persuaded me that it is at least arguable that all that Mr Hodivala is seeking to do is permissibly to enforce a public law obligation rather than impermissibly to come between the Secretary of State and the franchise operator or to step into the shoes of the Secretary of State as the enforcer of the agreement.

16. This is a public policy which the Secretary of State has promulgated pursuant to the provisions of section 57B of the Railways Act 1993, which requires him to publish a statement of policy with respect to the imposition of penalties and the determination of such issues. By sub-section (2), the statement of policy may include provision for a decision whether to impose a penalty or the determination of any penalty in respect of the contravention of any conditional grant of order:

    i. "to be influenced by -

    (b) the desirability of securing compliance with that relevant condition...

    (c) the consequences or likely consequences of anything which has been or is being done or omitted to be done...

    (d) the desirability of deterring contraventions of relevant conditions... "

17. The policy which the Secretary of State has adopted seems to take advantage of the permissible power in section 57B(2). The executive summary says that:

i. "The Secretary of State has a duty to protect the public interest by securing compliance with the franchise agreements under which rail services are delivered."

18. Mr Hodivala seeks permission to apply for judicial review to make the Secretary of State fulfil that duty or to have it declared that he has failed to do so. The purpose of the document explains how those duties, that is to say the duties to protect the public interest by securing compliance with the agreements, are to be delivered. It sets out the enforcement policy in relation to contraventions of franchise agreements and details of the Department's stepped approach to ensure that any enforcement action is proportionate to the contravention.

19. I accept Mr Hodivala's submission that it is at least arguable that it is for the Secretary of State, faced with asserted breaches of performance benchmarks and an argument from the operator that the breaches are to be attributed to force majeure and so not breaches of it at all, to reach the decision which the franchise agreement makes it for him to take and not to leave it until kingdom come. The latter approach would gut the public policy that he has promulgated of effect.

20. It is, in my judgment, arguable that there is an implied obligation in the policy, there being none asserted to exist in the franchise agreement itself, to reach decisions within a reasonable time in all the circumstances of the case.

21. Mr Sheldon submits that if that be so, as I find it at least arguably is, that the obligation is no more than what might be termed the Wednesbury obligation to take the decision within a time which would be taken by a reasonable Secretary of State in the

circumstances and to take no longer than the reasonable Secretary of State would take. In other words, it is a form of Wednesbury obligation. Mr Hodivala, although expressing it perhaps in different language, did not take issue with the substance of that test.

22. Accordingly, if it is arguable that there is a time related duty, it is clear, at least for these purposes, what the extent of that duty is.

23. The next question is: is it arguable that that duty has been breached? Mr Hodivala drew my attention to the authority of R (on the application of) Ms C v Secretary of State for Work and Pensions [2015] EWHC 1607 and in particular to the citation in it from the decision of Collins J in R (FH and Others) v Secretary of State for the Home Department [2007] EWHC 1571, extracts from which he set out at paragraph 91.

24. In essence, that case shows that it is at least arguable that where a person who has the knowledge and details of the process, the timing of which is under scrutiny, has taken an arguably prima facie period to reach a decision, which exceeds what any reasonable decision maker would take, there is an obligation on the decision maker then to explain why it has, in fact, taken so long.

25. Applied here, submits Mr Hodivala, the question is whether on the material before me at the permission stage it is arguable that prima facie the Secretary of State has exceeded a reasonable time in which to take that decision. He points to the 14 month period from the end of April 2016 and to the length of period for which he has been collecting data through a method which may not have been the most effective for analysis, and the differing times he has apparently allowed to arise between the notification of the force majeure event and the provision of the data demonstrating the event to be just such an

event.

26. Mr Sheldon submits that what is set out in the summary grounds of defence suffices to provide a prima facie case that the time taken is not arguably unreasonable. Therefore, no further elaboration is required.

