Neutral citation [2021] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1401/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 September 2021

Before:

THE HON. MRS JUSTICE BACON
(Chairwoman)
SIR IAIN McMILLAN CBE FRSE DL
ANNA WALKER CB

Sitting as a Tribunal in England and Wales

BETWEEN:

FORREST FRESH FOODS LIMITED

Claimant

- v -

COCA-COLA EUROPEAN PARTNERS GREAT BRITAIN LIMITED

Defendant

Heard remotely on 27 July 2021

JUDGMENT

APPEARANCES

Timothy Becker (instructed by Taz-ul Islam) appeared on behalf of the Claimant.

Josh Holmes QC and Nikolaus Grubeck (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Defendant.

A. INTRODUCTION

1. This is a judgment on an application to strike out or summarily dismiss a claim brought by Forrest Fresh Foods Limited (**FFF**) against Coca-Cola European Partners Great Britain Limited (**CCEP**). FFF has alleged that four instances of conduct by CCEP amounted to an abuse of dominance in breach of the prohibition contained in s. 18 of the Competition Act 1998 (**CA 1998**) (the **Chapter II prohibition**). Its claim was filed on 31 March 2021.

2. CCEP says that the allegations pleaded by FFF are so vague and unclear that it is impossible to discern the specific conduct complained of, how it is said to have infringed the Chapter II prohibition, or how any infringement is said to have caused loss and damage to FFF. On that basis it says that the claim should be struck out or summarily dismissed.

3. FFF's initial response in correspondence was to deny that there was any basis for its claim to be struck out. At the hearing before us, however, Mr Becker, for FFF, accepted that the Particulars of Claim were lacking in details, but submitted that this could be cured by an amended pleading.

4. Having considered his submissions, and those of Mr Holmes QC for CCEP, at the close of the hearing we announced our decision that the claim would be struck out and/or summarily dismissed, giving brief reasons that would be expanded in a judgment to be handed down in due course. This judgment sets out our fuller reasons for that unanimous decision.

B. FACTUAL AND PROCEDURAL BACKGROUND

(1) The parties

5. FFF is a wholesale supplier of soft drinks, confectionary, crisps and snacks, with a turnover of approximately £47 million in the trading year to April 2020. Its website says that it is one of the largest independent wholesalers in the country.

6. CCEP manufactures, markets and distributes non-alcoholic beverages, and is a licensed bottler for products of The Cola-Cola Company (**TCCC**) (amongst others). FFF has been a customer of CCEP since 2011.

7. In addition to buying products from CCEP, FFF has over time sold significant quantities of imported Coca-Cola products in the UK, including imports from Ireland and Georgia, and subsequently from Vietnam.

8. In 2016 FFF imported a large shipment of Coca-Cola stock from Vietnam, which was detained in the UK on grounds of a trademark breach. This apparently led to a dispute between FFF and an entity within the Coca-Cola group (not CCEP), which was settled in 2017. Following that dispute, FFF says that the relationship between it and CCEP became strained, and contends that CCEP treated it unfairly in various ways. That led to its decision to initiate these proceedings.

(2) Pre-action correspondence

9. On 17 April 2019 FFF's solicitor sent a pre-action letter addressed to "Coca-Cola UK", which is not a legal entity. The letter set out a claim for damages purportedly based on the infringement of Chapter I prohibition in s. 2(1) of the CA 1998, Article 101 TFEU and Article 53 of the EEA Agreement. Notwithstanding that position, the letter went on to refer to the principles governing abuse of dominance pursuant to the Chapter II prohibition and Article 102 TFEU. The wide-ranging allegations in the letter included reference to the settlement of the dispute involving Vietnamese imports, and claims of anti-competitive agreements, price-fixing and unfair contract terms.

10. A representative of TCCC forwarded the letter to CCEP on 26 April 2019, and at the same time provided FFF's solicitor with the contact details of CCEP's registered office and legal counsel. FFF's solicitor then forwarded the pre-action letter to CCEP on the same day. CCEP's solicitors responded to that letter on 20 May 2019, saying that FFF's letter provided no factual detail to support the allegations made against CCEP, and saying that it was therefore "impossible for our client to understand the factual and legal basis on which these allegations

are founded". In particular, they noted that it was unclear whether FFF was basing its claims on Chapter I or Chapter II of the CA 1998, or both. CCEP therefore asked FFF to further particularise its allegations.

