



Neutral citation [2023] CAT 3

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1418/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 January 2023

Before:

THE HONOURABLE LORD ERICHT
(Chair)
THE HONOURABLE LORD YOUNG
PETER ANDERSON

Sitting as a Tribunal in Scotland

BETWEEN:

BLUE PLANET HOLDINGS LIMITED

Pursuer

- v -

(1) **ORKNEY ISLANDS COUNCIL**
(2) **ORKNEY FERRIES LIMITED**
(3) **SINCLAIR HAULAGE LIMITED**

Defenders

RULING: EXPENSES

A. INTRODUCTION

1. This is the Tribunal’s decision on the defenders’ motions for expenses, which it dealt with on the papers.

B. COMPETITION APPEAL TRIBUNAL RULES

2. Rule 4 of the Competition Appeal Tribunal Rules (the “Rules”) provides:

“Governing principles

4.—(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;...”

3. Rule 104 of the Rules provides:

“Costs

104.—(1) For the purposes of these rules “costs” means costs and expenses recoverable before the Court of Session.

(2) The Tribunal may at its discretion.. at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.

...

(4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—

- (a) the conduct of all parties in relation to the proceedings;

(b) any schedule of incurred or estimated costs filed by the parties;

(c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;

...

(e) whether costs were proportionately and reasonably incurred; and

(f) whether costs are proportionate and reasonable in amount.

(5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be—

...

(b) dealt with by the Auditor of the Court of Session, as appropriate.”

C. THE MOTIONS FOR EXPENSES

(1) Motion on behalf of first and second defenders

4. The first and second defenders sought an order to find the pursuer liable to the first and second defenders in the expenses of the case. The first and second defenders successfully made an application for strike out. It was reasonable in all the circumstances to make the order sought.

(2) Motion on behalf of third defenders

5. The third defender sought an order to find the pursuer liable to the third defender for the expenses of the case. As the case against all defenders had been struck out, it was reasonable to make an order in favour of the third defender for their expenses incurred in defending themselves.

D. THE PURSUERS' RESPONSE

6. The pursuer submitted that each party should bear its own costs. The Tribunal had a wide discretion on costs and was not obliged to follow any principle such as costs should follow the event. Such a principle would load the dice against consumers and small enterprises and undermine the effectiveness of the competition regime. (*DG FT v Association of British Travel Agents Ltd* [2002] CAT 2, *CMA v Flynn Pharma* [2020] UKSC 12; Private Actions in Competition

Law: A consultation on options for Reform BEIS April 2012). The Governing Principles require the Tribunal to ensure that each case is dealt with justly and at a proportionate cost (Rule 4).

7. The pursuer further submitted as follows under reference to the factors set out in rule 104(4):

(1) Conduct of parties (Rule 104(4)(a)).

Having suffered loss as a result of the alleged illegal activities of a cartel, the pursuer had acted in good faith, properly and with integrity. The operators of the alleged cartel had acted in bad faith. The first defender had provided false and misleading information in response to Freedom of Information requests. The directors of the third defender resigned, presumably to avoid justice. The question remained did the owners of the third defender sell that business to the key witness for less than it was worth, turning the key witness into a defendant and incentivising him to ensure the defenders were acquitted. Some might see that as interfering with a witness and an attempt to pervert the course of justice. The defenders have withheld evidence from the Tribunal and misled it, resisting providing it until forced by the Tribunal to do so. They appear to have destroyed evidence such as the missing email from Andrew Blake to Dave Neil.

(2) Whether a party has succeeded on part of its case, even if that party has not been wholly successful (Rule 104(4)(b)).

As the strike out decision is subject to appeal, it cannot yet be determined which party has succeeded.

(3) Whether costs were proportionately and reasonably incurred (Rule 104(4)(f)).

There was no need for the first and second defenders to spend taxpayers money on teams of external lawyers and barristers. A proportionate

response would have been those responsible for the alleged infringements of competition law to represent themselves or have in-house lawyers represent them.

- (4) whether costs are proportionate and reasonable in amount.

Prior to commencing proceedings the pursuer concluded it could afford them only if it used the low-cost fast-track procedure which would have capped costs and ensured that the case was dealt with within six months. Had the pursuer's application for the case to be held under the fast-track procedure been considered and refused, or the cap on recoverable expenses set at a level the pursuer could not afford, it would not have proceeded with the case. However the application was never heard and costs were allowed to escalate as the first and second defenders took on ever larger teams of lawyers and barristers

E. DECISION ON EXPENSES OCCASIONED BY THE PURSUER'S REQUEST FOR THE PRODUCTION OF DOCUMENTS.

8. On 21 February 2022, the Tribunal ordered the pursuer to file a written request for the production of documents. The request was opposed by the first and second defenders and a hearing was held on 23 March 2022 at which the first and second defenders were ordered to produce certain documents by 1 April. Having lost the argument at the hearing on 23 March, the first and second defenders did not obey that order. Having breached the order, they came back to the Tribunal and sought to have it varied. That was the subject of a further hearing on 4 May 2022, at which the Tribunal expressed its concerns about the conduct of the first and second defenders in respect of the production of documents. (see Transcript of 4 May 2022 hearing: p.17, line 19 to p.18 line 12). The court made a further order for production. Although various other minor and generally uncontroversial matters were dealt with on 23 March 2022 and 4 May 2022, the main focus of the hearings on these days was on the production of documents.

