



Neutral citation [2020] CAT 18

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1335/5/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 July 2020

Before:

THE HONOURABLE LORD DOHERTY
(Chairman)
PETER ANDERSON
PROFESSOR DAVID ULPH CBE

Sitting as a Tribunal in Scotland

BETWEEN:

STRIDENT PUBLISHING LIMITED

Pursuer

- v -

CREATIVE SCOTLAND

Defender

RULING: PERMISSION TO APPEAL

A. INTRODUCTION

1. On 17 April 2020 the Tribunal handed down its Judgment ([2020] CAT 11) on the preliminary issue of whether the Defender, Creative Scotland (“CS”), is an undertaking for the purposes of the Competition Act 1998 (“CA 98”) in respect of the activity of which the Pursuer complained. For the reasons given in the Judgment the Tribunal decided that CS is not an undertaking for the purposes of the Pursuer’s claim; that the conduct of which the Pursuer complained is not conduct prohibited by the Chapter II prohibition contained in section 18 CA 98 ; and accordingly that the Tribunal did not have jurisdiction (CA 98 section 47A).
2. Pursuant to section 49 of the Competition Act 1998 (“the 1998 Act”), an appeal lies from a decision of the Tribunal to the Court of Session. An appeal must be on a point of law, and permission to appeal must be obtained from the Tribunal or from the Court of Session (section 49(2)(b)).
3. On 2 July 2020 the Pursuer filed an application for permission to appeal the Judgment (“the Application”). CS filed written observations on 9 July 2020 in respect of the Application.
4. Neither of the parties has requested an oral hearing. Having considered the parties’ submissions the Tribunal does not consider that a hearing is necessary and is accordingly determining the Application on the papers.
5. This is the Tribunal’s unanimous ruling on the disposal of the Pursuer’s Application.

B. THE APPLICATION

6. In terms of rule 107 of the Competition Appeal Tribunal Rules 2015 applications for permission to appeal require to be submitted within three weeks of notification of the decision in respect of which permission to appeal is sought. In the present case the Application ought to have been submitted by 8 May 2020. It was not submitted until about 11 weeks after notification of the decision.

7. The Pursuer acknowledges that the application is late. However, it maintains that it discovered only recently that CS had withheld evidence from the Pursuer and the Tribunal, and that had that evidence been available at the time of the hearing the Pursuer would have advanced a different argument and the Tribunal would have reached a different decision. It also submits that any delay since the discovery may be attributed to the Pursuer having to cope with Covid-19.
8. The evidence said to have been withheld is CS's assessment of a grant application made by Sandstone Press Limited ("Sandstone"). A redacted version of the assessment had been put in evidence before the Tribunal. More recently the Pursuer had recovered a less redacted version following a Freedom of Information request. On the basis of the fuller information now available the Pursuer is critical of CS's assessment of Sandstone's application.

CS's observations on the application

9. CS points out that the Application is very late, and it submits that no good explanation for the lateness has been given. It refutes the suggestion that CS wrongly withheld material information. The only reason the assessment document had been adduced in evidence was to provide an example of the assessment process which CS undertook. No reliance had been placed on its contents, and indeed its contents had been irrelevant to the issue of jurisdiction which was before the Tribunal. In those circumstances it was entirely appropriate that some confidential details of scoring of the application were redacted. The Pursuer raised no issue concerning the redaction before the Tribunal. The redacted scoring is not relevant or material to the issue of jurisdiction. The Application discloses no point of law in relation to which permission to appeal should be granted.

C. DECISION AND REASONS

10. We refuse permission to appeal for the following reasons.
11. First, the Application is very late. We are not satisfied that there is any good reason why it should be allowed to proceed despite its lateness. We are not persuaded that the delay can be justified by Covid-19 factors, or that such factors were in fact the reason

for the delay. Nor do we accept that recovery of the new information has a material bearing on the issue of lateness. If the Pursuer considered that unredacted information was essential the point should have been raised with the Tribunal at the hearing. It is too late to seek to adduce further evidence now. In any case, we are not persuaded that the additional information would have had a material bearing on the Tribunal's decision.

12. Second, the Application does not disclose a point of law. The Pursuer disagrees with the Defender's scoring of the Sandstone application, but that does not raise a point of law. Moreover, in our view the additional Sandstone information has no material bearing on the preliminary issue decided in the Judgment.
13. In our opinion the Application has no real prospect of success and there is no other compelling reason why permission should be granted. We are not persuaded that the Pursuer has any real prospect of establishing (i) that CS acted improperly in redacting the Sandstone assessment; or (ii) that the Pursuer should now be permitted to adduce further evidence; or (iii) that the redacted information would have been likely to have had a material bearing on the Tribunal's decision on the preliminary issue.

The Honourable Lord Doherty
Chairman

Peter Anderson

Professor David Ulph CBE

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 21 July 2020