



Neutral citation [2023] CAT 2

**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

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**RULING: PERMISSION TO APPEAL**

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## **A. INTRODUCTION**

1. This case is a private claim for damages for breach of the Chapter I and Chapter II prohibitions. The Tribunal struck out the case on the basis that the pursuer had not made a relevant case on damages in respect of either prohibition (para 20-23, 29, 55 of the Tribunal’s Judgment). Had the pursuer made out a relevant case on damages, the Tribunal would have allowed the case to proceed to a full evidential hearing on the alleged breaches of competition law (para 63).
2. An appeal lies from the Tribunal to the Court of Session on a point of law (Competition Act 1998 (the “Act”) sec 49(1)(c)). An appeal requires the permission of the Tribunal or the Court of Session (sec 49(2)(b)). The test is whether there is a real prospect of success or there is some other compelling reason why permission should be granted (*Strident Publishing Ltd v Creative Scotland* [2020] CAT 18).
3. The pursuer has made an application for permission to appeal. The parties have lodged detailed written submissions and the application has been decided on the papers without a hearing under Rule 108 of the Competition Appeal Tribunal Rules 2015 (the “Rules”).

## **B. THE APPLICATION FOR LEAVE TO APPEAL**

4. Under Headings 1 to 5 of the Application for Leave to Appeal the pursuer sets out the background and the legislation and authorities. Under Heading 6 the pursuer sets out its case against strike-out. Under Heading 8 the pursuer sets out its grounds of appeal in relation to the Chapter I prohibition contained in the Act. Under Heading 9 the pursuer sets out its grounds of appeal in relation to the Chapter II prohibition. Under Heading 10 the pursuer sets out its grounds of appeal in relation to the Governing Principles in Rule 4 of the Rules.

**C. GROUNDS OF APPEAL IN RELATION TO THE PURSUER’S CASE AGAINST STRIKE-OUT (HEADING 6 OF APPLICATION FOR PERMISSION TO APPEAL)**

5. The pursuer submits that the public interest element of a stand alone action can in itself constitute reasonable grounds for making a claim. The pursuer further submits that the pursuer’s case is that it has suffered loss because of the defender’s breaches of the Chapter I and II prohibitions and as such is entitled to bring a claim under sec 47A of the Act. This was precisely the sort of action that Parliament set up the Tribunal to encourage and support: it wanted private sector led challenges to anti-competitive behaviour.
6. In our opinion this ground discloses no error of law by the Tribunal or other compelling reason. A private action for damages is just that: an action for damages. It is not a general form of action by which a private sector party which has not suffered damage can police competition law by challenging anti-competitive behaviour. In order to succeed in a private action for damages a pursuer must set out a relevant case on damages. The pursuer failed to do so. Permission to appeal on this ground is refused.

**D. GROUNDS OF APPEAL IN RELATION TO THE DAMAGES SOUGHT FOR BREACH OF THE CHAPTER I PROHIBITION (HEADING 8 OF APPLICATION FOR PERMISSION TO APPEAL)**

7. The pursuer formulates its grounds of appeal under this heading as four contentions.

First Contention

8. The pursuer contends that the Tribunal erred in law when it failed to properly assess the defenders’ application for strike-out in accordance with the principles set out in law. It also erred in law when it failed to have due regard to the overriding objective of the CPR, the Governing Principles of the Tribunal and Parliament’s wishes.

9. In our opinion this contention does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The Tribunal applied the correct test for strike-out (paras 22-23) and acted in accordance with the Rules.

### Second Contention

10. The pursuer contends that with no proper investigation of the facts or evidence having taken place, the evidence still being gathered and in dispute and serious misconceptions remaining about key aspects of the case, there were reasonable grounds for believing that fuller investigation in to the facts would add to or alter the evidence and so affect the outcome of the case. The Tribunal was not in command of the facts when it struck out the case. It ought to have allowed due process to take place so that the facts could be properly established and considered before reaching a verdict.
11. In our opinion this contention does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The purpose of the strike-out procedure is to save time and expense by dismissing actions at an early stage without evidence. The Tribunal was entitled to decide the strike-out motion without hearing evidence. The Tribunal applied the correct test for strike-out (paras 22-23). The Tribunal did not make any assessment of the evidence. It did not need to do so to determine the strike-out question and arguments. It decided the case on the basis of the pursuer's position as set out in its claim form, witness statements and summary argument and reply and did not make findings as to fact (para 3, 18). The Tribunal concluded that even if the pursuer proved all its allegations, this did not give rise to a relevant claim for damages.

