Neutral citation [2025] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1379/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 March 2025

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 March 2025

RULING (VARIATION APPLICATION AND STRIKE OUT)

APPEARANCES

Mr Brian Beckett appeared on behalf of the Claimant.

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

A. INTRODUCTION

1. On 13 March 2025 the Tribunal heard an application by the Claimant to vary the Tribunal's Ruling dated 10 January 2025 ([2025] CAT 2) ("the 10 January Ruling") which we had made as to the provision of security for costs, and an application by the Defendant to strike out the action. At the end of the hearing we gave our decision on the applications, and said that further reasons would be provided in due course. These are those reasons.

B. THE BACKGROUND

2. This case has a long procedural history. We set out part of it in our 10 January Ruling.

3. For present purposes, it is only necessary to record that the Defendant, prior to the CMC fixed for 1 November 2024, raised the issue of security for costs for the period after the conclusion of the expert process. At the CMC on 1 November 2024, the Claimant accepted that further security for costs should, in principle, be provided. On that basis, the Tribunal adjourned the further hearing of the application for security for costs, so that the issues of the amount and the timing of further security could be the subject of further consideration by the parties, negotiation between them, and, in the absence of agreement, written submissions and a determination by the Tribunal on the papers.

4. The parties could not agree as to the amount or timing of security, and accordingly written submissions were put in by the parties, as detailed in [7] of the 10 January Ruling. During that process, the Claimant sent a letter of 6 January 2025 which raised an issue as to the form in which security should be provided; and the Defendant responded to that by a letter of 9 January 2025 (see [8] of the 10 January Ruling).

C. THE 10 JANUARY RULING

5. By the 10 January Ruling the Tribunal ordered that the Claimant should provide the amount of £575,000 by way of security for the Defendant's costs of the

preliminary issue trial for the period after the conclusion of the expert process (at [14]). We further ordered that this security should be provided by 21 February 2025 (at [17]). The parties subsequently agreed to extend this period to 28 February 2025, and the Tribunal approved that on 5 February 2025.

6. The Tribunal also dealt in the 10 January Ruling with the form in which security should be provided, at [19] – [20]. It was ordered that the security should be provided by way of payment into the Tribunal.

7. The Tribunal specified that the sanction for non-compliance by the Claimant with the order as to provision of security should be that the Defendant would be at liberty to apply to have the claim struck out; and we indicated that any application to strike out in the event of non-compliance would be heard on an expedited basis with a view to its being resolved prior to 14 March 2025.

8. The Tribunal also ordered the Claimant to pay the costs of the application for security for costs, which it summarily assessed at £38,000, to be paid within 14 days of the date of notification of the Ruling to the parties.

9. Although at one point the Claimant indicated that it was considering seeking to appeal the 10 January Ruling, no appeal application was made.

D. THE APPLICATIONS MADE

10. On 26 February 2025, the Claimant applied to the Tribunal for the form of security to be provided to be changed to a secured personal guarantee from Mr Brian Beckett, the security being the land and property known as Collier Brook Business Park, Glasshouse Lane, Kilnhurst, Mexborough S64 5TT ("Collier Brook"); and for the timing of the provision of that security to be changed to 21 March 2025.

11. The Claimant's letter of application stated that "our financial and commercial situation has changed due to a combination of operating and supply chain issues", and "it is also the case that the quantum and timing of security was higher and earlier than we anticipated". The application enclosed the Fifth

Witness Statement of Brian Beckett, which explained the ownership of Collier Brook, and exhibited a valuation of the property carried out by Stevens Property Consulting Ltd ("the valuation") which bears a date of 23 January 2025, and which Mr Beckett said in his witness statement was provided on 27 January 2025.

12. The Claimant failed to pay the sum of £575,000, or any sum, into the Tribunal by 28 February 2025, and has not done so since. Nor has it paid the costs of the application for security for costs which it was ordered by the 10 January Ruling to pay.

13. On 5 March 2025 the Defendant applied to the Tribunal for orders that:

    (1) The Claimant's claim be struck out as a result of its failure to pay the ordered security by 28 February 2025;

    (2) The Claimant's application of 26 February 2025 to vary the form and timing of the security for costs ordered be dismissed;

    (3) The Claimant should pay the Defendant's costs of the Defendant's strike out application and of the Claimant's variation application; and

    (4) The Claimant should pay the Defendant's costs of the claim.

