Neutral citation [2023] CAT 37

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1569/5/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 June 2023

Before:

BEN TIDSWELL

Sitting as a Tribunal in England and Wales

BETWEEN:

INSTAPLANTA (YORKSHIRE) LIMITED

Claimant

- v -

LEEDS CITY COUNCIL

Defendant

RULING (SECURITY FOR COSTS)

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1. INTRODUCTION

1. The Defendant seeks security for costs from the Claimant by way of an application made on 17 March 2023. The order sought in the application is *"for security for costs*

by way of shareholders' indemnities or directors' guarantees or After the Event Insurance or payment into court or bank guarantee in the sum of £1,173,300 or such other sum as the court thinks fit." Following a process by which I have limited the recoverable costs of the parties to budgets for certain phases, the Defendant has adjusted the specific sum for which security is sought to £922,049.

2. The application was scheduled to be heard at a CMC on 30 May 2023. After considering the written material relating to the application I decided to vacate the hearing and to determine the application on the papers. This Ruling records my decision on the application.

2. BACKGROUND

3. The Claimant (an incorporated company) is a small business based in Leeds, West Yorkshire, which provides roadside advertising space through the supply, installation, and maintenance of timber floral planters. The Defendant is the administrative authority for the City of Leeds in West Yorkshire, England.

4. The Claimant alleges that the Defendant, as the body charged with regulating roadside enhancements, has excluded the Claimant from participating in a market for supply of environmentally-friendly roadside advertising space in the Leeds metropolitan market, in which the Defendant is not only an active participant but is also said to be dominant.

5. In very summary terms, the Claimant says that the Defendant has misused its regulatory powers to exclude unfairly a competitor from the relevant market, which amounts to an abuse under Chapter II of the Competition Act 1998. The quantum of the claim is said to be in excess of £1,160,000 of lost profits, together with interest.

6. The Defendant takes issue with almost every aspect of the claim, including liability, causation and quantum.

7. Central to the claim is the Claimant's assertion that the Defendant has used its licencing powers under the Highways Act 1980 to prefer, and to protect, the economic activities of its own Parks and Countryside department. There are a number of communications

within the Defendant on which the Claimant relies. It is sufficient for present purposes to refer to one example, to illustrate the point:

(a) An email from a Parks and Countryside employee to a Highways and Transportation employee on 24 September 2015 objected to an application by the Claimant to site wooden planters in certain locations, saying:

> "Although we may not have availability signs on all sites they are on our availability list. I feel that by allowing [the Claimant], or any other company, to install planters with advertisements on Leeds City Council land can only have a detrimental effect on the value of our sponsorship sites. It would affect new sponsorship opportunities as well as the guarantee of renewals from companies who currently sponsor the sites. which we generate for the authority. It will greatly reduce the opportunity for us to maintain current sponsorship levels as well as create future revenue from sponsorship should the opportunity arise. We cannot maximise income if we allow a 3rd party to offer a similar product on the same street or in the same area with no financial gain what so ever for the authority…
>
> I would like to ask the question as to why Leeds City Council would even consider allowing these planters on land vested with the Authority when it has the clear potential to jeopardise the revenue that an in-house service is providing. We can see the impact the [Claimants] have already had on us by looking at the amount of sites and revenue generated from the areas they are already in"

(b) The Highways & Transportation employee responded:

> "I will object on your behalf, ensuring your comments and contact details are included"

8. The Defendant asserts that it was, for the most part, unable as a matter of law to grant the necessary permissions under the Highways Act 1980 and in any event that it changed its internal processes in 2017 to facilitate applications by the Claimant and to remove any suggestion that the Defendant was excluding the Claimant from opportunities in order to prefer the Parks and Countryside department's activities.

3. LEGAL FRAMEWORK

9. Applications for security for costs are governed by Rule 59 of the Competition Appeal Tribunal Rules 2015 ("the Rules"), the relevant parts of which provide as follows:

> "**Security for costs**
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> 59.—(1) A defendant to a claim may seek security for its costs of the proceedings.
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> (2) A request for security for costs shall be supported by written evidence.
>
> (3) Where the Tribunal makes an order for security for costs, it shall—
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> (a) determine the amount of security; and
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> (b) direct—
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> (i) the manner in which, and
>
> (ii) the time within which,
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> the security must be given.
>
> (4) The Tribunal may make an order for security for costs under this rule if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and—
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> (a) one or more of the conditions in paragraph (5) or, as the case may be, paragraph (6) applies; or
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> (b) an enactment permits the Tribunal to require security for costs.
>
> (5) Where a defendant seeks security for costs against the claimant, the conditions are that—
>
> …

> (b) the claimant is a company or other body (whether incorporated in or outside the United Kingdom) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
>
> …"

10. Once one of the conditions in rule 59(5) is satisfied, it is a matter for the discretion of the Tribunal. The circumstances which the Tribunal will take into account are set out in paragraph 5.158 of the Guide to Proceedings 2015 ("the Guide") which provides as follows:

> "5.158 The Tribunal will only order security for costs if it is just to do so in the circumstances of the case. Amongst the circumstances to which the Tribunal will have regard are: (a) whether it appears that the application is made in order to stifle a genuine claim, or would have that effect; (b) the stage of the proceedings at which the application 8 is made and the amount of costs which the claimant has incurred to the date of the application; (c) the claimant's financial position, whether it is impecunious and if so why it is impecunious and particularly, whether the impecuniosity can be attributed to the defendant's infringement; (d) the likely outcome of the proceedings and the relative strengths of the parties' cases if that can be discerned without prolonged examination or voluminous evidence; (e) any admissions by the defendant and, for example open offers - but the defendant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution; and (f) the provisions in the Tribunal's rules as to orders for costs: see *BCL Old Co v Aventis* [2005] CAT 2, at [27]."

11. The Tribunal will first decide whether or not it is appropriate to order security. If it is appropriate to make such an order, the Tribunal will then go on to consider the amount and form of the security. The Tribunal has the discretion to order an amount which is less that the amount sought, but it should not order security in a nominal amount only.[1]

12. As both parties recognise, there have to date been no orders for security for costs made by the Tribunal in contested applications. Indeed, there have only been four such applications:

[1]See *Roburn Construction Ltd v William Irwin (South) & Co Ltd* [1991] BCC 726.

(a) *BCL Old Co Ltd v. Aventis SA* [2005] CAT 2.

(b) *2 Travel Group Plc v. Cardiff City Transfer Services Ltd* [2011] CAT 30.

(c) *Albion Water Ltd v. Dwr Cymru Cyfyngedig* [2012] CAT 10.

(d) *Commercial Buyers Group Limited v Associated Lead Mills Limited and ors* [2023] CAT 17.

13. The Defendant notes that none of these cases was a standalone action (as opposed to a follow-on action, where the claim is based on a prior infringement decision of a regulator or, in the *Albion* case, the Tribunal itself in earlier proceedings). That is not the case here, as the claim is brought on a standalone basis. There has been security for costs ordered by the Tribunal by consent in one standalone action.[2]

14. As the Tribunal noted in *Commercial Buyers Group* at [13]:

> "The mere fact that security for costs has usually been refused by the Tribunal where security for costs has been contested in itself is not a good reason for refusing a properly founded application for security."

15. In this case, as in *2 Travel Group* and *Commercial Buyers Group*, the question arises of whether ordering security would stifle the claim. In *Commercial Buyers Group*, the Tribunal referred to the principles listed by Peter Gibson LJ in *Keary Developments Ltd v. Tarmac Construction Ltd* [1995] 3 All ER 534 and summarised this aspect of the test as follows:[3]

> > "In deciding whether or not ordering security is just in all the circumstances in cases where stifling is an issue, it is necessary to carry out a balancing exercise between the potential injustice to the claimant if prevented from pursuing a proper claim by an order for security, and the potential injustice to the defendants if no security is ordered and the defendants are unable to recover costs from the claimant."

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[2] *Kerilee Investments Limited v International Tin Association* Case No 1379/5/7/20, order dated 7 December 2021.
[3] At [18].

4. THE APPLICATION AND ARGUMENTS OF THE PARTIES

16. The Defendant relies on two witness statements from Karen Blackmore, Team Leader of General Litigation, Legal Services. The Claimant has filed witness statements from Paul Robinson and Malcolm Simpson, directors of the Claimant, and also the Claimant's solicitor, Stephen Tupper.

17. The Defendant relies on rule 59(5)(b) of the Rules and it is accepted by the Claimant that this condition has been met. The application therefore turns on the weight to be given to the various factors in paragraph 5.158 of the Guide.

18. In summary, the Defendant says that:

    (a) The application is not made to stifle the claim, but instead to protect the financial position of the Defendant and the services which it provides in Leeds. The evidence from Mr Robinson and Mr Simpson is weak and incomplete and it is not possible to verify either the Claimant's or the directors' financial positions. There are also complaints about the approach to after the event insurance for adverse costs and the basis on which the Claimant's expert is being paid.

    (b) The claim is in fact being used to place unfair pressure on the Defendant, in circumstances where there is no prospect of the Defendant recovering its costs and the claim is grossly exaggerated and unsubstantiated as to quantum.

    (c) It is not correct that the Defendant's actions have caused the Claimant's impecuniosity and various items of evidence are advanced to support that contention.

    (d) On the question of merits, Ms Blackmore's evidence (which summarises the proposed evidence of witnesses for the Defendant) is said to demonstrate that the Defendant came to the decisions it did independently of Parks and Countryside, based on its interpretation of its public duties and in good faith. Any error in that process would be a matter of administrative, not competition, law. There are causation and other problems for the case.