11. FFF's solicitor sent a further letter on 14 January 2020, reiterating the allegations previously made and introducing a new allegation of "anti-bribery and corruption". In further correspondence between the parties CCEP's solicitors repeatedly requested further particulars of the factual and legal basis on which FFF's allegations were founded, and the loss that FFF claimed to have suffered. FFF's response was, repeatedly, to contend that its claim had been adequately particularised.

12. The culmination of that correspondence was a letter from CCEP's solicitors on 25 September 2020, saying that it had explained its position insofar as it understood the allegations made against it, but maintaining that FFF had not properly explained either the legal basis of its claim or the way in which its claimed loss had been calculated. FFF did not respond to that letter; instead on 31 March 2021 it filed its claim against CCEP.

(3) FFF's Particulars of Claim

13. The Particulars of Claim do not pursue any allegations of breaches of the Chapter I prohibition. It is, however, alleged that CCEP has abused a dominant position in the "market for the wholesale supply of soft drinks within the European Market" in breach of the Chapter II prohibition. No particulars are given of that market, nor are any particulars given of CCEP's alleged dominant position save for a reference to CCEP's "ownership of the trade marks and the established repute of the brand 'Coca-Cola' and the supply chain for the Coca-Cola products".

14. The particulars given of the alleged abuse are then set out in four sub-paragraphs at paragraph 7 of the Particulars of Claim, as follows:

> "i. The Defendant has entered into a series of agreements or arrangements with the Claimant and other wholesalers ('**The Arrangements**'). The Arrangements have comprised the following: *28.01.2016; 08.02.2017; 09.11.2017. and are annexed hereto,* the object of the Arrangements

was for the Claimant to obtain Coca Cola products at an advantageous price in return for providing the Defendant with information relating to the Claimant's customer list together with details including quantities and frequencies of orders and description of the various Coca Cola products. Following which the Defendant would, to the detriment of the Claimant, supply directly to the said customers of the Claimant. By virtue of obtaining such information from the Claimant the Defendant used its dominant position to restrict the Claimant's access to the market place;

ii. Between January 2011 and April 2016, the Claimant was purchasing Coca Cola products from Ireland and Georgia. Such trading came to the knowledge of the Defendant who approached the Claimant and requested their assistance in removing the said Irish and Georgian stock from the UK Market;

iii. In April 2012, the Claimant was instructed by the Defendant to purchase stock from Batley's / (Bestway Cash and Carry) in order to shore up the Batley's sale figures of Coca Cola product. Purchasing produce from Batley's pricing was not attractive to the Claimant so the Defendant agreed to reimburse the Claimant thru [sic] the Defendant's retro payment scheme the difference in the price between what Batley's charged and how much the Claimant would normally pay for the product plus additional profit;

iv. Since October 2017 to date the Defendant has refused to reimburse the Claimant for sugar tax levies on Coca Cola products exported by the Defendant to Europe and beyond."

15. The Particulars of Claim go on to claim a figure of £11,629,255 representing loss of profit since 2011, plus exemplary damages and interest. An Excel file titled "FFF v Coca Cola -Damages Schedule" attached to the Particulars of Claim contains four sheets, each named "SUMMARY", "UK", "IMPORTS" and "Exports". The "SUMMARY" sheet appears to set out a "losses summary" for the years 2015 to 2024, amounting to over £55m in total, with a cross-reference against the year ended 31 December 2021 to add export losses from the "Exports" sheet. The "UK" sheet gives further sets of figures for the period 2011 to 2021; the "IMPORTS" sheet gives figures for the period 2011 to 2019; and the "Exports" sheet contains figures referenced to the period between February 2019 and January 2021. There is no narrative explaining either the relationship between the various figures and the allegations in paragraph 7 of the Particulars of Claim, or how those figures correspond to the loss of profit claim of approximately £11.6m.

16. CCEP sent a further letter to FFF on 5 May 2021, setting out its view that the pleading in paragraphs 7(i) to (iv) of the Particulars of Claim was deficient and

liable to be struck out, and inviting FFF to confirm that it would amend its pleading. FFF's response on 10 May 2021 was to say that it was unwilling to amend its Particulars of Claim at this stage, and was "confident that any Strike out application by your client will be defended successfully".

(4) CCEP's strike out/summary judgment application

17. CCEP then issued its application on 14 May 2021, seeking an order:

    (1) striking out paragraph 7 of FFF's Particulars of Claim, pursuant to rule 41 of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**); or

    (2) giving summary judgment against FFF pursuant to rule 43 of the Tribunal Rules; or

    (3) that FFF's claim be struck out unless FFF has filed amended Particulars of Claim containing proper particulars.

