Neutral citation [2021] CAT 18

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1359/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 June 2021

Before:

THE HONOURABLE MRS JUSTICE BACON
(Chairwoman)

Sitting as a Tribunal in England and Wales

BETWEEN:

REST & PLAY FOOTWEAR LTD

Claimant

- v -

GEORGE RYE & SONS LTD

Defendant

Heard remotely on 10 June 2021

RULING (FAST-TRACK AND STRIKE OUT)

APPEARANCES

Matthew Kennedy (instructed by Maitland Walker LLP) appeared on behalf of the Claimant.

Anneli Howard QC (instructed by Womble Bond Dickinson (UK) LLP) appeared on behalf of the Defendant.

A. INTRODUCTION

1. There are before me two applications by the Claimants. The first application is for an order that its claim be made subject to the fast-track procedure, pursuant to Rule 58 of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules"). The second application is that I strike out the Defendant's counterclaim, which was filed with its defence, on the basis that it is not a claim which the Tribunal has jurisdiction to hear or determine.

B. THE CLAIMANT'S APPLICATION FOR THE FAST-TRACK PROCEDURE

2. The Claimant contends that the fast-track procedure should be ordered, under Rule 58 of the Tribunal Rules. The Defendant is generally neutral but has expressed concern as to any slippage of the timetable, and has expressed concerns about the Claimant's historic failures to particularise its alleged losses. Nevertheless, irrespective of whether the fast-track procedure is ordered by me now, both parties are in agreement that it is desirable for the case to be progressed quickly and efficiently, and according to a timetable which is largely agreed between them.

3. Some factors might potentially indicate suitability of this case for allocation to the fast-track procedure. Those are that the two parties to the proceedings are a micro and a small enterprise respectively, the fact that there is likely to be only around three factual witnesses and two expert witnesses, and the fact that the Claimant seeks only damages: see Rule 58(3)(a), (e) and (h).

4. On the other hand, various factors count against fast-track designation, although I accept that each of these is unlikely to be decisive in itself.

5. First, the parties are agreed on a four-day provisional trial estimate rather than the three days that are indicated in Rule 58(3)(b).

6. Secondly, the claim is not entirely straight forward, and is likely to involve legal and economic issues regarding the causation and quantification of loss that might be of some complexity: see Rule 58(3)(c). The agreement in question is

a resale price maintenance agreement which is said to have been entered into at least in part at the request of the Claimant, and which in the Defendant's submission was specifically designed to benefit the Claimant rather than causing the Claimant loss.

7. Establishment of the counterfactual case, for the purposes of quantification of loss, is in those circumstances not likely to be straightforward. It will, in particular, depend very heavily on expert evidence, for which disclosure as to the Claimant's pricing and revenues will need to be provided and analysed (as is accepted by both sides): see Rule 58(3)(f) and (g).

8. Thirdly, the parties are agreed on a timetable to trial that will involve a substantive hearing starting at the earliest eight and a half months from now, while Rule 58(2)(a) requires the substantive hearing to be fixed to commence as soon as practicable and in any event within six months of the Tribunal's order allocating the proceedings to the fast-track procedure.

9. Fourthly, although both parties are keen to progress the proceedings as quickly as possible, it is common ground that there is no particular urgency, given that the case concerns damages that are alleged to have been suffered in the period between 2015 and 2019. While the claim form was filed in August 2020, there has already been a stay of the proceedings by consent from 13 November 2020 to 1 February 2021 for the parties to engage in mediation.

10. I note in that regard the Tribunal's comments in *Breasley Pillows v Vita Cellular Foams (UK)* [2016] CAT 8 at [33] that the fact that a claim is not urgent is not the most relevant factor, but it is also not irrelevant, bearing in mind the procedure is designed to be much faster than ordinary litigation and means that the case effectively jumps the queue.

11. Finally and for completeness, there is at present a counterclaim (see Rule 58(3)(d)), but that is subject to a strike-out application, which I will come on to.

12. Looking at the relevant factors on both sides, taking them together, I do not consider that this is a case that is suitable for designation under the fast-track procedure.

13. That does not, however, prevent the Tribunal from robustly case managing these proceedings to ensure an efficient procedure and the minimisation of costs. Helpfully, steps to achieve that have been largely agreed between the parties with a view to ensuring an efficient and speedy procedure in this case, irrespective of fast-track designation, and I endorse and approve those steps. So although I am not formally ordering that the case should be subject to the fast-track procedure, in practice that is unlikely to make any difference to the timetable that has been agreed between the parties.