### Third Contention

12. The pursuer contends that the Tribunal's decision to strike out the claim without giving the pursuer, who is represented by a party litigant, the opportunity to amend its pleadings was unreasonable, breached accepted legal principles and

wrong in law. It was also unfair and in breach of the Tribunal's Governing Principles and Rule (2)(d) of the Rules.

13. In our opinion this contention does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The Tribunal did not err in not giving the pursuer an opportunity to amend. In its skeleton argument the pursuer stated "If, however, the Pursuer's particulars of claim are found to be deficient then I would most respectfully ask for the Tribunal's permission to amend them and make good any deficiencies." However the pursuer made no motion for any specific amendment. A Tribunal hearing is not an iterative process whereby the Tribunal works out why one party should succeed and then tells the other party how to amend to prevent such success. The responsibility is on the party wishing to amend to set out the amendments it wishes to make and invite the court to allow these specific amendments.

#### Fourth contention

14. The pursuer contends that the Tribunal failed to have due regard to the overriding objective of the CPR, which is to enable the courts to deal with cases justly, and wrongly denied the pursuer its right to have its case properly heard.
15. In our opinion this contention does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The case was properly heard in accordance with the Rules.

#### **E. GROUNDS OF APPEAL IN RELATION TO THE DAMAGES SOUGHT FOR BREACH OF THE CHAPTER II PROHIBITION (HEADING 9 OF APPLICATION FOR PERMISSION TO APPEAL)**

16. The pursuer's claim in relation to the Chapter II prohibition was made under headings (a) to (i) (para 31 ff of the Judgment). The pursuer seeks to appeal only in respect of (a), (e), (f) (g) and (h), and sets out the following grounds.

(a) Overcharging and price discrimination

17. The pursuer submits that there was no legal basis for striking out the claim. The Tribunal was not aware at the time when it struck out the claim how much the pursuer had been overcharged: it has now been calculated as at a minimum £2,056. The Tribunal was wrong to strike the damages claim out on the ground that it was de minimis: the importance of a case lies not solely in the quantum of damages claimed but in establishing if competition law has been infringed. Other remedies were available to the pursuer but that does not prevent it from bringing an action for damages under the Act.
18. In our opinion this ground does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The pursuer failed to set out a loss that was caused by the breach. The legal basis for striking out the claim was that the pursuer did not have reasonable grounds for recovering damages (para 33). The Tribunal gave the pursuer an opportunity to clarify the amount sued for (Transcript p88 line 20 to p90 line 14) and was entitled to proceed on the basis of the information provided to it at the hearing.

(e) Abuse of monopoly and breach of trust to embezzle and delay the delivery of goods, harass and extort money

19. The pursuer submits that the fact that other remedies may have been available does not preclude it from bringing a claim under the Act.
20. In our opinion this ground does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The legal basis for striking out the claim was that the pursuer did not have reasonable grounds for recovering damages (para 41). The pursuer failed to set out a loss that was caused by the alleged breach.

(f) Refusal to supply and tying. Abuse of monopoly to cut off access to essential services and to restrict access to the law

21. The pursuer accepts that it did not set out the amount sought and how it is calculated but submits that claimants who have suffered loss by reason of the defenders' breach should have their damages quantified by the court doing the best it can on the available evidence. The pursuer contends that the Tribunal erred in law when it failed to properly assess the strikeout in accordance with the principles set down in law. It also erred on law when it failed to have due regard to the overriding objective of the CPR, the Governing Principles of the Tribunal and Parliament's wishes. The Tribunal's decision was factually incorrect and the pursuer ought to have been given an opportunity to rectify. The Tribunal ought to have assumed that the facts pleaded were true. It erred and instead conducted a mini-trial, questioned the facts, made assumptions about the pursuer's case that were wrong without giving the pursuer the opportunity to address and correct these misconceptions.
22. In our opinion this ground does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The pursuer failed to set out a loss that was caused by the alleged breach. The pursuer had not set out the amount sought nor how it was calculated and the Tribunal was not required to speculate about these matters and was entitled to find that the pursuer had no reasonable grounds for recovering damages (para 45). The Tribunal did not conduct a mini-trial but decided the question of strike-out on the basis of the factual position put forward by the pursuer in its claim form, witness statements and summary argument and reply (para 3, 18).