18. CCEP's application comprised a witness statement from Mr Kenneth Henderson, a partner of CCEP's solicitors CMS Cameron McKenna Nabarro Olswang LLP, which set out the pre-action correspondence and explained why CCEP considered paragraph 7 of the Particulars of Claim to be unintelligible. In particular, Mr Henderson said that the objections set out in that paragraph failed to set out the basic factual allegations necessary for CCEP to understand and respond to FFF's case (paragraph 7(i) and (ii)), and/or set out claims that would be time-barred (paragraph 7(ii) and (iii)), and/or failed to identify any anti-competitive conduct whatsoever (paragraph 7(i), (iii) and (iv)).

19. In response, FFF filed a wide-ranging set of witness evidence consisting of statements from Mr Chris Craven, the managing director of FFF; Mr Mark Craven, another director of FFF; Mr Taz-ul Islam, FFF's solicitor; Mr David Brimble, a customer of FFF between 2012 and 2017; Mr John Douglass, an employee of FFF who previously worked at another soft drinks wholesaler; Mr Neil Turton, the managing director of the buying group Sugro, of which FFF

is a member; Mr Zahid Iqbal, the director of a customer of FFF; and Mr Fessor Bashir, a manager of another customer of FFF.

20. In addition, FFF relied on a letter from its accountants and auditors AMS Accountants Corporate Limited dated 19 July 2021, setting out a calculation of "gross margin losses resulting from Coca Cola removing access to its products by the company", calculating total losses "at £11.5m on UK and imported Coca Cola sales".

21. As discussed below, while FFF's witness evidence raises a plethora of factual points concerning the relationship of FFF and other entities with CCEP and/or entities identified as "Coca-Cola", that evidence does not set out proper particulars of the complaints at paragraph 7 of the Particulars of Claim. Nor does it in any way address the limitation issues raised by CCEP, explain how the conduct complained of is said to constitute an abuse of CCEP's alleged dominant position on the market asserted in the Particulars of Claim, or set out how any abuse of a dominant position caused the loss and damage claimed by FFF.

C. RELEVANT LEGAL PRINCIPLES

(1) The test for striking out/summary judgment

22. Rule 41(1)(b) of the Tribunal Rules provides that the Tribunal may, of its own initiative or on the application of a party, and after giving the parties an opportunity to be heard, strike out in whole or in part a claim if it considers that there are no reasonable grounds for making the claim.

23. In similar vein Rule 43(1) of the Tribunal Rules empowers the Tribunal, after giving the parties an opportunity to be heard, to give summary judgment against a claimant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue, and that there is no other compelling reason why the case or issue should be disposed of at a substantive hearing.

24. In *Wolseley v Fiat Chrysler Automobiles* [2019] CAT 12 (*Wolseley*), at [16], the Tribunal adopted with approval the principles governing applications for summary judgment set out by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) at [15]:

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
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> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

25. The Tribunal in *Wolseley* also noted at [15] that for the purposes of the application in that case there was no material difference between the test for striking out and for summary judgment. The same was common ground between the parties at the hearing before us in this case.

(2) The need for a properly particularised claim

26. It is trite law to say that a claim must be properly pleaded. Nonetheless, Cockerill J's recent summary (in *King v Stiefel* [2021] EWHC 1045 (Comm) at [145]-[149] serves as a useful reminder of the applicable requirements. In essence, a party's statement of case must allow the other side to know the case it has to meet, in order to ensure that the parties can properly prepare for trial and that unnecessary costs are not expended and court time wasted on points that are not in issue and which lead nowhere. Furthermore, and importantly, Particulars of Claim should set out "the essential facts which go to make up each essential element of the cause of action" (as opposed to the evidence supporting the claim).

27. The importance of proper particularisation of a competition law claim has been repeatedly emphasised in the case law. In *Parks v Esso Petroleum* [2000] ECC 45 (CA) the Court of Appeal at [44] endorsed the comment of Neuberger J in *Esso Petroleum v Gardner* (unreported, 8 July 1998) that a proper pleading of a case based on Article 101 TFEU must include particulars of the facts necessary to found that claim. A similar statement was made by Sir Andrew Morritt in *P&S Amusements v Valley House Leisure* [2006] EWHC 1510 (Ch) at [15].

