

PNE CLAIMS FEE

OPINION

Summary

1. This Opinion concerns the claims fee in respect of claims which are made for the rectification of Past Notification Errors (*PNEs*) under Section P6 of the Balancing and Settlement Code (*BSC* or *the Code*), and, in particular, the decision of the Panel on 13th November 2003 concerning the amount of the claims fee under Section P6.2.2 of the Code. That decision, taken on the casting vote of the Chairman, was not to increase the level of the fee. The Chairman stated that he gave his casting vote in this way on the ground that this would preserve the status quo. In the light of this decision, the Panel did not proceed to discuss what level of increased fee might be appropriate.
2. In my opinion, this decision was not taken in accordance with the requirements of Section B1.2.1 of the Code, and is therefore invalid. Section B1.2.1 requires the Panel to conduct its business under the Code with a view to achieving a number of stated mandatory objectives. This requirement applies to all aspects of the Panel's business under the Code, including the taking of decisions on the amount of the claims fee under Section P6.2.2. In taking that decision, all members of the Panel, including the Chairman, should have cast their votes in accordance with the substantive requirements of Section B1.2.1. These are not compatible with, and do not permit, the taking of a decision by casting vote on the formal ground that the decision would thereby preserve the status quo.
3. The "formal" casting of a chairman's casting vote (for example to preserve the status quo) is a practice which has been adopted by chairmen in some contexts. It tends to maintain the chairman's reputation for impartiality, and this may facilitate the chairman's function of conducting business. But it is not a rule of law, and it may only be applied where the context permits. As I explain below, the law recognises no general duty that a Chairman must cast his casting vote so as to maintain the status quo. And where there is a governing instrument (or legislation) which identifies mandatory objectives or mandatory considerations which must be taken into account by a body in taking a decision, these mandatory objectives or considerations apply to all members of the decision-taking body. These duties are not compatible with the "formal" casting of a decisive vote, for example on the ground that this would preserve the status quo.
4. Consequently, it is my opinion that the Panel should, in order to comply with the relevant provisions of the BSC, reconsider the issue as a matter of urgency.

Relevant provisions of the BSC

5. Sections P6.2.2, 6.2.6 and 6.2.7 make provision for fees to be paid by Claimants in respect of such claims. P6.2.6 and 6.2.7 permit parties to group a number of claims as one single claim for fee purposes: where *‘the relevant mistake results from the same cause’*. Under P6.2.2, the fee for each claim:

“shall be £5,000 or such other amount as the Panel may from time to time after consultation with the Parties and the approval of the Authority determine”.

6. The composition of the Panel is set out in Section B1.1.2, and includes the Panel Chairman.
7. The duties of the Panel are set out in Section B of the BSC. In particular Section B1.2.1(b)(iii) and (c) provide that:

“The Panel shall conduct its business under the Code with a view to achieving the following objectives: ...

(b) that the Code is given effect in such manner as will facilitate achievement of the objectives ... set out in Condition C3(3)(a) to (c) of the Transmission Licence, namely: ..

(iii) promoting effective competition in the generation and supply of electricity; and (so far as is consistent therewith) promoting such competition in the sale and purchase ... of electricity;

(c) that the Code is given effect without undue discrimination between Parties or classes of Parties; ...”

This provision binds the entire Panel, and each member of it, including the Chairman. It sets out mandatory objectives.

8. Section B1.2.3 provides that:

“Insofar as the Panel Chairman or other individual Panel Members or the Panel Secretary have functions under this Code which they or must carry out individually, the provisions of this paragraph 1.2 shall apply to the Panel Chairman, other individual Members or Panel Secretary ... as if references to the Panel in this paragraph 1.2 were references to such person, to the extent those provisions are applicable to such function.”

9. By Section B2.8.1 (emphasis added):

“A person appointed as Panel Member, when acting in that capacity:

(a) shall act impartially and in accordance with paragraph 1.2.1; ...”

This again applies to all Panel Members, including the Chairman.

10. The ‘*powers and functions*’ of the Panel are set out in Section 3.1. In particular, they include:

- (1) *“the powers, functions and responsibilities provided in the Code ...”*: Section B3.1.1;
- (2) *“implementing or supervising the implementation of the procedures for the modification of the Code in Section F”*: Section B3.1.2(b);
- (3) *“the power ... to decide any matter which, under any provision of the Code, is or may be referred to the Panel for the decision”*: Section B3.2.1(a).

11. In exercising any of these powers and functions, the Panel is carrying out its business under the Code, and is bound by the provisions of Section B1.2.1. This applies to the making of any decision as to the amount of the claims fee under Section P6.2.2. It also applies to the consideration of any Modification Proposal.

