Neutral citation [2024] CAT 35

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1379/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 May 2024

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

Heard remotely on 13 May 2024

RULING (RELIEF FROM SANCTIONS)

APPEARANCES

Mr Stephen Nathan KC (instructed by Avery Law LLP) appeared on behalf of the Claimant.

Ms Laura John (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Defendant.

A. INTRODUCTION

1. At the conclusion of the hearing on 13 May 2024, the Tribunal indicated that it would grant the Claimant relief from sanction, and would supply its reasons for that decision in due course. These are those reasons.

B. BACKGROUND

2. By way of background, this is a claim brought by the Claimant under s. 47A Competition Act 1998 for damages in relation to the supply chains for tin, tantalum and tungsten and in relation to Traceability Services. The claim was commenced on 31 March 2021.

3. As long ago as 29 October 2021, at the first case management conference ("CMC"), the Tribunal ordered that there should be a determination of preliminary issues as to market definition and applicable law. By that order, the parties were given permission to rely, for the purposes of the preliminary issues, on expert evidence as to economics, and as to the minerals supply chains. At that point it was envisaged that there should be a hearing in Michaelmas 2022. In fact, the proceedings have moved at a much slower pace than that.

4. Following the CMC on 29 October 2021, the Claimant agreed to provide £400,000 security for the Defendants' costs up to the filing of expert reports, and this was paid between 28 January 2022 and 28 April 2022.

5. On 5 July 2022, the Tribunal made an order, by consent, giving directions as to the hearing of the preliminary issues (the "Directions Order"). Paragraph 9 of the Directions Order provided that:

> "By 4pm on 17 February 2023, the parties shall exchange and file:
>
> (a) signed statements of witnesses of fact on the issues to be considered at the preliminary issues hearing; and
>
> (b) signed expert reports in the area of mineral supply chains, on the issues to be considered at the preliminary issues hearing."

No specific provision was made as to the date on which expert evidence in the field of economics was included in the Directions Order.

6. The parties had also agreed directions for disclosure, which are reflected in the Directions Order. The original deadline was 25 November 2022; but this was put back as a result of a number of extension requests by the Claimant, which were agreed by the Defendant, and ordered by the Tribunal. It eventually took place on 24 March 2023, after an order was made on unless terms on 13 March 2023.

The 31 January 2024 "Unless" order

7. The date specified in paragraph 9 of the Directions Order for factual witness statements and expert reports on mineral supply chains was extended as a result of a number of requests for extensions by the Claimant which, again, were agreed by the Defendant and ordered by the Tribunal. A final extension, up to 29 February 2024, was granted on unless terms by the Tribunal by its order of 31 January 2024. That order (the "31 January Unless Order") provided, in paragraph 1 for the amendment of paragraph 9 of the Directions Order to specify a date of 29 February 2024, and in paragraph 2 provided:

> "Unless the Claimant serves its evidence by 4pm on 29 February 2024 in accordance with paragraph 9 of the Directions Order, as amended by paragraph 1 above, the claim will be struck out and judgment entered for the Defendant with costs to be assessed if they are not agreed."

What occurred on 29 February 2024

8. On 29 February 2024, the following occurred:

(1) At 2.51 pm CMS Cameron McKenna Nabarro Olswang LLP ('CMS') on behalf of the Defendant sent to the Claimant's solicitors, Avery Law LLP ("Avery") an email which asked for confirmation that they were ready to exchange experts' reports in the field of mineral supply chains and signed witness statements on the issues to be considered at the preliminary issues hearing, and continued:

> "It is our intention, in accordance with the CAT Rules 2015, to personally serve these at your offices prior to 4pm".

(2) At 2.54pm, Avery replied to say:

> "We are ready to exchange and propose doing so by 15:15.
>
> Our intention is to exchange by email with a link to the various materials. It would be helpful if you would kindly serve electronically, please?
>
> We will then file our client's material electronically with the Tribunal."

(3) At 3.13pm CMS responded:

> "… Noting that the Tribunal has not provided approval for service by means of electronic communication as per the CAT Rules 2015, Rule 111(1)(d), we intend to serve personally in accordance with Rule 111(1)(a).
>
> We reserve the Defendant's position if service by the Claimant is not properly effected."