28. More recently in *Sel-Imperial v The British Standards Institution* [2010] EWHC 854 (Ch), Roth J noted at [17]-[18] that:

> "… it is important that competition law claims are pleaded properly. To contend that a party has infringed competition law involves a serious allegation of breach of a quasi-public law, which can indeed lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of and how that is alleged to violate the law. As Laddie J observed in *BHB Enterprises Plc v Victor Chandler (International) Ltd* [2005] EWHC 1074 (Ch), [2005] EuLR 924, at [43]:

> 'These are notoriously burdensome allegations, frequently leading to extensive evidence, including expert reports from economists and accountants. The recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials.'
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> … It is only through the clear articular of each party's position in its statement of case, with appropriate factual detail, that the other side can know what case it has to meet and what issues any experts have to address, and that the court can effectively exercise its case management powers."

29. Mr Becker did not dispute or seek to place any gloss on any of these principles. His position was simply that with further particularisation at least some of the objections in paragraph 7 of FFF's Particulars of Claim could and should proceed to trial. FFF did not, however, apply to amend its Particulars of Claim, nor did Mr Becker proffer any draft amended Particulars, and Mr Becker was indeed unable to articulate at the hearing what further particulars might be provided (as we discuss in more detail below).

30. That is a deeply unsatisfactory approach to a strike out/summary judgment application. The onus is on a claimant advancing a claim of infringement of competition law to identify (i) the relevant primary facts which are the foundation of that claim, (ii) the way in which those facts are said to infringe the relevant competition law provision(s) relied upon, and (iii) the way in which that alleged infringement is said to have resulted in the loss or damage claimed.

31. If there are deficiencies in one or more aspects of the pleaded case on those points, a claimant might seek to meet an application for strike out/summary judgment with a draft amended pleading that seeks to address those deficiencies. It is, however, quite different for a party to acknowledge that a claim is inadequately particularised, without advancing any coherent submission whatsoever as to what further particulars might be forthcoming if the case were permitted to proceed.

32. That effectively invites the Tribunal to speculate as to what case might potentially be advanced if it were to be repleaded. But that is not the function of this Tribunal or any court. The Tribunal's role is to assess the case on the materials before it. It is not for the Tribunal to suggest to a claimant how its case might properly be pleaded; nor can the Tribunal even begin to assess an

amorphous hypothetical case that might be put forward if the claimant were permitted to go away and have another go.

D. DISCUSSION

33. With the above comments in mind, we address in turn each of the four heads of claim set out at paragraph 7 of the Particulars of Claim.

(1) Provision of FFF's customer data to CCEP and direct supply to FFF's customers

34. FFF's first objection, at paragraph 7(i) of the Particulars of Claim, is that CCEP offered it a discounted price, a condition of which was that FFF was required to provide CCEP with data regarding FFF's customers and the quantities of sales to those customers. Subsequently, according to FFF, CCEP supplied directly to some of FFF's customers, which FFF said restricted its access to the market.

35. The first problem with that contention is that the Particulars of Claim do not specify which of FFF's customers are said to have been supplied directly by CCEP, or how that is linked to the provision of customer data by FFF to CCEP. FFF's witness evidence does identify some customers who are said to have switched to CCEP as a result of a direct approach by CCEP, including Mr Brimble who is one of FFF's witnesses, but again there is nothing indicating that CCEP approached any of those customers on the basis of the sales information provided to it by FFF. In fact, as we discuss further below, CCEP said that it knew who those customers were in any event because it delivered stock directly to them.

36. More importantly, irrespective of the factual basis of this objection, the Particulars of Claim do not anywhere articulate the basis on which CCEP's supply to customers of FFF could be regarded as an abuse of dominance, as opposed to competition on the merits; nor is that set out in FFF's evidence. Mr Becker's skeleton argument took the matter no further, saying simply that the abuse consisted of CCEP knowing who FFF's clients were so that it could

"make [its] own attractive deals with them thereby pushing the Claimant out of the market place".

37. When asked at the hearing how FFF said that CCEP's conduct in this regard constituted an abuse of a dominant position, rather than CCEP simply offering a more favourable price to the customers in question, Mr Becker was unable to give any coherent answer, suggesting only that the fact that CCEP made its discounted price conditional on provision of FFF's customer list might have amounted to an unfair trading condition. He could not, however, identify how exactly the contractual terms were said to be anti-competitive, ultimately responding that his case was put as it had been put, and that he could say no more than that.

