



Neutral citation [2023] CAT 11

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1569/5/7/22

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

2 March 2023

Before:

BEN TIDSWELL  
(Chair)

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**INSTAPLANTA (YORKSHIRE) LIMITED**

Claimant

- v -

**LEEDS CITY COUNCIL**

Defendant

Heard at Salisbury Square House on 17 February 2023

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**RULING (FAST-TRACK)**

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## APPEARANCES

Daniel Carall-Green (instructed by TupperS Law) appeared on behalf of the Claimant.

Mr Michael Bowsher KC and Adam Aldred (instructed by Leeds City Council) appeared on behalf of the Defendant.

## **A. INTRODUCTION**

1. This Ruling concerns an application by the Claimant to have these proceedings allocated to the Tribunal's Fast Track procedure (**FTP**). The application was opposed by the Defendant. At a CMC on 17 February 2023, I heard argument on the matter and refused the application. These are the reasons for my decision.

## **B. THE PROCEEDINGS**

2. The proceedings involve allegations by the Claimant that the Defendant has abused a dominant position under Chapter II of the Competition Act 1998 (the **Competition Act**). The Claimant says it has been foreclosed from competing with the Defendant in the market for the supply of environmentally-friendly roadside advertising space, by reason of the Defendant's refusal to grant permission for the installation of timber floral planters under section 115E of the Highways Act 1980 (**HA80**).
3. According to the Claimant, the Defendant also operates in the relevant market, with a market share in the region of 80%. The Defendant is dominant in the relevant market by virtue of its market share and also because of the gatekeeper role the Defendant has, as the body responsible for granting (or not granting) permission under section 115E HA80. The Claimant alleges that the refusal in 2015 to grant permissions amounts to an abuse, by the Defendant exercising its duty improperly and thereby treating its own commercial arm more favourably than a competitor and placing the Claimant at a competitive disadvantage. The Claimant asserts that the exclusionary behaviour has continued after 2015, until the present day.
4. The Defendant disputes all aspects of the Claimant's claim. It denies that it is an undertaking for the purposes of either the granting of permissions or the sponsorship that the Defendant receives through its Parks & Countryside arm, which it says is not sufficient to constitute economic activity in a market (as alleged by the Claimant). The Defendant takes issue with the Claimant's market definition. It also denies any abuse, arguing that it has exercised its statutory functions properly in refusing permissions from time to time. Central to this

point is the question of the Defendant's duties under section 115E HA80, on which the Defendant took legal advice (and has now waived privilege in that legal advice).

5. The Defendant also alleges that it engaged with the Claimant on various occasions including in 2017 and 2021 in order to address concerns that the Claimant had about the process for obtaining permissions for the installation of planters. The Defendant says its conduct was objectively justified, both in terms of its approach to permissions under section 115E HA80 and also in relation to other considerations that were taken into account in relation to the Claimant's applications.
6. The Defendant also takes various other points, including a limitation point in relation to events in 2015, the counterfactual position and whether the Claimant has suffered a loss and the quantum of loss claimed. The Defendant also disputes the basis of the claim under the Competition Act, arguing that the proper remedy for the Claimant's complaint about the Defendant's approach to section 115E HA80 was a challenge on public law grounds.

### **C. THE RELEVANT LEGAL BACKGROUND**

7. Rule 58 of the Rules makes provision for an FTP as follows:

“(1) The Tribunal may, at any time, either of its own initiative or on the application of a party, make an order that particular proceedings be, or cease to be, subject to the fast-track procedure.

(2) Where the Tribunal has ordered that particular proceedings be subject to the fast-track procedure—

(a) the main substantive hearing is to be fixed to commence as soon as practicable and in any event within six months of an order of the Tribunal stating that the particular proceedings are to be subject to the fast-track procedure; and

(b) the amount of recoverable costs is to be capped at a level to be determined by the Tribunal.