(g) Misappropriation of sixty sanding belts for electric floor sander and harassment

23. The pursuer submits that the decision to strike out was made on wrong assumptions as to the facts in relation to the availability of services from an alternative supplier. A fuller investigation of the facts would add to or alter the evidence and affect the outcome. The case should not have been summarily struck out but ought to have been allowed to go to trial. The Tribunal erred in law when it failed to properly assess the strikeout in accordance with the principles set down in law. It also erred in law when it failed to have due regard to the overriding objective of the CPR, the Governing Principles of the Tribunal and Parliament's wishes.

24. In our opinion this ground does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The Tribunal found that the pursuer's position was contradicted by its own case (para 47). At the stage of strike-out the Tribunal assesses the pursuer's case as set out in the pleadings and other documents and is entitled to come to a decision on strike-out without hearing evidence. The Tribunal assessed the strikeout in accordance with the correct legal test (paras 20-23). The case was properly dealt with in accordance with the Rules.

(h) Exploitative abuse of the monopoly to misappropriate and destroy property

25. The pursuer submits that the principal reason given for strike-out is based on a wrong assumption. A fuller investigation of facts would add to the evidence. The pursuer was entitled to bring a claim under competition law although other remedies were available. The pursuer contends that the Tribunal erred in law when it failed to properly assess the strike-out in accordance with the principles set down in law. It also erred on law when it failed to have due regard to the overriding objective of the CPR, the Governing Principles of the Tribunal and Parliament's wishes.

26. In our opinion this ground does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The Tribunal found that the pursuer's position was contradicted by its own case (para 47). At the stage of strike-out the Tribunal assesses the pursuer's case as set out in the pleadings and other documents and is entitled to come to a decision on strike-out without hearing evidence. The Tribunal assessed the strike-out in accordance with the correct legal test (paras 20-23). The case was properly dealt with in accordance with the Rules.

**F. GROUNDS OF APPEAL IN RELATION TO THE GOVERNING PRINCIPLES UNDER THE RULES (HEADING 10 OF APPLICATION FOR PERMISSION TO APPEAL)**

27. The pursuer submitted that in the present case the parties were not placed on an equal footing (Rule 4(2)(a)) and the case was not dealt with fairly (Rule 4(2)(d)).

The pursuer as a micro-enterprise represented by a party litigant with no legal training. The defenders were represented by lawyers and had taxpayer funding. The pursuer was at an unfair advantage: it did not know how the Tribunal worked, its processes were unfamiliar and arcane, and no assistance was at hand to help it understand them. The Governing Principles place the Tribunal under an obligation to rectify that imbalance and the Tribunal should have made allowances for procedural mistakes made by the pursuer and should have allowed the pursuer to amend its case.

28. In our opinion this ground does not have a reasonable prospect of success, nor is there any other compelling reason why permission should be granted. The Tribunal made considerable allowances for the pursuer being represented by its director rather than a legal representative. The Tribunal did not take a strict view limiting the pursuer's case to what was in its formal pleadings (ie claim form) but took into account the pursuer's position as set out in the pursuer's director's witness statement, which referred to matters beyond the formal pleadings. (Transcript 21 February 2022 p8 line10 to p 10 line7). The Tribunal explained its procedure for the assistance of the pursuer's director (eg Transcript 23 March 2022 p19-25, Transcript 4 May 2022 p43 line 15). The CAT publishes on its website a Guide to Proceedings which explains in straightforward terms how cases are conducted. The case was dealt with fairly and in accordance with the Rules. No specific amendment was sought by the pursuer (see para 13 above).

## **G. CONCLUSION**

29. Permission to appeal is refused.

The Hon. Lord Erich  
Chair

The Hon. Lord Young

Peter Anderson

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

Date: 23 January 2023