C. THE CLAIMANT'S APPLICATION TO STRIKE OUT THE DEFENDANT'S COUNTERCLAIM

14. The Claimant has applied to strike out the Defendant's counterclaim for payment of a debt of £44,115, or equivalent damages for breach of contract, in relation to Grisport footwear products supplied to the Claimant during 2019 by the Defendant, but not paid for by the Claimant.

15. The basis for the strike out application is that in the Claimant's submission the counterclaim does not fall within s. 47A of the Competition Act 1998 ("the 1998 Act") since it is not a claim in respect of an infringement decision or an alleged infringement of the competition rules. The Defendant's response is that s. 47A is engaged by the counterclaim on various alternative bases.

(1) Procedural matters – jurisdiction to strike out

16. There is a preliminary issue of procedure as to whether I have the jurisdiction to strike out the counterclaim in the context of the present case management conference while I am sitting alone. It is common ground that under the Tribunal Rules, in particular reading Rule 110 together with Rule 41 which contain the relevant power to strike out in this case, I do not have the power to strike out the counterclaim sitting alone. I would have had that power if I had ordered the fast-track procedure, which would have enabled the Tribunal to continue sitting by the chairperson alone: see s.14(1) of the Enterprise Act 2002. Since I have not ordered the fast-track procedure, I am bound by the normal rules, including Rule 110.

17. It is therefore undisputed that as matters stand I cannot strike out the counterclaim in these proceedings, but I would have jurisdiction to dismiss the application to strike out.

18. As an alternative Mr Kennedy for the Claimant submitted that, rather than striking out the counterclaim, his application could be read as an application for an order that the Tribunal does not have jurisdiction to decide the counterclaim, pursuant to Rule 34.

19. Attractive though that solution might have been, I am not persuaded that Rule 34 can be used in this way. Rather, Rule 34 appears to be designed to address the situation where a defendant contests the Tribunal's jurisdiction to hear the claim at the outset of proceedings. Rule 34(2) and (3) thus provide that a defendant making an application for an order declaring that the Tribunal has no jurisdiction shall first file an acknowledgment of service in accordance with Rule 33, and that the defendant who does so does not lose any right it may have to dispute the Tribunal's jurisdiction. Under Rule 34(5), a defendant who files an acknowledgement of service, without making an application disputing jurisdiction within the period specified in Rule 34(4), is treated as having accepted that the Tribunal has jurisdiction to hear the claim.

20. Those provisions imply that Rule 34 governs a jurisdictional dispute raised by the defendant to the claim when the claim is first filed, rather than governing a strike out sought by the defendant to a counterclaim, in circumstances where the Tribunal's jurisdiction in respect of the main claim is uncontested. In that latter case the correct procedural route is an application under Rule 41.

21. In these circumstances, the appropriate way to deal with the application justly and at proportionate cost is for me to consider the substance of the parties' arguments and either to dismiss the application to strike out if I find in favour of the Defendant on this point, or to conclude that I would not dismiss the application and give reasons for that if I am inclined to find in favour of the Claimant.

(2) Substance of the application

22. It is common ground that under Rule 39(2) a counterclaim must fall within the ambit of s. 47A of the 1998 Act. It is also common ground that the Defendant's counterclaim in this case is a claim for damages or any other claim for a sum of money within the meaning of s. 47A(3) of the 1998 Act. The disputed issue in this case turns on the construction of s. 47A(2) of the 1998 Act, which at the time the counterclaim was brought provided:

> "This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of –
>
> (a) the Chapter I prohibition,
> (b) the Chapter II prohibition,
> (c) the prohibition in Article 101(1), or
> (d) the prohibition in Article 102."

23. In the present case it is undisputed that the counterclaim does not itself allege infringement of the competition rules, nor does it rely on an infringement decision: it is a pure claim for a contractual debt (or equivalent damages for breach of contract). That, in Mr Kennedy's submission, is fatal, since it means that the counterclaim falls outside the ambit of s. 47A(2).

24. In response the primary position advanced by Ms Howard QC, for the Defendant, was that it was sufficient for any of the claims within the proceedings to be a competition claim, such that the proceedings were "brought … in respect of" an infringement decision or an alleged infringement.