12. The provisions governing decisions of the Panel, and voting, are contained in Section B4.4. In particular:

- (1) *“in deciding any matter at any meeting of the Panel, each Panel Member shall cast one vote”*: Section B4.4.1.
- (2) But this is subject (inter alia) to Section B4.4.4, which provides that: *“The Panel Chairman shall not cast a vote as a Panel Member but shall have a casting vote on any matter where votes are otherwise cast equally in favour of and against a relevant motion ...”*
- (3) *“Except as otherwise provided ... any matter to be decided at any meeting of the Panel shall be decided by simple majority of the votes cast at the meeting ...”*

The effect is that decisions of the Panel are taken:

- (a) first, by counting the votes cast by the Panel Members other than the Chairman: the Chairman casts no vote at this stage;

- (b) then, if there is an equality of votes, the Chairman has a casting vote.
14. There is no provision of the Code which requires or permits the Chairman to cast his casting vote on the formal ground that by so doing the decision would preserve the status quo.
15. On the contrary, the provisions of B1.2.1 apply to the casting vote. First, because the casting vote is part of the process by which the Panel makes its decision: indeed it is the decisive vote in taking the Panel's decision; and B1.2.1 applies to the Panel's decision. Secondly, even if the casting vote could be seen as an individual function of the Chairman (rather than as part of the process of reaching the Panel's decision, which I think is the correct analysis) it would be caught by Section B1.2.3.

Relevant case law

16. The issue whether there is any legal obligation on a chairman to cast his casting vote so as to maintain the status quo was considered, in the context of local authority meetings, by the Divisional Court (Bingham LJ, Leggatt and Roch JJ) in R. Bradford City Metropolitan Council ex parte Wilson [1990] 2 Q.B. 375 and by the Court of Appeal in R. v Bradford City Metropolitan Council ex parte Corris [1990] 2 Q.B. 363 (Neill LJ giving a judgment with which May and Nourse LJJ concurred). Both Courts held unanimously that there was no such duty.
17. Although these decisions relate to the particular statutory context of local government, the reasoning is valuable more generally. In particular:
- (1) As to the meaning of "casting vote":

"The current meaning of 'casting vote' as defined in the English language dictionaries, is a vote used when there is an equality of votes to break the deadlock. I have not been able to find any dictionary definition to the effect that a casting vote is a vote used in the case of an equality of voters to maintain the status quo. The Local Government Act 1972 does not define 'a second or casting vote'. In my judgment the phrase 'a second or casting vote' must be given, in the absence of a special definition ... its normal or ordinary meaning unless there is some convention or usage which requires otherwise." Wilson per Roch J at page 388.

"The word 'casting' in this context appears to be derived from an archaic use of the word 'cast' as meaning to turn or tilt a scale or balance. A casting vote is therefore a vote which is decisive in that it turns or tilts the scales on one side or the other." Corris at pages 369 and 373.

These explanations of the meaning of the words "casting vote" apply with equal force in the construction of Section B4.4.4.

- (2) As to the purpose of conferring power to cast a casting vote:

“The purpose of granting a casting vote to chairmen of local authorities cannot have been to enable them to preserve the status quo, because any motion will lapse if there is no majority for it”: Wilson per Leggatt J at page 386; so also: Bingham LJ at page 381 and Roch J at page 388-9. The same point is made by Neill LJ in Corris at page 371.

This point applies with equal force to the construction of Section B4.4.4: if the intention had been to preserve the status quo there would have been no need to confer a casting vote on the Chairman, as any motion where votes cast were equally divided would simply lapse.

- (3) A review of the standard works on meeting procedure did not support a rule that a casting vote should be exercised on formal grounds (for example to maintain the status quo); nor did they support a clear and well-established practice to that effect. See: Wilson at pages 383 (Bingham LJ) and 389 (Roch J) and Corris at page 372.

This again is relevant to our case: as it shows that there is neither a rule nor a “general practice” which could affect the meaning of the “casting vote” provision in Section B4.4.4.

- (4) Any suggested analogy with the Parliamentary convention that the Speaker of the House of Commons exercises his vote on formal grounds (so as to prolong further discussion and if that is not possible to maintain the status quo) “*is ... one to be treated with great caution*”. This is because of the special nature of the House of Commons and of the Speaker’s role in that House. Even the Speaker’s convention is not mandatory. See: Wilson at pages 381 (Bingham LJ), 386 (Leggatt J) and 388 (Roch J). (This analogy was not pursued in Corris).