9. In all these circumstances in our view the expense incurred in respect of the first and second defenders' resistance to the production of documents should not fall on the pursuer. We find the first and second defenders liable to the pursuer and the third defender in respect of the expenses occasioned by the pursuer's request for documents. For the avoidance of doubt, that includes the expenses of the hearings on 23 March 2022 and 4 May 2022 in full.

F. DECISION ON REMAINDER OF THE EXPENSES

10. The starting point is that the successful party is entitled to recover its costs (*The Racecourse Association v OFT* [2006] CAT 1). A balance must be struck between ensuring that costs awards do not undermine the effectiveness of the competition regime whilst ensuring a just result for both parties (*CMA v Flynn Pharma* [2020] UKSC 12, para [153]). In accordance with normal practice, it is appropriate that expenses are dealt with by the first instance tribunal at this stage and not deferred until after any appeal.
11. The successful parties in this case were the defenders. They succeeded in having the case struck out. This is not a case where there was mixed success. The case was a private claim for damages on behalf of the pursuer. It could succeed only if the pursuer was entitled to damages. It failed because the claims for damages were struck out.
12. The effectiveness of competition law is not undermined by making an award of expenses against the pursuer in this case. Effective competition law depends on parties bringing relevant cases in which issues of competition law can be effectively addressed. In order for competition law issues to be effectively addressed in a private damages claim, the claim must set out a relevant claim in damages, which it did not in this case.
13. In seeking to ensure a just result for both parties, the Tribunal has to take into account that the defenders have incurred expense in defending a claim which has been struck out.

14. The procedure in this case has not been unnecessarily prolonged such as to generate excessive legal expenses. It has been decided on one substantive hearing. If any particular cost is excessive or unreasonable that can be dealt with by the Auditor.
15. The pursuer now submits that its fast-track application was never heard and if it had been and had been refused (or recoverable expenses had been set at too high a level) it would have taken an informed decision as to whether it was worth proceeding with the case. We do not accept that submission.
16. The application was in fact heard at the hearing on 21 February 2022. The Tribunal reserved determination of the fast-track application until determination of the strike out (para 10 of Order of 21 February 2022). Before coming to that decision, the Tribunal asked the pursuer's director Mr Murray whether he wished the question of fast-track decision to be decided that day (Transcript of 21 February 2022 hearing: p.15, line 14). Had the pursuer wished the Tribunal to make a decision as to whether to grant or refuse the fast-track application that day so that the pursuer could make an informed position as to whether to proceed, it could have asked the Tribunal to do so. However, it did not do so and instead Mr Murray on behalf of the pursuer confirmed that he was content to go forward on the basis that consideration of whether the case should go down the fast-track procedure should be postponed until after the strike-out hearing (Transcript of 21 February 2022: p.15, lines 1-17). In any event the fast-track procedure was unlikely to have resolved the case more quickly or cheaply than the procedure adopted of having a strike out hearing around 3 months after the first case management hearing.
17. The conduct of the first and second defenders in relation to the request for production of documents has been dealt with by the ruling under Heading E above. The change of ownership of the third defenders has no bearing on the question of expenses as it has no bearing on the legal ground (damages) on which the case was struck out.
18. A defender in a case before this Tribunal is entitled to be represented by external lawyers. There is equality of arms as both the pursuer and the defender are

entitled to instruct solicitors and counsel and recover that expense from the other side in appropriate circumstances. If one party chooses not to instruct solicitors and/or counsel that is their choice and the other party is not obliged to follow suit and is not barred from recovering that expense. In the current case, it was entirely appropriate for the first and second defenders to instruct external solicitors and junior and senior counsel. The first and second defenders acted reasonably, proportionately and with appropriate economy in bringing in senior counsel for the strike-out hearing and not for the earlier hearings which were of the nature of case management.

19. Having taken account all the circumstances of the case, and the matters set out in Rules 4 and 104 of the Rules, we find the pursuer liable to the first, second and third defenders for the expenses of the case, except in so far as dealt with under Heading E above (expenses occasioned by pursuer's request for production of documents).

G. ASSESSMENT OF EXPENSES

20. Parties have provided us with figures for expenses incurred. We take the view that detailed consideration of these figures is best done by the Auditor of the Court of Session. The Auditor has expertise in assessing whether the expenses claimed for are reasonable. The Auditor can also make enquiry as to the applicability of VAT on the fees etc of the defenders. The Auditor will also be able to determine which of the expenses are properly ascribed to the request for production.
21. Accordingly we direct under Rule 104(5) that the sum to be paid under the foregoing findings on expenses shall be dealt with by the Auditor of the Court of Session.
22. We order the pursuer and the first and second defenders to make payment of the expenses as set out above as the same shall be taxed by the Auditor of the Court of Session.

The Hon. Lord Erich
Chair

The Hon. Lord Young

Peter Anderson

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 23 January 2023