14. In support of its application the Defendant served the Third Witness Statement of Kenneth Henderson.

15. On 10 March 2025, the Claimant responded to the Defendant's strike out application, and to what the Defendant had said in relation to the Claimant's application to vary. Enclosed with the Claimant's submission was a Sixth Witness Statement of Mr Brian Beckett, and a letter of the Claimant to the Defendant's solicitors in relation to the Defendant's financial position.

16. The hearing of both the Claimant's variation application and the Defendant's strike out application took place at the Tribunal on 13 March 2025. Mr Beckett

represented the Claimant, assisted by a McKenzie Friend, Mr Steven Arrowsmith. The Defendant was represented by Ms Laura John and Ms Kristina Lukacova instructed by CMS Cameron McKenna Nabarro Olswang LLP. Each side made oral submissions.

E. THE APPLICATION TO VARY

(1) The parties' contentions

17. The Claimant contends that there has been a change in its circumstances since November 2024. In particular, it contends that a project which it has in Namibia "has been impacted by supply chain issues" which has had a "material negative impact on [the Claimant's] operating cash flows of some £600,000 over the next 3-6 months"; that it has entered into negotiations to sell a majority shareholding in its project in Somaliland, which would release some capital though not for 3-6 months; and that in relation to its project in the DRC it has proved impossible to enforce orders against BRITCON S.A.R.L. and efforts to do so have been put on hold indefinitely.

18. The Claimant contends further that it has no access to other funds, and that it has therefore offered to put up the only asset available, namely a personal guarantee secured on Collier Brook. It contends that the Defendant will not be prejudiced by this change in the form of security, as the market value of Collier Brook is some £1.2 million as shown in the valuation. The Claimant noted that the Defendant had made objections to the reliability of the valuation, and had sought to deal with these by attempting to engage the Defendant in a process of obtaining a joint valuation, but the Defendant had refused to engage with this.

19. The Defendant submitted that the application to vary was one which must fail because there had been no material change in circumstances since the 10 January Ruling. In any event, and even if the Tribunal were to consider the application, it should be refused. The form of security which was now proposed was significantly inferior to that ordered by the Tribunal; the Claimant's explanation of the alleged change of position was poor; the Claimant's contention that it is unable to comply with the 10 January Ruling was highly

questionable, as was its suggestion that the claim will be stifled; and there was an important issue of timing, in that security must be in place by the start of the period to be covered by the further security for costs.

(2) Decision in relation to the Application to Vary

20. The Tribunal has a power to revoke or vary an earlier order under Rule 115(2) of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules"). That power is not, however, open-ended, and has to be exercised judicially and in accordance with established principles.

21. Guidance was given in *Tibbles v SIG plc* [2012] 1 WLR 2591, [2012] EWCA Civ 518 in relation to CPR rule 3.1(7), which is in materially the same terms as the Tribunal Rule. At [39] Rix LJ said

> "(i) … The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. …
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated."

22. This guidance has been applied in relation to Rule 115(2) of the CAT Rules in *British Telecommunications Plc v Office of Communications* [2018] CAT 1, see especially at [73] – [79].

23. There is no suggestion of a misstatement in this case. The key question is whether there has been a material change of circumstances since the 10 January Ruling. As to this, we are of the clear view that it has not been established by the Claimant that there has been any such change of circumstances. As far as we can judge, the Claimant's financial position seems to have been much the same before 10 January 2025 as it is now. The points made in the Claimant's application letter, and in Mr Beckett's oral submissions about the projects in

Namibia, Somaliland and the DRC were all vague, and high level. There was no detailed evidence, and no documentation was provided in relation to them. Thus, in relation to the Namibia project, there was no detail as to what the "supply chain issues" are, how precisely they have affected the Claimant's financial position, or when and how they arose. In relation to the DRC matter, it appears that difficulties in enforcement date from at least 2023.

24. It is simply not made out that the matters referred to by the Claimant in relation to Namibia or the DRC have arisen in the period since 10 January 2025 and constitute a material change from the position as at that time. The matter referred to in relation to Somaliland would, if it comes off, apparently be a way in which the Claimant would obtain funds, by the disposal of a majority shareholding, but it has not yet happened. It is not, on any view, a material change of circumstances since the 10 January Ruling.

25. For those reasons, we have concluded that the application to vary should be refused.

26. We have, however, considered whether, if we are wrong as to there having been no material change in circumstances, or this were a case in which there were no objection of principle to a variation, our previous order should be varied as proposed by the Claimant. We are of the view that it should not.