38. We note for completeness in this regard that CCEP said that it needed the sales information in order to process discounts given by it to FFF pursuant to the terms of the agreements between them. FFF argued in its evidence that CCEP's delayed provision of those discounts was anti-competitive, but Mr Becker confirmed at the hearing that this was not part of the pleaded case in the Particulars of Claim.

39. Mr Becker also frankly admitted that the schedules of loss before the Tribunal do not set out the loss and damage said to have been sustained as a result of this head of claim. While the most recent schedule of loss attached to the accountant's letter of 19 July 2021 claims that FFF suffered an "estimated loss of gross margin of £100k per annum" from direct sales by CCEP to FFF's customers, it provides no details whatsoever of how that figure has been calculated. Indeed there is an explicit statement that the figures set out in the schedule do *not* include losses attributable to direct sales by CCEP. Mr Becker accepted that this would need to be particularised, but argued that this did not necessarily make it a hopeless case.

40. A claimant of course does not have to set out in the Particulars of Claim a comprehensive and detailed case on the loss and damage said to have arisen from an alleged breach of the Chapter II prohibition. In many or even most cases, that will not come until the exchange of factual and expert evidence. It is,

however, incumbent on a claimant to explain at the very least in its pleadings the basis on which loss and damage is said to have arisen from the impugned conduct.

41. In the present case, as Mr Holmes QC pointed out at the hearing, CCEP was well aware of the identity of FFF's customers, since (as set out in FFF's letter of 14 January 2020) it was already delivering stock directly to those customers. Accordingly, if CCEP wished to approach those customers with an offer of more favourable pricing, it was able to do so irrespective of the sales information provided by FFF.

42. FFF therefore needs to explain how in those circumstances any loss and damage due to customers switching to direct purchases from CCEP is said to have been causally linked to the sales information provided by FFF pursuant to its agreements with CCEP. This is not, however, set out in the Particulars of Claim or FFF's evidence; nor was it addressed by Mr Becker in his skeleton argument or at the hearing.

43. In relation to this head of claim, therefore, FFF has failed to set out the primary factual matters relied upon, has failed to articulate how CCEP's conduct could have amounted to an abuse of a dominant position, and has failed to explain the basis on which that conduct is said to have caused loss and damage to FFF. On the material before the Tribunal, therefore, we do not consider that paragraph 7(i) of the Particulars of Claim has any reasonable basis or real prospect of success.

(2) Interference with imports of Coca-Cola products

44. FFF's second objection is that CCEP sought FFF's assistance in removing Irish and Georgian stock from the UK market. The details of this given at paragraph 7(ii) of the Particulars of Claim are, however, hopelessly unclear with no explanation of what assistance CCEP sought (or FFF gave), still less how that could constitute an abuse of dominance or could have caused loss to FFF.

45. Nor was any elucidation provided by Mr Becker's skeleton argument on this point, which merely said that CCEP "was able to use its intelligence (often gleaned from the Claimant's contacts) to ascertain who was selling Coke from Ireland or Georgia and ensure that such stock 'vanished' thereby pushing up the cost of Coke to the Defendant's advantage but causing the Claimant loss as the supplies from such foreign [sic]."

46. The witness statement of Mr Chris Craven indicates that in fact the conduct relating to this allegation consisted of CCEP providing FFF with additional discounts in order to enable FFF to offer lower prices to the UK market, in order to compete with cheaper imported stock. Mr Becker was entirely unable to explain how this could have amounted to an abuse of a dominant position, as opposed to being competition on the merits.

47. Nor does the material before the Tribunal disclose any intelligible basis for FFF's claim to loss and damage in this regard. Insofar as FFF was given discounts enabling it to compete with stock imported by other suppliers, that was to FFF's advantage. Insofar as FFF itself imported Coca-Cola products, Mr Chris Craven's evidence was that it continued to do so; CCEP was aware that it did so; and CCEP was "happy with this business model". That squarely contradicts Mr Becker's submission at the hearing that FFF ceased importing as a result of CCEP's conduct. While it appears from the evidence that FFF did cease importing stock from outside the EU at some point, no explanation is given of how that was caused by the additional discounts given by CCEP to FFF, as described by Mr Chris Craven.