(4) At 3.24pm Avery emailed enclosing a link to an expert report in the field of mineral supply chains (and also, though it had not been necessary for it to be served at this juncture, in the field of economics) and a signed witness statement. The email continued:

> "… Kindly confirm receipt. This is being filed electronically with the CAT. Please urgently provide us with a link to your client's exchange materials.
>
> We note your reservation of rights regarding personal service – as opposed to exchange. Please confirm whether or not you require a hard copy of the same? That can be made available to you at the earliest on Monday next week. To the extent that your client objects – please confirm – we will make an application for retrospective electronic service. The hope and expectation is that that will not be required."

(5) At 3.56pm CMS sent an email which said that the Defendant's documents had been served at Avery's offices a short while before, but in any event enclosing a link. It added:

> "… As previously noted, our client reserves its position to the extent that your client does not effect proper service."

9. Hard copies of the relevant documents were then printed and served in hard copy on CMS at 10.33am on 1 March 2024.

C. THE PARTIES' POSITIONS

10. The Defendant contends that the Claimant did not serve its witness statement or expert report on mineral supply chains in accordance with the unless terms of the 31 January Order, and that, accordingly, the claim is struck out.

11. In this regard, the Defendant refers to the Competition Appeal Tribunal Rules 2015 (the "CAT Rules"), Rule 111, which provides:

> "**Documents etc**
>
> **111.**— (1) Subject to paragraph (16), any document required to be sent to or served on any person for the purposes of proceedings under these Rules (including documents required to be sent to the Registrar for filing) may be –
>
> (a) delivered personally at the appropriate address;
>
> (b) sent to that person at the appropriate address by first class post;
>
> (c) served through a document exchange or by any other service which provides for delivery on the next business day;
>
> (d) where authorised by the Tribunal, sent to that person by fax or other means of electronic communication; or
>
> (e) sent or served in such other manner as may be specified by practice direction."

12. The Defendant points out that none of the relevant orders in this case specified that service could be effected electronically pursuant to CAT Rule 111(1)(d).

13. The Defendant accepts that, had this point stood alone, it would be only a technical point, and one which it would not have relied on. But, the Defendant argues, what was actually served on 29 February (or 1 March) 2024 by the Claimant was so defective and non-compliant with the CAT Rules that it would fall to be excluded pursuant to Rule 55. In the circumstances, there should be no relief from sanctions.

14. The Defendant relies on the following deficiencies in the material served:

    (1) In relation to the witness statement of Mr Beckett:

(a) that it is not relevant to the preliminary issues, and thus not within the scope of the permission which the Tribunal has granted for factual witness evidence; and

(b) that it does not contain a confirmation of compliance by Mr Beckett, or a certificate of compliance by his legal representative, as required by paragraph 4 of Practice Direction 2/2021 on Trial / Appeal Witness Statements;

(2) In relation to the expert report of Messrs Tim Williams and Anton de Feuardent of Fair Links:

(a) that expert evidence was only permitted in relation to economics and mineral supply chains, while these experts purport to give evidence in their capacity "as independent economic and financial experts";

(b) that the report is an undifferentiated joint report, which does not state which part falls within the expertise of which expert;

(c) that the report contains matters not part of the preliminary issues;

(d) that the experts say that their understanding is that, during cross-examination, they may be assisted by a consultant from Fair Links; and

(e) that this evidence does not support the Claimant's pleaded case that there was only one market in tin, tantalum and tungsten in that Messrs Williams and de Feuardent conclude that there are three, and does not provide any evidence to support the proposition that there is a single market across the entire supply chain, or that the market affected or likely to be affected would be in the UK.

15. For the Claimant, it was contended that there had not been non-compliance. Mr Nathan KC submitted that, as a result of previous dealings between the parties'

solicitors, Avery had been "lulled" (to use Mr Nathan KC's word) into considering that electronic service would be sufficient, and that there was an estoppel which prevented the Defendant from relying on the fact that there was not physical service of a hard copy within the relevant time.