27. In addressing this issue, we have found helpful the approach of the court in *Recovery Partners GB Ltd and Another v Rukhadze and Others* [2018] EWHC 95 (Comm) ("*Recovery Partners*"). That was a case in which there was an application to substitute a new form of security for costs (viz a deed of indemnity and an ATE insurance policy) for undertakings by the claimants' solicitors. The judge, Mr Nicholas Vineall QC, sitting as a deputy High Court Judge, said at [38] – [39]:

> "38. In my view, once there is a material change of circumstance the Court has a broad discretion which should be exercised taking into account all relevant factors, but remembering that the burden is on the party who seeks to be released from his undertaking that it is appropriate to do so.

> 39. I therefore reject [counsel for the claimants'] proposed approach. He submitted that once there is a material change of circumstance the question is to be approached simply as though this were a de novo application for security. But it is not. … It does not seem to me to follow as a matter of logic that merely because the Court might have accepted the deed and the ATE policy had they been available earlier this year, that it is therefore necessarily appropriate to allow them now to be substituted for the security previously given."

While that was a case in which the application was to vary security already provided, in the present it is to vary the security ordered but not provided. But it seems to us that in the present case, as in that, it is wrong to treat the position as if we were faced with a de novo application for security.

28. At [42] Mr Vineall QC said:

> "In my view, and remembering that the burden is on the party seeking release from an undertaking, the factors which might be material on an application of the present type, and which do arise and are material in this case, include the following:
>
> (a) how long the old security has been in place and whether the costs which it secured have already been incurred;
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> (b) the extent of the difference (if any) between the quality of the old security and the quality of the new security;
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> (c) the strength of the explanation given for the claimant's change of position;
>
> (d) in particular, whether or not, and if so to what extent, declining to permit the change would cause hardship to the claimant or inhibit its ability to pursue the claim."

29. Although, as we have mentioned, the factual situation in *Recovery Partners* was somewhat different from that in the present case, we consider that the factors which Mr Vineall QC identified at (b), (c) and (d) as relevant there are relevant here to the exercise of the discretion which there would be if there had been a material change of circumstances. We will look at those matters in turn.

30. As to the issue of the quality of security offered, there is a clear difference between the quality of that currently ordered (a payment in), and what is now proposed (a personal guarantee secured on real property). Self-evidently, the proposed security is less liquid. We also agree with the Defendant that there are legitimate concerns about the value of the security proffered. The valuation

provided states (at 6.2) that the valuer has not been asked to comment on the property's suitability for secured lending and the report is not to be used for any form of secured lending. The valuation given is for vacant possession, but the property is not vacant. Further, at 6.6 it is stated that the property is in a Flood Zone 3, which "may mean it is very difficult to obtain buildings and contents insurance to cover this risk", which "in turn will likely mean that obtaining a mortgage may be difficult". There also appears to have been a very significant increase between the purchase price of £710,000 in December 2021, and that in the valuation of £1,200,000, which we do not consider had been adequately accounted for.

31. As to the reasons on which the Claimant relies for now contending that the security should be in the form of a secured guarantee, as opposed to a payment in, we have already dealt with this in the context of whether there has been a change in circumstances. As we have said, it appears to us that there is no persuasive evidence of a material change in circumstances.

32. In relation to the question of whether a variation is necessary in order to avoid hardship to the Claimant, or will inhibit its ability to pursue the claim, we consider that it is necessary to approach this question in essentially the same way as the courts treat the issue of whether security should be ordered in the face of an objection that an order for security will cause hardship and/or stifle a genuine claim. In that context, it has been said in *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB) at [31] by Eady J that

> "… it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not."

33. Further, a party contending that security will stifle a claim will usually have to give details not only of its own financial resources, but also "whether it can raise the amount needed from its directors, shareholders or other backers or interested persons" (see for example *Keary Developments Ltd v Tarmac Construction* [1995] 3 All ER 534 at p.540).

34. We are clearly of the view that the evidence put before us by the Claimant has not been full, frank, clear and unequivocal. There are significant gaps in that evidence. There is no evidence from or any detail about the financial position of the other shareholders in the Claimant apart from Mr Beckett. While Mr Beckett has given, in paragraph 6 of his Sixth Witness Statement, the names of the Claimant's trade debtors, there is no detail about the terms of those debts, or as to whether efforts have been made to call them in to try to comply with the Tribunal's existing order. Furthermore, there are unexplained aspects of the Claimant's finances. If the Claimant is as impecunious as Mr Beckett suggests it is difficult to see how the litigation can, irrespective of the order for security for costs, be taken forward. Yet, on 7 March 2025 the Claimant wrote to the Defendant to say that its costs to date are of the order of £1 million, and that:

> "We are preparing a future costs budget for proceedings through to the end of the Preliminary Issues Hearing. It is expected that these too will be in the region of £800,000 to £1,000,000."