27. In my judgment, Mr Sheldon is correct in that respect. I accept that what he sets out in paragraph 38 with the associated detail, although it is not very detailed, means that there is no arguable prima facie case that the Wednesbury reasonable time period has yet been exceeded. The operator and the Secretary of State have a very great deal of information to impart and analyse.

28. I see nothing unreasonable in the Secretary of State looking at the rolling pattern of events as the various forms of industrial action evolved, and stop/ start negotiations took place. I do not consider that a reasonable Secretary of State could only have resolved the issue by focusing on one period and reaching a decision on it.

29. Secondly, I accept that there is no basis upon which a reasonable Secretary of State could be criticised for adopting a bottom down and then top up analysis. I accept that there was an enormous volume of data required, which had to be considered separately by reference to each of the events. Particularly problematical is attributing the shortcomings in relation to performance to shortcomings by the operator as opposed to shortcomings induced by force majeure. He also has to consider the question of whether, faced with those events, the operator has taken the steps to minimise or mitigate the effect of what was happening.

30. I am not at all persuaded that the time is arguably shown prima facie to be so

unreasonable as to be Wednesbury unreasonable. In those circumstances, the essential feature of ground one, namely is there an arguable case on what might be regarded as the merits, fails.

31. But I have been told by Mr Sheldon, as I have said, that the decision is imminent. I have taken that into account in my assessment of what the end date will be. There comes a point where it is perfectly obvious that time has been too long. When the Secretary of State has had the material, it is on his desk, it has been analysed by the civil servants and bearing in mind the problems which have been faced by hundreds of thousands of people over a long time, it is right that he should (and I am sure he wholly intends to) treat this as a matter of some urgency now.

32. But the fact that there is an end date in mind is part of my judgment that the overall timetable is not arguably prima facie unreasonable. I indicated to Mr Sheldon that I would in effect require the Secretary of State to produce his decision imminently. I am prepared to allow two weeks for that to be done. If the decision is not made available to the Interested Party within two weeks from today, permission will be granted on ground one. If it is so made available, that will be the end of the case. Permission will be refused.

33. That leaves ground four. Ground four asserts that the Secretary of State in relation to his function of reaching decisions under the franchise agreement is performing a public function which falls within the scope of section 149 of the Equality Act, the public sector equality duty.

34. This requires a public authority, exercising its functions, to have due regard to the need to

eliminate discrimination, to advance equality of opportunity between those who do or do not share a protected characteristic and to foster good relations between those who do and do not share a protected characteristic. Disability is the relevant protected characteristic focused on here.

35. In my judgment, the only relevant public duty is the public duty to which I have referred under the policy. When the Secretary of State reaches his decisions as to what constitutes force majeure and in particular as to what are reasonable endeavours to minimise or mitigate the effect of the force majeure, he is not performing a public function. I do not consider the contrary to be arguable. He is exercising the powers that he has under the franchise agreement and the franchise agreement can only be enforced in this respect to the extent that section 149 bites upon Govia, but there is no basis upon which it can be said that it does.

36. Section 149 cannot be invoked in the indirect way in which Mr Hodivala effectively seeks to invoke it so as to require Govia to be subject to it because the Secretary of State has to assess its obligations by reference to section 149. It is simply an indirect and impermissible way of imposing section 149 on the other party to a contract. That is not what the section permits.

37. It is entirely another issue as to whether on the true construction of the franchise agreement an operator, which knows that there are disabled passengers, can be said to have minimised or mitigated the effect on those who are disabled by steps it has taken or omitted. It is not for me here to construe the agreement, but I have to say it would be a surprising submission if a court were to hear that minimising the effect on passengers were to exclude minimising the effect on disabled ones.

38. Mr Sheldon says it does not even get to that stage because what is being looked at is minimising the effect on passenger services. He may be right. If he is, then it may be that the last point which I have just been making does not even arise, but that is not a matter for me. All I need say is that Mr Hodivala's argument amounts to the indirect and not very indirect imposition of section 149 upon Govia, which is an impermissible use of it. Section 149 may apply to the duties which I have referred to, but that is not how the argument was or can be put.