25. On that interpretation of s. 47A(2), however, as long as the particulars of claim included a single cause of action in relation to an infringement decision or alleged infringement of the competition rules, the claim could be filed in the Tribunal even if the majority of the causes of action pleaded in the claim were completely unrelated to any issue of competition law, such as contractual or tort claims, or allegations of patent infringement, provided only that the relief sought was of a type specified in s. 47A(3) of the 1998 Act (i.e. damages or other monetary sum or – for proceedings in England and Wales or Northern Ireland – an injunction). Furthermore, as Mr Kennedy pointed out, a claim could initially be brought that encompassed both competition and non-competition causes of

action, but the competition law issues might then fall away at some stage down the line (e.g. following a strike out or settlement), leaving only the non-competition issues to be decided by the Tribunal.

26. The Defendant's primary position as to the interpretation of s. 47A would thus subvert of the role of the Tribunal as a specialist tribunal, and would undermine the difference between the Tribunal and the High Court. As Birss J noted in *Unwired Planet International v Huawei Technologies* [2016] EWHC 958 (Pat) at [44]:

> "The CAT is a specialist tribunal for dealing with infringements of competition law. Nothing in the 2002 Act or the 2015 Regulations demonstrates any intention by the legislator to broaden the scope of its responsibilities beyond that."

27. It would be entirely inconsistent with that principle for the Tribunal to have *prima facie* jurisdiction to deal with any monetary claim whatsoever, provided that it was brought alongside or pleaded by way of a counterclaim to a competition claim.

28. As a matter of statutory construction it would also be very odd for the opening sub paragraph of s. 47A to indicate that the section defines the type of claims that may be brought before the Tribunal, only for the key identifying feature in sub paragraph (2), namely the competition law aspect of the proceedings, to be interpreted as not in any way qualifying the type of claim that may be brought, but simply meaning that some part of the proceedings, no matter how small, has to relate to an infringement or alleged infringement of the competition rules.

29. Having considered the matter further and realistically acknowledging those problems with the Defendant's primary position, Ms Howard made two alternative submissions. The first was that the proceedings must at least be mainly or predominantly competition law proceedings. The second was that the present debt claim pleaded by way of counterclaim could be regarded as a claim in respect of an alleged infringement of the competition rules, given the nexus between the underlying facts for the debt claim and those relevant to the competition claim.

30. I do not accept either of those submissions. Starting with the suggestion that the proceedings should be predominantly or mainly related to a competition infringement, there is, as Ms Howard fairly acknowledged, no such qualification in the language of s. 47A. Moreover, as Mr Kennedy pointed out, any such requirement would be unworkably vague and uncertain.

31. As to the second suggestion, it seems to me that the debt claim, no matter how closely related it is on the facts to the competition claim, is clearly not a claim in respect of an alleged infringement of the competition rules. It is a straightforward claim in debt for products supplied which have not been paid for.

32. For completeness, I note that in *Sportradar v Football Dataco* [2020] CAT 25 it was common ground that counterclaims in tort and breach of contract fell outside the jurisdiction of the Tribunal. While that meant that the Tribunal did not formally have to decide the issue of jurisdiction, the Tribunal equally did not disagree with the position of the parties that the counterclaims would need to be brought in the High Court. Indeed, at [54] of the judgment the President of the Tribunal provided a strong indication that the Tribunal endorsed that analysis.

33. For those reasons, while I cannot strike out the counterclaim in this hearing, I do not dismiss the Claimant's application for strike out. The Defendant will need to decide, on that basis, whether to maintain its counterclaim, in which case the strike out application will have to be listed for determination by a full Tribunal, or withdraw the counterclaim and bring it as a separate County Court action.

34. In the latter case, as discussed with the parties during the course of counsel's oral submissions, if no competition law defence is raised to the debt claim, then the County Court claim can be determined there and then without transfer in any way. If a competition law defence is raised, then the County Court claim will need to be transferred to the Chancery Division, and it would then be sensible for that to be assigned to me, and the claim can then be case managed bearing in mind the present proceedings. That may require a transfer of any competition law issues to the Tribunal, as in the *Sportradar* case, but it might

not be necessary to transfer anything at all if the claim can simply be stayed to await the outcome of these Tribunal proceedings.

35. Mr Kennedy also accepts that, in the event that the Claimant is successful in its competition claim in circumstances where there is an outstanding debt claim by the Defendant pending (wherever that is), the execution of the Tribunal's judgment might need to be stayed in order that there may be effective set-off of the Defendant's liability against any debt that is found to be owed by the Claimant.

36. While this is not an entirely straightforward procedural outcome, it is apparent from cases such as *Sportradar* that this type of procedural issue may be an inevitable consequence of the separate and distinct jurisdictions of the Tribunal and the High Court.

The Hon Mrs Justice Bacon
Chairwoman

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

Date: 10 June 2021