(3) In deciding whether to make particular proceedings subject to the fast-track procedure the Tribunal shall take into account all matters it thinks fit, including—

- (a) whether one or more of the parties is an individual or a micro, small or medium-sized enterprise within the meaning of Commission Recommendation No. 361 (EC) of 2003 concerning the definition of micro, small and medium-sized enterprises;
- (b) whether the time estimate for the main substantive hearing is three days or less;
- (c) the complexity and novelty of the issues involved;
- (d) whether any additional claims have been or will be made in accordance with rule 39;
- (e) the number of witnesses involved (including expert witnesses, if any);
- (f) the scale and nature of the documentary evidence involved;
- (g) whether any disclosure is required and, if so, the likely extent of such disclosure; and
- (h) the nature of the remedy being sought and, in respect of any claim for damages, the amount of any damages claimed.”

8. The Competition Appeal Tribunal’s Guide to Proceedings 2015 deals with the FTP at paragraph 5.146:

“Given that competition cases generally tend to be heavy, complex and often involve consideration of novel issues, it is unlikely that the Tribunal will designate a case as suitable for the FTP unless it is a clear-cut candidate for such an approach. Generally, such a case is likely to arise or be linked to a scenario where injunctive relief is being sought, or, in the case of a claim for damages, where all the parties are clearly committed to a tightly constrained and exceptionally focused approach to the litigation. ...”

9. There have been several applications to the Tribunal for FTP orders in past cases, many of which are usefully summarised in *Belle Lingerie v WACOAL Emea Ltd* [2022] CAT 22. As the Tribunal there noted at [62], each case will turn on the application of Rule 58 to its own particular facts and circumstances, and comparisons with other cases are therefore of limited assistance.

**D. THE FTP APPLICATION**

10. The Claimant’s primary position was that the claim is neither factually complex nor novel. As a result, limited expert and factual evidence would be required and the case could be tried within three days, which could sensibly be listed within the next six months. Alternatively, the case could be managed to separate

closing submissions, or to split off quantum, thereby ensuring that a three day hearing would be sufficient.

11. The Defendant took a different view, arguing that the trial is likely to last between seven and 10 days. This was said to be driven by the number of witnesses, as well as the complexity of the legal and factual issues. In relation to factual witnesses, the Defendant identified at least seven witnesses it proposed to call and indicated there might well be more, given the extensive Reply served by the Claimant shortly before the CMC.
12. In advance of the CMC, I asked the parties to provide me with details of the main issues that required determination, the likely number of factual and expert witnesses and the extent of documentation which was likely to be required to be disclosed. At the hearing, I explored with the parties the key elements of their respective cases. This material was helpful in identifying the extent of likely legal and factual issues (and the likely degree of difference between the parties).
13. It was apparent that there was a considerable degree of alignment between the parties on the nature of the main issues, although (not unexpectedly) very different views about the correct outcomes. There are a number of central legal and economic issues in the case, such as the proper construction of the provisions of HA80, the correct market definition, the economic status of the Defendant in its various functional roles and the application of Chapter II to the conduct pleaded by the Claimant (and in particular the interplay between HA80 and the Competition Act). By themselves, these points might have been manageable within a three day trial.
14. However, there is also the question of the factual background to the alleged continuing infringement, which occupies the period between 2015 (when the first application for permission was refused) and the present day. By way of example, this includes:
  - (1) Discussions between the parties in 2017, leading to what was described by the Defendant as the 2017 Process, pursuant to which the Defendant says it changed the basis on which it assessed applications and under

which the Claimant is alleged to have made a number of further applications for permission to install timber planters.