16. If that was wrong, the Claimant sought relief from sanction. Any breach had not been serious or significant; it had caused no prejudice; and it would be disproportionate for there not to be relief from sanction.

17. As to the various complaints of non-compliance and deficiencies in the documents served, the Tribunal should not be investigating or considering points which might go to the merits of the dispute. Furthermore, the Claimant had now, by a letter of 8 May 2024 (the "8 May letter") intimated that it would be applying: to Re-Amend its Statement of Claim; to serve a new version of Mr Beckett's witness statement; and for permission to serve a replacement expert report of Messrs Williams and de Feuardent.

D. ANALYSIS AND CONCLUSIONS

18. In our view this is a case in which there was non-compliance with the 31 January Unless Order, and that the claim was struck out, subject to a successful application for relief from sanction. We say this for the following reasons:

    (1) There had been no authorisation by the Tribunal under Rule 111(1)(d) for electronic communication to the Defendant.

    (2) There was no estoppel. The terms of the 31 January Unless Order were clear. Unless there was service of the relevant documents by 4pm on 29 February 2024 the claim was to be struck out. The previous dealings of the parties did not affect the operation of that Order. There can be no estoppel as to whether the CAT Rules and the Tribunal's order have been complied with. Nor, in any event, do we consider that the previous dealings had shown a clear course of action which meant that it was unconscionable for the Defendant to refuse to agree to electronic service, as it did on 29 February 2024. Furthermore, and in any event, the

Defendant cannot be estopped by previous dealings in relation to the service of different documents from raising the objections it does to the service of these, which are founded, or at least rely, on the content of these particular documents.

19. In the circumstances, the real issue, in our view, is whether there should be relief from sanction. In relation to this, Mr Nathan KC submits that the Tribunal should apply, if only by way of analogy, the approach of the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906 ("*Denton*"). Ms John for the Defendant points out, correctly, that it has not been determined that those principles are, strictly, applicable in this Tribunal: see *Merricks v Mastercard* [2023] CAT 39. As in that case, however, we do not consider it necessary to decide that point here, as there can be and is no serious dispute that the considerations set out in *Denton* are very relevant to the decision which must be made here.

20. We accordingly ask first whether the breach is a serious or significant one. We agree with Mr Nathan KC that the main focus of this enquiry is whether the failure to serve hard copies, as opposed to serving electronically, was serious or significant. We are of the view that, judged on its own, and even making full allowance for the fact that the breach was of an unless order, it was not. It was immaterial to the proper running of the litigation, and caused no prejudice to the Defendant.

21. Ms John's submission is that this breach cannot be considered in isolation from the deficiencies in the documents served, because what is in effect happening is that the Claimant is seeking an extension of some 9 weeks to serve compliant documents.

22. While we fully understand and sympathise with the Defendant's frustration, we consider that the Defendant could only pray in aid these other deficiencies if it could be said that they constituted a further way in which the 31 January Unless Order was not complied with, such that the sanction was activated. In our view, it cannot be said that they did. The deficiencies relied upon do not, in our view, mean that, effectively, no witness statement or no expert report had been served.

Instead, a witness statement and an expert report had been served, though each might be susceptible, in whole or in part, to exclusion or rejection. This however is not a matter upon which we need to rule at this stage, as set out below.

23. This may be put another way. If it is assumed that the witness statement and the expert report had been served, in hard copy, before 4pm on 29 February 2024, it could not then be said that that was non-compliance with the Unless Order such that it triggered the automatic sanction specified. What could and no doubt would still have been said is that the documents served were in some ways non-compliant with the CAT Rules, and/or would not assist the Claimant.

24. In light of our view as to the lack of seriousness and/or significance of the breach, we do not consider that it is necessary to deal in any great detail with the other aspects of the *Denton* approach. To the extent it is relevant, and as to the second stage, we accept that the failure to comply with the CAT Rules was innocent, in the sense of not deliberate, and was understandable, in light of the past dealings between the parties. We do not accept, however, that it can be said that there was a good reason for the course taken by Avery. What should have happened is that Avery should have clarified the way in which service could be effected in time to permit service by hard copy if electronic service was not going to be accepted.