The Preliminary Issues hearing is due to take place in July 2025. It is not satisfactorily explained how the Claimant will be able to incur costs of the order of £800,000 to £1 million in that period, but is not able to comply with the order as to payment in of the sum ordered by way of security for costs.

35. We thus consider that the evidence in support of the Claimant's contention that the refusal of a variation will cause it undue hardship and stifle the claim is not complete, is lacking in clarity and is not compelling. It does not persuade us that it is likely that the existing requirement for the provision of security will cause the claim to be stifled. Taken with the concerns as to the quality and value of the security proffered which we have mentioned, we conclude that this is not a case in which, even if there had been a material change of circumstances, it would be appropriate to accede to the Claimant's application to vary.

F. THE APPLICATION TO STRIKE OUT

(1) The Parties' Contentions

36. The Defendant contends that the claim should be struck out as a sanction for non-compliance with the 10 January Ruling by the Claimant in two respects,

namely non-provision of the security for costs ordered, and non-payment of the costs which it was ordered it should pay. Such a course would the appropriate and proportionate sanction.

37. The Claimant contends that the claim should not be struck out. It contends that it is genuine and significant claim, to which Mr Beckett is committed. It would not be in accordance with the overriding objective of delivering justice for the claim to be dismissed.

(2) Decision on the Application to Strike Out

38. Under Rule 41(1)(d) of the CAT Rules, the Tribunal may strike out a claim "if … the claimant fails to comply with any rule … or any order or direction of the Tribunal".

39. As the 10 January Ruling stated, it was intended that the sanction for non-compliance with the order as to the provision of security was that the claim might be struck out.

40. We consider the striking out of the claim to be an appropriate sanction for what is serious non-compliance. The present case is a clear one where security for costs should be provided by the Claimant. It is also necessary that that security should be provided before the period to which that security is supposed to relate; and the Defendant will be prejudiced by having to incur costs for that phase for which it is unsecured. The Claimant had considerable notice of the fact that it would need to provide security, but it has not made any payment in at all, even to date. In addition, it has failed to pay the costs it was ordered to pay by the 10 January Ruling.

41. We have considered whether the merits of the claim are such as to be relevant to whether it should be struck out. In our view this is not one of those cases in which the merits of the case can be seen at this stage to be so strong that that is relevant to this decision. This is not, for example, a follow-on case, in which liability is already established. It is, as Mr Beckett himself accepted, a claim

which faces challenges. We approach the matter on the basis that it is a claim which may or may not succeed.

42. In our view, given the above, and the entire history and circumstances of the case, the sanction of strike out is appropriate and proportionate.

43. As we indicated at the hearing, we are, however, prepared to give the Claimant a further chance in which to comply with the order for security for costs and for payment of the costs of the application for security for costs. We will order that the Claimant is, by 4 pm on 21 March 2025 to pay £575,000 into the Tribunal by way of security for costs and to pay the Defendant £38,000 by way of costs. Failing those payments, the claim is to be struck out without further order.

44. As we also indicated at the hearing, we are unlikely to be sympathetic to any application for relief from the sanction referred to in the previous paragraph if the payments are not made by the time and date specified, unless there are truly exceptional circumstances.

G. CONCLUSION

45. For the reasons set out above:

    (1) The Claimant's application to vary the 10 January Ruling in relation to the provision of security for costs is dismissed.

    (2) Unless the Claimant pays, by 4 pm on 21 March 2025, both (a) £575,000 into the Competition Appeal Tribunal as security for costs ordered under the 10 January Ruling, and (b) £38,000 to the Defendant as costs ordered under the 10 January Ruling, the claim is struck out without further order and judgment entered for the Defendant, with costs of the claim, to be assessed if not agreed.

46. We also determine that the Claimant should pay the costs of the application to vary and the application to strike out. We summarily assess these costs at

£37,500 and £25,000 respectively. Those costs are to be paid by 4 pm on 10 April 2025.

The Hon. Mr Justice Butcher Chair	Peter Anderson	Simon Holmes

Charles Dhanowa C.B.E., K.C. (*Hon*) Registrar	Date: 17 March 2025