The First Subsidy Control Challenge in the Competition Appeal Tribunal

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Competition Appeal Tribunal; Costs; Duty of candour; Local authorities' powers and duties; Privilege; Subsidy control; Waste collection

Introduction

The first claim for judicial review brought before the Competition Appeal Tribunal (CAT) under s.70 of the Subsidy Control Act 2022 (the 2022 Act) has been heard and now dismissed by the CAT. The unsuccessful applicant was refused permission to appeal by the CAT and has not sought permission to appeal from the Court of Appeal of England and Wales.[1] The proceedings are therefore at an end.

The purpose of this article is to identify and explain some issues and considerations which arose during the hearing of the application, and which may be of more general interest for those involved in future claims under the 2022 Act.

Section 70 of the 2022 Act provides for the review of subsidy decisions to ensure they are consistent with the subsidy control requirements in Pt 2 of the 2022 Act. Section 70(1) states: "An interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal for a review of the decision". Section 70(5) provides that: "In determining the application, the Tribunal must apply the same principles as would be applied—(a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review; (b) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court". The Tribunal's substantive jurisdiction therefore allows a court to determine whether a subsidy decision is consistent with the subsidy control requirements under the 2022 Act, rather than public law more generally. In doing so, a court is to apply the same grounds as would apply in any other judicial review before the relevant national court[2] in the fields of state aid and subsidy control.[3]

The application for judicial review was brought by The Durham Company Ltd, trading as Max Recycle (Max Recycle) against the respondent, Durham County Council (the Council). It arose out of a long running dispute concerning the charges levied by the Council for the collection and disposal of commercial waste from business and other non-household premises. Max Recycle is a private provider of commercial waste collection services which claimed that its charges were being undercut because the Council cross-subsidised its commercial waste collection services from other council resources.

Factual background to the dispute

The Council is the unitary authority for the non-metropolitan county of Durham.[4] The Council is the sole waste collection authority (WCA) and the waste disposal authority (WDA) for County Durham under Pt II the Environmental Protection Act 1990 (the 1990 Act). The Council, as a WCA, has a duty pursuant to s.45(1)(a) of 1990 Act to arrange for the collection of household waste in County Durham, subject to limited exceptions (the Household Waste Collection Duty).[5]

Pursuant to s.45(3) of the 1990 Act, the Council, as a WCA, may not charge for the collection of household waste save in the limited circumstances where it is permitted to do so by regulations. In those cases, it is not obliged to arrange for the collection of the waste unless requested to do so.

The Council, as a WCA, has a duty pursuant to s.45(1)(b) of the 1990 Act to arrange for the collection of commercial waste "if requested by the occupier of premises in its area to collect any commercial waste from the premises" (the Commercial Waste Collection Duty). Pursuant to s.45(4) of the 1990 Act, the Council, as a WCA, must recover a "reasonable charge" for the

* Brick Court Chambers, London. This note sets out the personal views only of the authors, who were leading and junior counsel for the respondent council before the CAT. Junior counsel also appeared for the Council in an interlocutory appeal on cost capping to the Court of Appeal, discussed further below.

[1] This was an English case. An appeal in a Scottish case lies to the Inner House of the Court of Session. A Northern Irish case goes to the Court of Appeal in Northern Ireland.

[2] The Administrative Court, part of the King's Bench Division of the High Court in England and Wales; the Outer House of the Court of Session in Scotland; the Judicial Review Court, part of the King's Bench Division of the High Court in Northern Ireland.

[3] Earlier state aid judicial review case law is discussed by A. Robertson, M. Lester and S. Love, in "Judicial Review in the United Kingdom of State Aid Decisions" [2007] E.C.L.R. 585. See also *R. (on the application of British Sugar Plc) v Secretary of State for International Trade* [2022] EWHC 393 (Admin), Foxton J, a judicial review brought in relation to the state aid provisions applicable under the Northern Ireland Protocol ([59]–[133]), and to the subsidy control provisions of the UK/EU Trade and Cooperation Agreement ([134]–[151]), the latter applying review prior to the entry into force of the 2022 Act; see also *R. (on the application of British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) (a subsequent case under the interim regime) at [206]–[207]; currently on appeal (CA-2023-000696; CA-2023-000698). The interim subsidy control regime prior to the entry into force of the 2022 Act is explained in A. Robertson, "The New UK Subsidy Control Regime" [2021] E.C.L.R. 230.

[4] County Durham excludes the boroughs of Darlington, Hartlepool and Stockton-On-Tees which are in the ceremonial county of Durham. For the record, leading counsel traces his maternal roots to the pit village of Oxhill, Stanley, County Durham.

[5] The terms "household waste", "commercial waste" and "industrial waste" are used as defined in s.75 of the 1990 Act and regulations made under it.

collection and disposal of commercial and industrial waste unless it considers it inappropriate to do so in the case of commercial waste.[6]

The Council, as a WCA, has elected to perform the collection of both household and commercial waste itself and not to outsource the same. The Council, as a WCA, does not exercise its industrial waste collection power save where it is able to collect industrial waste itself using its existing facilities. The Council collects commercial waste from approximately 3,200 business premises in County Durham. It uses the same vehicles and the same employees to collect (i) all household waste and (ii) the majority (78%) of commercial waste collected by it. A minority (22%) of commercial waste is collected by the Council using multi-purpose vehicles, which are also used for other functions (other than the collection of household waste).