25. Even if the reason for the breach was not a good one, and if proceeding on the basis of the *Denton* guidance, it would still be necessary to consider "all the circumstances of the case, so as to enable [the Tribunal] to deal justly with the application". In relation to that consideration of all the circumstances, the lack of seriousness and/or significance of the breach is clearly a matter of central importance. Further, we accept Mr Nathan KC's submission that this is not a case in which there can be said to have been a history of non-compliance with the Tribunal's orders by the Claimant. True it is that the Claimant has repeatedly sought extensions of time, but they have been agreed to and/or ordered by the Tribunal. The previous order made on unless terms was complied with. The lack of prejudice which was caused to the Defendant by the breach should also be considered here, though of course it is a consideration which forms part of the assessment of the seriousness or otherwise of the breach itself.

26. We recognise the importance of enforcing orders made by the Tribunal, which is enshrined in Governing Principle 4(2)(f) of the CAT Rules. Nevertheless, we consider that it would not be a proportionate response to the breach for relief from sanction to be refused, particularly where the result would be that the claim could not be pursued at all.

27. The Claimant accepts a number of respects in which it is said that both the witness statement and expert report were non-compliant with the CAT Rules, or did not reflect the case which the Claimant was advancing in its statements of case as at 29 February 2024. As we have mentioned, it has sought to rectify these in the other applications intimated in the 8 May letter. We have not heard those applications and, as indicated at the hearing, we will give the Defendant the opportunity to respond to them.

28. On three matters, however, there was a difference between the parties as to whether there was any non-compliance. One was as to whether the substance of Mr Beckett's first statement (which is not added to in his second, as it simply seeks to ensure compliance with paragraph 4 of Practice Direction 2/2001) was of any relevance to the preliminary issues. Ms John argued it was not; Mr Nathan KC said that it was.

29. We do not consider that it is necessary or appropriate to seek to resolve this matter at this stage. What we will say, however, is this: Mr Beckett's witness statement was the only one which was served in pursuance of paragraph 9 of the Directions Order (as amended). While we recognise that the Claimant will be entitled to serve factual evidence which is responsive to the Defendant's factual evidence, we are unlikely to permit the service of any factual evidence by the Claimant which could and should have been put forward as part of its initial tranche of factual witness statement evidence.

30. Another matter is that the Claimant contends that there is nothing objectionable or non-compliant with the CAT Rules or the orders of the Tribunal in Mr Williams and Mr de Feuardent giving evidence in their capacity as "financial" as well as "economic" experts. We agree that there is no significant point here. Any financial expertise overlaps very much with their economic expertise.

31. Finally, as to the complaint that the expert report is undifferentiated between the two, we accept from Mr Nathan KC that each may be able to speak to all of it. It is likely, however, that we will require the Claimant to identify which part of the report each will be responsible for and speak to, and not permit them to duplicate, because that would potentially be unfair to the Defendant, and wasteful of time and cost.

E. DISPOSAL

32. For these reasons:

(1) We conclude that there was non-compliance with the unless provision in the 31 January Order;

(2) We nevertheless grant relief from sanction to the Claimant;

(3) We have not determined the other applications intimated in the 8 May Letter. The Tribunal will do so, on the basis of written submissions, in due course.

33. We will equally consider and resolve the issue of the costs of the application for relief from sanction and the hearing of 13 May 2024 after receiving written submissions. In this regard, we had, prior to the hearing, understood that the Claimant accepted that it should bear the costs of the application for relief from sanctions. In the 8 May letter it was said: "The Claimant accepts that the costs of and consequent to these applications [viz the three applications enumerated in the letter, including that for relief from sanction] will ordinarily fall to be borne by the Claimant." Notwithstanding this, Mr Nathan KC said at the end of the hearing that the Claimant will be applying for its costs. We will consider that, and the position of the Defendant as to the appropriate costs order, on the basis of written submissions.

The Hon. Mr Justice Butcher Chair	Peter Anderson	Simon Holmes

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

Date: 21 May 2024