39. Accordingly, the order will read as I have indicated.

40. MR HODIVALA: My Lord, just one point of clarification. The decision from the Secretary of State, my Lord indicated, was to be made available to the Interested Party within two weeks. If it is not done, then permission will be granted on ground one.

41. MR JUSTICE OUSELEY: Yes.

42. MR HODIVALA: Of course, it may be that there is no communication with the Claimant in that respect.

43. MR JUSTICE OUSELEY: Well, I do not think you are entitled to it. You may be entitled to be told it has been received --

44. MR HODIVALA: Yes.

45. MR JUSTICE OUSELEY: -- but I am not sure you are entitled to receive it.

46. MR HODIVALA: No. That is really all I seek; to clarify --

47. MR JUSTICE OUSELEY: All right.

48. MR HODIVALA: -- that there needs to be communication with the Claimant.

49. MR JUSTICE OUSELEY: Yes. Can the order reflect --

50. MR SHELDON: My Lord, I will discuss with my learned friend the appropriate wording.

51. MR JUSTICE OUSELEY: His point is a perfectly fair one --

52. MR SHELDON: Yes, absolutely.

53. MR JUSTICE OUSELEY: -- in relation to being told that Govia have got it.

54. MR SHELDON: There will be a mechanism for communication.

55. MR JUSTICE OUSELEY: Yes. Thank you.

56. MR SHELDON: My Lord, I am very grateful for your decision in dealing with this matter so swiftly.

57. We do ask for the costs of our acknowledgment of service. That was agreed to by King J on the papers, but, of course, the matter needs to be considered again.

58. MR JUSTICE OUSELEY: He said it was for review, did he not?

59. MR SHELDON: I really have nothing more to say other than we have provided a schedule of costs. The costs are reasonable.

60. MR JUSTICE OUSELEY: Yes, I think you probably did. I am not sure I have it.

61. MR SHELDON: There is no particular reason why the ordinary order should not apply.

62. MR JUSTICE OUSELEY: Mr Hodivala.

63. MR HODIVALA: Well, my Lord, we have drafted and circulated to my learned friends some written submissions. Can I hand those up?

64. I will very briefly go through the thrust of the submissions that this is a claim that has been brought by a claimant who has standing, who is acting in the wider public interest with regards to commuters' interests. There is authority that is on page 2 at A to H that says in such circumstances, no order as to costs may be an appropriate order.

65. We say that if my Lord is against us on that, as a matter of principle, the way in which the Claimant is funded, certainly for this litigation, has been through public donations, through a website called Crowd Justice.

66. The costs sought in the sum of £25,917 from the Secretary of State clearly represent a large amount of work that has been undertaken by the Secretary of State with regards to addressing the points that were raised in the course of this claim; as I say, those points being raised by a company that was acting in the public interest at those using Southern Rail.

67. So that on that basis, we say that there ought to be no order as on costs on the authorities that are set out. If my Lord is against me on that, then we would invite a proportion, a small proportion, of those costs. We suggested 25 per cent in our written document.

68. My Lord has clearly indicated that the refusal of permission at this stage is premised on a future event. To that extent, that has been taken into account. The assurance by the Secretary of State that the decision is imminent is something that has been taken into account for an otherwise, we would submit, arguable case and certainly permission to be granted if the decision is not taken imminently.

69. So we would say that the full amount would be disproportionate. We say that if there is to be any order as to costs, a small percentage of those costs would be far more appropriate.

70. MR SHELDON: I simply say this is not the kind of case, as articulated in the submissions of my learned friend, in terms of the public interest type case. It is essentially an ordinary judicial review being brought by a company limited by guarantee,

albeit reflecting the interests of a number of individual commuters. They have lost on the papers. They sought to renew it and they have lost again today. Of course, we do not seek the costs of preparing for today's hearing.