48. The schedule of loss provided by FFF's accountants similarly fails to identify any link between the losses claimed and the alleged abusive conduct. Indeed a significant part of the loss set out in that schedule is said to arise from losses of sales through Vietnamese imports from 2016 onwards. This is not anywhere referred to in the Particulars of Claim and appears to relate to the dispute concerning FFF's importation of Vietnamese stock. As noted above, that was a dispute with a different Coca-Cola entity, which was settled in 2017.

49. Even leaving aside those points, however, it is apparent from both the evidence and the pre-action correspondence that the conduct referred to in this part of the claim relates to a period prior to 2013. However, as CCEP pointed out, claims for damages in respect of an alleged infringement of the Chapter II prohibition which occurred prior to 1 October 2015 are subject to a two-year limitation period from the date on which the cause of action accrued, pursuant to rule 119 of the Tribunal Rules and rule 31 of the Competition Appeal Tribunal Rules 2003.

50. Mr Becker therefore accepted, at the hearing, that any claim relating to conduct for which the cause of action accrued before 1 October 2015 was time-barred. His submission was, however, that this was not fatal to this part of FFF's claim, because his instructions were that there was relevant conduct on the part of CCEP that occurred after that date.

51. When pressed, however, Mr Becker was unable to point to anything in the material before the Tribunal (including the extensive witness evidence from FFF) that identified any conduct relating to this part of the claim that occurred after 2012. Moreover, while he said that further particulars could be provided, he was unable to say what those particulars would be – and as we have already noted no draft amendment was put forward on this or any other point.

52. This head of claim is therefore wholly unparticularised as to the facts, unintelligible as to the legal basis for the claimed abuse of dominance and the claim to loss and damage, and time-barred on the material before the Tribunal as to the date on which the alleged conduct occurred. Paragraph 7(ii) of the Particulars of Claim therefore has neither a reasonable basis nor any real prospect of success.

(3) Incentivising FFF to purchase stock from Batley's

53. Mr Becker's skeleton argument conceded that the allegation at paragraph 7(iii) of the Particulars of Claim did not constitute an abuse causing loss to FFF, and Mr Becker did not pursue this point at the hearing. We therefore need say no more about this, save to note for completeness that in any event the allegation

concerns conduct that is said to have occurred in 2012, such that any claim in this regard would have been time-barred in any event on the same basis as set out above.

(4) Refusal to reimburse FFF for sugar tax levies

54. FFF's fourth and final allegation, at paragraph 7(iv) of the Particulars of Claim, is that CCEP refused to reimburse it for the Soft Drinks Industry Levy on its exports of Coca-Cola products.

55. Again, however, this allegation is hopelessly unparticularised, with no details in the Particulars of Claim or FFF's evidence of what if any products were exported by FFF, the destination of the exports, the quantities exported, the dates of export or the amounts sought by way of reimbursements. All that Mr Becker's skeleton argument said on this point was that the allegation "relates to the Defendant in effect dictating which one of its customers who could obtain the benefit of a rebate of the sugar [sic]".

56. At the hearing, Mr Becker clarified that the claim did not relate to specific exports in respect of which reimbursement was claimed, but instead concerned a blanket refusal by CCEP to reimburse the levy, in circumstances where FFF believes that CCEP has reimbursed the levy to other suppliers who have exported stock. As to that belief, Mr Becker relied on the witness statement of Mr Chris Craven, which referred to evidence of UK stock being exported to the Netherlands and China.

57. Those submissions suggested that FFF's claim in this regard is in fact an allegation of discrimination as between FFF and other customers of CCEP. The immediate problem with that, however (as Mr Holmes pointed out at the hearing), is that the Particulars of Claim contain no suggestion of a discrimination case on this point.

58. There is, moreover, nothing whatsoever in the materials before the Tribunal to indicate that CCEP has itself reimbursed the sugar tax levy to any wholesale exporters in the position of FFF (whether those referred to in FFF's evidence or

otherwise), and Mr Becker accepted that no reimbursements are identified in the documents exhibited to the witness statement of Mr Chris Craven. Indeed CCEP stated robustly in its pre-action correspondence on 13 March 2020 that "it is CCEP's general policy not to engage in such claim processing and there is no statutory obligation on suppliers to undertake such steps".

59. Mr Becker's response was to assert that it would not be economically viable for FFF to export Coca-Cola stock without the levy being reimbursed. That may well be the case. But that does not mean that CCEP has engaged in claim processing for export credits on the part of any of its customers; nor is there anything before the Tribunal implying that CCEP has done so.