- (2) The preparation in 2021 by the Defendant of a draft Service Level Agreement, which was said by the Defendant to be for the benefit of the Claimant, but to which the Claimant allegedly did not respond.
  - (3) The circumstances in which the Defendant has permitted the installation of other objects or structures (including timber planters) with advertising or sponsorship on them, including community initiatives under the Defendant's Leeds in Bloom programme.
  - (4) The occasions on which the Claimant has successfully applied to the Defendant for permission under section 115E HA80.
  - (5) The circumstances in which the Defendant has given permission to other applicants under section 115E HA80.
15. While I had some scepticism about the Defendant's approach to factual evidence, given that a long list of suggested witnesses inevitably extends the trial estimate for the purposes of any FTP application, I note that the Claimant has served a Reply extending to over 50 pages, much of which addresses factual items such as those referred to above.
16. I am of the view that these events over a material period of time do need to be explored in factual evidence and that a number of witnesses from the Defendant, possibly in the region of seven different individuals, will need to be called in order to do that properly. Some of them may only address short points, like the background to an email. Others may have more substantial evidence, of a disputed nature, to deal with. That is in addition to the one witness of fact the Claimant proposes to call, who will have to deal with loss and quantum issues as well as the involvement of the Claimant in the matters above. The number of witnesses is therefore likely to be substantial, even if some of them may give evidence on quite limited subjects. For that, if no other reason, it is clear that the case cannot sensibly be tried within three days.

17. There is also a risk that seeking to try the case within six months will not allow proper preparation in relation to the legal, economic and factual issues. This may either cause the trial to be postponed or to take place in more than one hearing, both of which would cause further delay in resolving the matter. It would be better to ensure that sufficient time is available for the case to be properly prepared at the date it does go to trial, even if that means the trial date is more like nine months than six months away.
18. At the CMC, I explored with the parties whether any of the legal issues, and in particular the question of the correct interpretation of the relevant provisions of HA80, could be dealt with as a preliminary issue. There was no enthusiasm from either party, no doubt for good reason. It was also apparent that the Claimant's suggestion for managing the trial in parts did not deal with the fundamental problem that the likely extent of factual evidence made the case unsuitably long for the FTP.
19. Recognising these difficulties, Mr Carall-Green advanced a secondary position, emphasising that the main attractions of the FTP for the Claimant were the prospect of strong costs control and a speedy resolution of the case. If the FTP application was not granted, the Claimant still sought close costs control by the Tribunal and the exercise of firm case management to ensure a quick resolution.
20. This was in my view a sensible suggestion and entirely consistent with the Tribunal's approach to cases of this sort. The FTP is a mechanism for management of a particular type of case, but it is far from the only means by which the Tribunal can provide for speedy and efficient justice. The wide case management powers of the Tribunal are well suited for the careful and focused management of cases to ensure that they are dealt with in a timely and proportionate way.

## **E. DECISION**

21. For the reason set out above, I have refused the Claimant's application to be included in the FTP. The nature of the factual evidence in the case means that a three day trial is not feasible, in any sensible configuration, and the range of



issues and a degree of complexity of some of those issues creates a material risk that the parties might not be properly prepared for a hearing in six months' time, leading to further delay and inefficiency. As a result, it is not necessary to deal with the other factors set out in Rule 58.

22. However, as indicated at the CMC, the Tribunal will exercise close supervision of this matter to ensure it is deal with in a timely and proportionate way.
23. I have also ordered that the parties provide costs budgets, with a view to close management of costs throughout the case. That will involve the following:
  - (1) Each party is to submit to the Tribunal a budget for the case, broken down by phase of activity (for example, disclosure, preparation of expert evidence, etc.).
  - (2) The Tribunal will review and approve the budgets, with the benefit of any observations from a party on the other party's budget (a short hearing may be necessary to resolve any issues).
  - (3) Each party is under an obligation to notify the Tribunal as soon as there is any expectation that party might exceed their own budget for any phase.
  - (4) There will be a presumption that a successful party will not recover costs in respect of any amounts in excess of the budget amount for a phase, which presumption can be displaced if the successful party can provide good reasons why the unsuccessful party should still pay those costs.
24. Finally, the parties will need to submit requests to the Tribunal for permission to call expert and factual witnesses, by reference to specific paragraphs in the pleadings, in order to ensure that there is a careful focus on the real issues in the case and a proportionate response to the issues.

25. My expectation is that the parties will co-operate with each other and the Tribunal to ensure that this matter is managed with all due expedition and careful costs control, for a hearing to take place in October 2023.

Ben Tidswell  
Chair

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

Date: 2 March 2023