18. What emerges from Wilson and Corris is that there is no rule of law that a casting vote must be exercised to maintain the status quo; that the ordinary meaning of the words “casting vote” would not support such a constraint; and that the purpose of conferring a casting vote is not to maintain the status quo.
19. Once these points are recognized, it is in my opinion inevitable that the Chairman’s casting vote, conferred by Section B4.4.4, must be subject to the mandatory objectives stated in Section B1.2.1. It is these objectives which are mandatory, and not the maintenance of the status quo. If the decisive vote is given on formal grounds (to maintain the status quo) the decision as a whole has not been taken so as to advance the mandatory objectives. The decision would also be bad on familiar principles of public law: including failure to take account of relevant considerations.

20. In my opinion it would require an amendment to the BSC, to exempt decisions taken on the Chairman's casting vote from Section B1.2.1, to enable the Chairman validly to cast his vote on the formal ground that the decision would thereby maintain the status quo. There would be obvious objections in principle to such an amendment. It would tend to diminish the importance of the mandatory objectives.

The decision on 13th November 2003

22. At its meeting on 13 November, the Panel considered the PNE Claims Fee, with a paper (69/017) from Elexon. The PNE Committee had recently published its decisions on single claims. It was now known that the fees that would be collected, if the fee remained at £5,000 per claim, would be £225,000. The total costs of the P6 process were estimated at £1.610m. If the fees remained at the £5,000 level there would therefore be a shortfall of some £1.385m to be collected from all BSC Parties. A fee level which would fully recover the costs of the process would be about £38,800. Various views had been expressed in consultation as to whether the Panel should now determine a different fee level in the light of the actual information on the costs of the process.
23. Some Parties were in favour of an increase. Their arguments included:- (a) that P6.2.2 itself expressly envisaged a further decision on the claims fee and that the £5,000 figure was therefore not fixed; (b) when Modification Proposal Alt P37 had been agreed, there had been widely-documented statements that the claims fee was estimated to cover process costs; and (c) that new entrants and non-claimants should not be required to pay for the costs of the claims process. Other Parties were opposed. Their arguments included:- (a) that an increase would be in effect retrospective and disturb the decisions taken by claimant Parties; (b) that the process was for the benefit of all Parties; (c) that an increase in claims fee to the full amount of £38,800 would have an adverse effect on smaller claimants and small claims.
24. I do not in this Opinion set out, or analyse, all the arguments. What is important is that the arguments, and the decision itself, raised issues to which the mandatory objectives in Section B1.2.1 were plainly relevant. Indeed I understand that the ordinary members of the Panel were reminded of this in the course of the discussion. For example, a decision that the claims fee should remain at £5,000, and the shortfall of £1.385 million costs be met by all members, would arguably involve undue discrimination against both new Parties and non-claimants. To the extent that it imposed costs on new Parties which did not relate to their period of participation in the BSC it would also arguably not promote effective competition. These are issues which should have been resolved in the taking of the decision. But the decision was in fact taken on a casting vote given on the formal ground of maintaining the status quo.

Conclusion

25. For the reasons given above, in my opinion the decision taken on 13th November 2003 was not properly taken. If it is not retaken, this invalid decision will in effect have prevented the Panel from properly considering the exercise of its power under Section P6.2.2 to fix the amount of the claims fee. In particular, it will preclude a proper consideration by the Panel of the appropriate level of the claims fee in the light of the information on the substantial £1.385 million shortfall resulting from the announcement of the PNE Committee's decisions on single claims. The decision should therefore be reconsidered.
26. In substance, the decision could be reconsidered by a reconsideration of the issue under P6.2.2 itself, or by consideration of an appropriate Modification Proposal relating to the same subject-matter (e.g. stating a particular revised fee level): or by both routes.
27. However, any reconsideration in order to cure the defective decision would need to be capable of being effective, given the timetable constraints. A decision under P6.2.2 requires consultation, a Panel decision and the Authority's approval. I understand that the proposed timetable for the announcement of the substantive decisions on the PNE claims by the PNE Panel, together with the very short invoicing timetable which currently applies to the claims fee after that announcement by the PNE, could now impose timetable difficulties with an effective reconsideration. If this is the case, it is important that steps are taken to enable the process of reconsideration to be effective.
28. One possibility would be to seek amendment, as an urgent modification, of the invoicing timetable. This would seem to me to be both appropriate and justifiable in order to ensure that the Panel (and the industry and Authority) is given the opportunity properly to consider the issues under Section P6.2.2 and take a valid and effective decision on those issues.

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