71. MR JUSTICE OUSELEY: They got rather further today.

72. MR SHELDON: They did get further today, my Lord, but they did not get permission. Of course, if permission is granted because the Secretary of State does not communicate the decision within the appropriate time, then any order for costs will fall away.

73. MR JUSTICE OUSELEY: Yes. Essentially, the public sector equality duty arguments have all failed.

74. MR SHELDON: That has failed and then the two other arguments have failed, as well as --

75. MR JUSTICE OUSELEY: They are all --

76. MR SHELDON: You are right. All the equality arguments have failed.

77. They also in pre-action correspondence raised a whole series of other grounds which we had to address. They were effectively --

78. MR JUSTICE OUSELEY: What, in the AOS?

79. MR SHELDON: No, in pre-action correspondence they put forward various other arguments.

80. MR JUSTICE OUSELEY: Yes, but you do not get those.

81. MR SHELDON: But we are not seeking those costs.

82. My Lord, to the extent that they have succeeded, they have not succeeded at all, but to the extent that they have persuaded you of certain arguable points, that is pretty minimal in terms of the overall context.

83. So first, we say costs should follow the ordinary way. It is not a public interest type case where no costs should be awarded at all. However, if you are minded to reduce the costs on a proportionate basis, then to be reduced by 25 per cent rather than the other way round because they have potentially succeeded on one point rather than the four that they raised. So I would ask you if you are going to make an order that is less than 100 per cent, it should be 75 per cent of our costs.

84. MR JUSTICE OUSELEY: Thank you.

85. MR HODIVALA: My Lord, I was just thinking one other way of dealing with it may be sort of to simply wait and see.

86. MR JUSTICE OUSELEY: No, I am not going to wait and see. If you get permission, then this order will fall.

87. MR HODIVALA: Exactly, yes.

88. MR JUSTICE OUSELEY: If you lose, I am pretty certain the Secretary of State had something else in mind in getting to focus his attention to it.

89. MR HODIVALA: Focus.

90. But no, with regards to the costs, we would say that ground one is essentially the main

argument. It has been this morning that we have been told again that the decision is imminent. So --

91. MR JUSTICE OUSELEY: Well, it is the main argument today, but costs of today have not been sought.

92. MR HODIVALA: I agree.

93. MR JUSTICE OUSELEY: What is being sought is the costs of the summary grounds of defence and the summary grounds of defence have to cover at least some other --

94. MR HODIVALA: There were some other grounds, which is why we say if it is not no order, then we concede --

95. MR JUSTICE OUSELEY: I do not think it will be no order as to costs. It will not be that. I am going to have to do as best I can. Do you wish to respond to Mr Sheldon saying your authorities are not on point?

96. MR HODIVALA: Sorry, my?

97. MR JUSTICE OUSELEY: Your authorities are not on point. They are all rather different from the situation that we have here.

98. MR HODIVALA: Well, simply to say that there has been no previous authority that covers this situation, so it has necessarily been an exercise in trying to do what lawyers to, which is to extrapolate legal principles and apply them to novel facts.

99. MR JUSTICE OUSELEY: Yes.

100. MR HODIVALA: We would say this is a public interest case.

101. MR JUSTICE OUSELEY: I do not think that this is case in which there should be no order as to costs because of the public interest, as strong as it is in these proceedings.

102. The costs capping regime does not apply at this stage. I regard it as dangerous with that regime to rely upon old authorities which precede it for the purposes of reaching a judgment that public interest permits some different way.

103. Nonetheless, although some of the costs of the summary grounds of defence should be paid, I consider that not all of them should be paid. The Secretary of State succeeded in knocking the case out, but after, I may say so, some refinement of his position, not all of which was accepted, and narrowing of the position.

104. I have come to the conclusion that in relation to ground one there should be some costs and there should be costs in relation to grounds two to four. I have come to the conclusion, doing it very roughly, that an order for two thirds of the sum claim, which is two thirds of £25,917, should be paid. The arithmetic can be worked out when the order is drafted.

105. Thank you very much.