



Neutral citation [2025] CAT 2

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1379/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 January 2025

Before:

THE HONOURABLE MR JUSTICE BUTCHER
(Chair)
PETER ANDERSON
SIMON HOLMES

Sitting as a Tribunal in England and Wales

BETWEEN:

KERILEE INVESTMENTS LIMITED

Claimant

- and -

INTERNATIONAL TIN ASSOCIATION LIMITED

Defendant

RULING (SECURITY FOR COSTS)

A. INTRODUCTION

1. This is the Tribunal's ruling in relation to two matters which, by our order of 1 November 2024, we directed should, if they could not be agreed by the parties, be determined in writing after receipt of written submissions. Those two matters are:

- (1) The quantum and timing of further security for costs to be provided by the Claimant; and
- (2) The costs of the Defendant's application for security for costs issued on 18 October 2024.

B. BACKGROUND

2. The Claimant's claim was brought on 30 December 2020. It is a standalone claim for damages under s. 47A Competition Act 1998, concerning the supply chains for tin, tantalum and tungsten. At the first case management conference ("CMC") on 29 October 2021 the Tribunal directed that there should be a determination of preliminary issues as to market definition and applicable law.
3. Following the first CMC, the Claimant agreed to provide £400,000 as security for the Defendant's costs up to the conclusion of the expert process in the preliminary issues trial. That was paid between 28 January 2022 and 28 April 2022.
4. The procedural history has been somewhat protracted. The process of service of witness evidence and industry expert evidence had been concluded by 1 November 2024, when a further CMC took place. The Defendant was, at that point, still due to serve its expert report on the area of economics, and by our order of 1 November 2024, we ordered that that report should be served by 31 January 2025, with the Claimant to file and serve any reply report from its expert in economics by 14 March 2025. The hearing of the preliminary issue trial has been listed for 14-31 July 2025.

5. In the run up to the CMC of 1 November 2024 the Defendant raised with the Claimant the issue of security for costs for the period after the conclusion of the expert process (i.e. for the period after that for which security for costs had already been provided in the aftermath of the first CMC on 29 October 2021). This was initially raised by the Defendant in the autumn of 2023, following the publication of the Claimant's accounts for the period 1 April 2021 to 30 September 2022. Thereafter it was raised on 14 August 2024, at which point the Defendant asked the Claimant a number of questions, with follow up letters from the Defendant's solicitors on 4 September 2024, 20 September 2024 and 11 October 2024. A response from the Claimant on 17 October 2024 did not satisfy the Defendant's concerns, with the result that it issued its application for security for costs pursuant to Competition Appeal Tribunal Rules 2015 rule 59 on 18 October 2024. The Defendant sought that that application should be heard at the CMC on 1 November 2024. The Claimant sought that the hearing of that application should be adjourned, because the Claimant was at that point not legally represented.
6. At the CMC on 1 November 2024, the Claimant accepted that further security for costs should, in principle, be provided. On that basis, the Tribunal adjourned the further hearing of the application for security for costs, so that the issues of (1) the amount, and (2) the timing of the further security could be the subject of further consideration by the parties, negotiation between them, and, in the absence of agreement, written submissions and a determination by the Tribunal on the papers. The Tribunal also laid down a timetable for written submissions in relation to the costs of the Defendant's application for security for costs which it issued on 18 October 2024.

C. THE SUBMISSIONS RECEIVED

7. The Tribunal has received and reviewed written submissions filed pursuant to its order of 1 November 2024. These have comprised:
 - (1) Submissions from the Defendant as the costs of the security for costs application, served on 13 December 2024.

- (2) Submissions from the Claimant dated 13 December 2024 dealing with the amount and timing of further security for costs. Those submissions referred to a letter sent by the Claimant to the Defendant's solicitors of 12 December 2024.
 - (3) Submissions from the Defendant in response on the issues of the amount and timing of security, dated 20 December 2024. Those submissions referred back to the materials it initially filed in support of its application for security for costs, in particular the First Witness Statement of Kenneth Henderson, the Defendant's schedule of estimated relevant costs, and the Defendant's Skeleton Argument for the CMC on 1 November 2024.
 - (4) Submissions from the Claimant in response on the costs of the Defendant's security for costs application, dated 20 December 2024.
8. The Tribunal has also received a letter from the Claimant dated 6 January 2025 and a responsive letter from the Defendant dated 9 January 2025 dealing with the form in which security should be provided.

D. THE AMOUNT, TIMING AND FORM OF FURTHER SECURITY FOR COSTS

9. We will deal with these issues first.

(1) Amount

(a) *The parties' positions*

10. The Defendant's application is for further security in the amount of £740,000 in respect of the stages in the litigation after the conclusion of the expert process up to the end of the preliminary issues trial, to include the pre-trial review ("PTR"), preparation for the trial, and the trial itself. The Defendant's estimated costs for the next stages of the litigation are £1,071,000; and the Defendant's application is for security in an amount of some 69% of those estimated costs.

11. For its part, the Claimant contends that this estimate of costs is “disproportionate, excessive and unreasonable”. In particular the Claimant points to the fact that the current estimate for these phases of the litigation is significantly greater than that for the equivalent stages included in the Defendant’s costs budget of 7 September 2021. The Claimant says that this increase has not been properly justified. It is not adequately accounted for by inflation; the trial estimate of three weeks is likely to be an over-estimate; and the Claimant’s past conduct of the proceedings (as to which the Claimant does not accept any shortcomings on its part) cannot be a reason why the future costs are at the level estimated. The Claimant makes a specific criticism of the amount included for experts in trial preparation (some £85,000), and queries why security for costs of £113,700 is required for ADR / settlement costs. The Claimant contends that an estimate of £550,000 would be appropriate and controlled, and that a sum of £350,000 would be an appropriate amount to be ordered by way of security for costs.