(e) The application has been made in a timely manner on 17 March 2023, having been signalled at a CMC on 17 February 2023 and in respect of a claim served at the end of 2022.

19. The Defendant also suggests in its written submissions a variant of the form of security sought by the application, involving personal guarantees for half the value of the equity in each of the directors' family homes, together with payments into court of savings and some proportion of monthly income.

20. The Claimant says:

(a) The claim is a genuine one and the approach of the Defendant to it demonstrates in several respects that there is an intention to stifle it. In any event, it is clear that the effect of ordering security will be to stifle the claim.

(b) The Claimant's most recent annual accounts[4] disclose that it has less than £5,000 of net assets. Mr Robinson confirms that the Claimant has no material assets and that it pays Mr Robinson and Mr Simpson what is said to be a modest salary. Both Mr Robinson and Mr Simpson say in their witness statements that they have no other material source of income, only small amounts of savings and no other assets apart from joint tenancy interests in family homes, both of which are subject to mortgages.

(c) The application was not made promptly and the Claimant has now incurred considerable costs itself which would be wasted if the claim were stifled.

(d) The Claimant's impecuniosity is the Defendant's fault. There was never any prospect of getting after the event costs insurance and there is no irregularity in the Claimant's arrangements to fund its team for the litigation.

(e) In some detail, the arguments in the Defence are scrutinised in the Claimant's written submissions and are said to be unlikely to prevail.

[4] The net assets shown in the 2022 accounts and the prior 11 years are summarised in Ms Blackmore's first statement at [19].

5. ANALYSIS

21. It is not appropriate to seek to resolve detailed questions of fact in applications for security for costs. There are many disputed facts presented in the witness evidence. To the extent they remain relevant, they are a matter for determination at trial. Nothing I say in this Ruling should be taken to indicate any view on the likely outcome of any of the matters in dispute.

22. Instead, I need to conduct a balancing exercise, with reference to the factors listed in the Guide. As to each of those:

    (a) Stifling the claim: It seems very likely that imposing any security, beyond the nominal, will have the effect of the claim being stifled. It is plain from the evidence that the Claimant does not itself (or from its shareholders) have the financial resources to meet anything but a nominal order for security for costs. I do not consider it reasonable to require the directors to put their personal assets directly at risk for the purposes of the litigation.[5] It also seems likely that there is and would have been no reasonable prospect of third party funding or adverse costs insurance, given the size of the claim. As a result, this factor weighs against ordering security. I make no finding about whether it is the Defendant's intention to stifle the claim – that is not necessary given my finding about the likely effect.

    (b) Stage of proceedings at which application made: There has been a certain lack of urgency in the Defendant's approach to the application. It could and probably should have been brought to fruition faster. However, I am not convinced that is entirely the Defendant's fault, nor that the extent of any fault renders the Defendant's position unreasonable. I consider this factor to be largely neutral.

    (c) The Claimant's impecuniosity: It seems clear that the Claimant is impecunious, but it is not clear at this stage of the proceedings whether the Defendant's actions have caused that. The most I can say is that it seems plausible that, if

[5] This was also the Tribunal's approach in *Commercial Buyers Group* at [25].

liability were to be established, (on which I express no view at all at this stage) the Defendant's actions may have caused financial harm of some sort to the Claimant. I consider this factor to be largely neutral.

(d) Merits: It is again too early in the proceedings to form any view of the merits. I do not consider the standalone status of the claim to materially change the position. The email and other documentary evidence which the Claimant relies on supports, on its face, a plausible theory of exclusionary conduct. However, it is clear that this question will be hotly contested by the Defendant at trial and I express no view on the likely outcome here. I therefore consider it largely to be neutral.

23. The balancing process I have to undertake requires consideration of two unsatisfactory outcomes. On the one hand, the Defendant may be exposed to an unsatisfied costs order if it succeeds at trial, with unhelpful impact on the Defendant's budget for providing other public services. On the other hand, the Claimant, a micro-business which has sought but failed to get financial assistance from various other sources, will be unable to pursue its claim for damages which it says were caused by the Defendants.

24. Taking all the relevant factors into account, I consider that the Defendant should bear the risk, because an order for security for costs would in effect lead to the end of the claim. While I recognise the difficulties this creates for the Defendant, I am also conscious of the importance of facilitating recourse by small businesses to the Tribunal under section 47A of the Competition Act 1998, including in cases where there is no prior infringement decision on which to base a follow-on claim. In this regard I note that, in early 2019, the Competition and Markets Authority declined to investigate a complaint made by the Claimant, citing its Prioritisation Principles.[6]

25. The application for security for costs is dismissed.

[6] See page 57 of the exhibits to Ms Blackmore's third statement.

26. The Defendant should pay the costs of and occasioned by the application, to be summarily assessed by me on the papers if not agreed between the parties within 28 days of the date of this Ruling.

Ben Tidswell
Chair

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

Date: 5 June 2023