60. Mr Becker's suggestion that further particulars on this point might be provided in due course is, in our view, wholly unsatisfactory in circumstances where there is no draft amended pleading for consideration by the Tribunal, and where Mr Becker was not able to explain, at the hearing, what those particulars would or might be.

61. Mr Becker also accepted that nothing in the schedules of losses provided by FFF related to this aspect of the claim. His submission was (again) that further particulars could be provided. But that does not address the fundamental problem that the material before the Tribunal does not even set out the basis upon which FFF's claim for loss and damage is founded, other than a vague assertion from Mr Becker at the hearing that FFF would have exported Coca-Cola products if it had been able to do so.

62. As with the other heads of claim, therefore, we consider that paragraph 7(iv) of FFF's Particulars of Claim has no reasonable basis or real prospect of success. The claim appears to turn on allegations that are neither pleaded nor set out in the evidence, with no explanation of the basis on which any loss and damage is claimed.

(5) Exemplary damages

63. We have commented above on the lacking particulars of loss and damage in relation to the four heads of claim set out at paragraph 7 of the Particulars of Claim. For completeness we address here the claim for exemplary damages. The only basis for that claim is the statement that the conduct set out in paragraph 7 was "calculated to make a profit", such that the loss and damage thereby caused was "caused with a view to profit".

64. In relation to conduct that occurred on or after 9 March 2017, however, the Tribunal has no power to make an award of exemplary damages: Schedule 8A to the CA 1998, paragraph 36.

65. As to conduct that occurred before that date, an award of exemplary damages is possible, but the Tribunal made clear in *2 Travel Group v Cardiff City Transport Services* [2012] CAT 19, at [598], that where exemplary damages are sought:

> "it will be necessary to plead, and to plead with specificity, facts and matters alleging that the competition law infringement in question was executed either intentionally in breach of the law or recklessly so as to be regarded as sufficiently outrageous so as to fall within Lord Devlin's second category. Otherwise, we consider, the claim will fall to be struck out."

66. FFF's Particulars of Claim do not remotely meet that standard of specificity.

(6) Conclusion on strike out/summary judgment

67. Our conclusion is that there is on the material before the Tribunal no reasonable basis for FFF's claim (for the purposes of the strike out test), nor any real prospect of success (for the purposes of the summary judgment test). If there is a case to be answered, it has not been made to CCEP or this Tribunal.

68. We bear in mind that rules 41 and 43 provide that the Tribunal *may* strike out or give summary judgment on a claim or part of a claim in the circumstances set out in those rules, rather than specifying that the Tribunal *must* do so, consistent with the equivalent provisions in the CPR. In deciding whether it is appropriate to strike out a claim or give summary judgment the Tribunal must therefore take account of all of the circumstances of the case before it.

69. In the present case, Mr Becker argued that the resources of the parties were not evenly balanced, given that FFF was represented by counsel instructed by a sole solicitor practitioner. That does not, however, explain or justify the manifest and serious deficiencies in the way in which FFF's case has been advanced. FFF is, on its own account, a large company with a multimillion pound annual turnover. It has instructed a solicitor for all stages of these proceedings and was represented by Mr Becker at the hearing before us. It also appears from the evidence that leading counsel assisted with FFF's pre-action correspondence between June and August 2020.

70. The position is therefore that despite being represented by a solicitor throughout these proceedings, and counsel at this hearing, and despite long being on notice that CCEP considered FFF's case to be unintelligible, FFF has made no attempt to amend its Particulars of Claim to set out a coherent and intelligible claim, and has responded to the application at this hearing with nothing more than vague and unspecific suggestions that further particulars might be provided if ordered to do so. That is not a proper approach to litigation, for the reasons that we have already discussed (and we note in similar vein the comments in *Spencer v Barclays Bank* [2009] EWHC B9 (Ch), at [36], and *BrewDog v Frank Public Relations* [2020] EWHC 1276 (QB), at [45]).

71. We therefore concluded, at the hearing, that this claim should be struck out in its entirety. In the alternative, if not struck out, we would have given judgment summarily for CCEP on the basis that FFF has no real prospect of succeeding on the claim.

E. CONCLUSION

72. FFF's claim will therefore be struck out in its entirety. We will consider further submissions from the parties on the consequential issues, including costs.

The Hon. Mrs Justice Bacon Chairwoman

Sir Iain McMillan CBE FRSE DL

Anna Walker CB

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

Date: 7 September 2021