12. The Defendant’s response is that its current estimate is fair and reasonable. Since the 2021 budget, the trial estimate has increased from two to three weeks, and the Claimant’s suggestion that that may be an over-estimate is baseless: it is an estimate which was agreed by the Claimant’s previous legal team. Speculation that the issues may be narrowed is just that: there is no reason to assume it will happen, in particular as the Claimant has not yet seen the Defendant’s economic evidence. Equally, the 2021 budget was based on 2021 rates, which have been updated in view of the passage of time, and to reflect the rates of the Defendant’s current firm of solicitors (which is different from that at the time of the 2021 budget). While those rates are higher than the previous firm’s, they are within the bounds of what can be expected from a firm with the appropriate expertise. The Claimant makes no criticism of the estimated number of hours to be spent on the various stages. Further, the Defendant points out that it has not instructed leading counsel, and its expert economist is a junior partner. As to the Claimant’s past conduct, this necessarily informs the estimates of future costs, because it indicates the extent to which the Defendant may have to expend costs dealing with the manner in which the Claimant pursues the litigation.

(b) Conclusions

13. As the Claimant says in its submission, it has not had the benefit of a professional assessment of the Defendant's estimate, and "so cannot comment on specifics". This has meant that the Tribunal has, in turn, not had the benefit of detailed and specific submissions on the Defendant's estimate. We have to apply our own critical faculties and experience to the estimate provided. We consider that there are criticisms which can be made of the estimate put forward by the Defendant, as being of more than will be recoverable on a detailed assessment. In particular: (1) the hourly rates employed may be said to be excessive, not least because they exceed the London 1 guideline rates (updated as at 1 January 2025); (2) the amount of solicitors' time involved in relation to the PTR may be said to be excessive; and (3) the amount budgeted for ADR / settlement may be said to be excessive.
14. In our judgment, the appropriate amount which the Claimant should provide as security for costs is £575,000.

(2) Timing

15. The parties are agreed that it would be appropriate for the sum to be provided to be paid into the Tribunal, but they disagree as to the date by which that should be done.
16. The Claimant proposes that security be given by 4 pm on 14 March 2025. The Defendant says that that date leaves no buffer for any delays, given that it is on 14 March 2025 that the phases for which security has already been provided are due to end. The Defendant proposes that security should be provided by 14 February 2025.
17. In our view it is appropriate that there should be some buffer, and we propose to order that the security should be provided by 21 February 2025.
18. The sanction for non-compliance will be that the Defendant shall be at liberty to apply to have the claim struck out. We do not consider that there should be an automatic stay of the proceedings if there is non-compliance: given the date

we have ordered for the provision of security, we apprehend that an automatic stay might lead to uncertainty and possibly to unnecessary delays. Any application to strike out, if there is non-compliance will be heard on an expedited basis with a view to its being resolved prior to 14 March 2025.

(3) Form of Security

19. Prior to the Claimant's letter of 6 January 2025, we had understood there to be agreement that security should be provided by way of payment into the CAT. In its letter of 6 January 2025, the Claimant said that, should it be ordered to provide security earlier than 14 March 2025, 'we would have to consider alternate forms of security, e.g. secured guarantees'. The Defendant has objected to this suggestion on the part of the Claimant, saying that it comes too late, is unexplained and unproved, and involves no concrete proposal.

20. In our view there is force in the points made by the Defendant in this regard. The further security should be provided in the same manner as the first tranche of security was provided, i.e. by payment into the CAT.

E. COSTS OF THE APPLICATION FOR SECURITY FOR COSTS

21. The Defendant seeks its costs of the security for costs application, to be summarily assessed in the sum of £53,624.00. The Defendant contends that it needed to make an application, given that the Claimant had not engaged with its queries about further security until 31 October 2024, and even then did not concede that security should, in principle, be put up. That concession was only made at the hearing of 1 November 2024 but should have been made sooner. Its delay meant that the Defendant had had to prepare on the basis that every aspect of the security for costs application was contested. In the event, the Defendant has obtained an order for security for costs, and in an amount greater than the Claimant offered. The Defendant is therefore the successful party, and costs should follow the event.

22. The Claimant does not accept that it failed to engage with the issue of further security in a timely fashion. It contends that the amount of security sought by the Defendant indicated that there was little chance of reaching any agreement:

“it was virtually non-negotiable”, and that the Defendant was “entirely set on making the application, even if we had engaged on it.” Costs should be costs in the case.

23. In our view the Claimant did not engage in a timely fashion with the Defendant’s requests in relation to further security, and the Defendant acted reasonably in issuing an application when it did. That application necessarily dealt with all aspects of security for costs, including the financial state of the Claimant, because, before the application was made, no concession had been forthcoming that security should, in principle, be put up. Such a concession was only made at the CMC on 1 November 2024. Although the Claimant now says that that concession was made on pragmatic grounds, we consider that it was an inevitable concession, and one which should have been made sooner than it was. Furthermore, the Tribunal has now ordered that further security should be provided in an amount greater than the Claimant has, at any stage, offered to provide. Accordingly we are of the view that the Defendant has been successful and should have its costs of the application for security for costs.
24. As to the amount of those costs, we consider that there are criticisms to be made as to the amount of costs claimed. In particular there are issues as to the hourly rates, which, as we have said, exceed London 1 guideline rates, the number of hours of work on documents, and the use of two counsel. We propose summarily to assess the costs at £38,000, payable within 14 days of the date on which this Ruling is notified to the parties.
25. This ruling is unanimous.

The Hon. Mr Justice Butcher
Chair

Peter Anderson

Simon Holmes

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

Date: 10 January 2025