If the Council, as a WDA, were to arrange for the separate disposal of household waste and commercial waste collected, it would incur higher disposal charges per tonne of (commercial) waste disposed than the disposal charges it currently incurs per tonne of (household and commercial) waste disposed. The Council sets the charges for collection and disposal of commercial waste with a view to recovering its costs of doing so across all persons from whom it collects commercial waste and does so. The Council's actual costs of its waste collection and disposal activities that are not recovered through charges (for commercial waste collection or permitted charges for household waste collection) are met from public funds.

The Council sets the level of its commercial waste collection charges on an annual basis. It last did so on 13 March 2023. The Council does not charge VAT to persons from whom waste is collected pursuant to its Commercial Waste Collection Duty.

Licensed private contractors, such as Max Recycle, can of course collect and dispose of commercial waste on terms negotiated between them and their customers. A private commercial waste collection business must charge its customers VAT as required.

Previous proceedings before the English courts and European Commission

Max Recycle had previously unsuccessfully challenged the Council's statutory exemption from VAT in judicial review proceedings against Her Majesty's Revenue & Customs (HMRC).[7]

Having failed in that challenge, Max Recycle then made a complaint to the European Commission (the Commission) on 30 July 2018 alleging that the Council had contravened arts 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) (concerning state aid) in the manner in which it collected commercial waste. At a meeting with the Council on 11 September 2019, the Commission advised the Council to take certain steps with respect to its charges for commercial waste collection services so as to reduce the risk of a successful challenge under arts 107–108 of the TFEU.

On 22 January 2020, Max Recycle issued proceedings in the Chancery Division alleging a breach by the Council of art.108(3) of the TFEU and claiming *Francovich* damages and declaratory relief.

The Council adopted its current approach to charging for commercial waste collection services on 18 March 2020. The Council's approach to charging has not changed since that time.

On 24 November 2020, the Commission notified Max Recycle of its provisional view that the Council had not breached EU State aid law.

On 25 November 2020, HHJ Keyser QC granted the Council reverse summary judgment in the proceedings in the Chancery Division, thus striking out the claim.[8]

On 1 February 2022, the Court of Appeal (Coulson & Arnold LJJ; Edis LJ dissenting) dismissed Max Recycle's appeal against the decision of HHJ Keyser QC.[9]

On 25 March 2022, following further representations by Max Recycle, the Commission closed its case. Max Recycle has not sought annulment of that case closure decision in the EU General Court.

On 20 July 2022, Max Recycle's solicitors wrote a letter before action to the Council's solicitors, contending that the Council would contravene the Subsidy Control Act 2022 (the 2022 Act) once it entered into force.

On 16 December 2022, the Council's solicitors responded to a letter before action. They indicated that the Council would resist any application brought by Max Recycle under s.70 of the 2022 Act after 4 January 2023 (being the date on which the substantive provisions of the 2022 Act came into force).

Max Recycle's application to the CAT[10]

Max Recycle filed its claim for judicial review at the CAT on 3 February 2023.

A case management conference took place (remotely) on 17 February 2023, at which the President of the CAT made a directions order. As well as setting a deadline for requests by third parties to intervene, the order also directed the Council to serve its defence by 22 March 2023 as to the three issues identified by the Tribunal for the main hearing. These were (i) whether the decision under review was capable in law of amounting to a "decision" within the meaning of s.70 of the 2022 Act; (ii) whether the decision under review constituted a

[6] The Council has a power to arrange for the collection of industrial waste where requested to do so: see s.45(2) of the 1990 Act.
[7] *R. (on the application of Durham Co (t/a Max Recycle)) v Revenue and Customs Commissioners* [2016] UKUT 417 (TCC); [2017] S.T.C. 264, Warren J; application for permission to appeal to the Court of Appeal dismissed by Nugee J [2018] UKUT 188 (TCC); [2018] B.T.C. 517.
[8] *Durham Co Ltd (t/a Max Recycle) v Durham CC* [2020] EWHC 3200 (Ch).
[9] *Durham Co Ltd v Durham CC* [2022] EWCA Civ 66; [2023] E.C.C. 5.
[10] Part of this summary of the Tribunal's reasons is based on the unofficial summary helpfully prepared by the CAT Registry published on the CAT website.

"subsidy" within the meaning of s.70 of the 2022 Act; and (iii) whether the subsidy control principles, to which s.12 of the 2022 Act refers, were satisfied.

On the 17 March 2023, the President made an order rejecting an intervention request.

On the 21 March 2023, the President made an order regarding cost capping. This order was the subject of an appeal to the Court of Appeal for which the President gave permission on 6 April 2023. That appeal was heard by the Court of Appeal on 6 June 2023 and judgment handed down on 26 June 2023 setting aside the President's costs capping order: [2023] EWCA Civ 729; [2023] Costs L.R. 1177. This is discussed in more detail below.

The hearing of the application took place on 3 and 4 July 2023. Of the three issues that the Council had been directed to address in its defence, only the first two—(i) whether there was a decision for the purposes of s.70 and (ii) if so, was it a subsidy as defined in the 2022 Act—were the subject of written and oral argument. The third issue, compliance with the subsidy control principles referred to by s.12 of the 2022 Act, did not arise for argument. This was because the Council accepted in its defence that it had not addressed its mind to compliance with those principles, its position being that the principles were inapplicable as there was neither a decision nor a subsidy, and that the subsidy control requirements could only apply there was both a decision and a subsidy.

The Tribunal issued its judgment on 27 July 2023.[11] Although Max Recycle succeeded on the first issue by establishing that there had been a decision taken by the Council falling within s.70, the Council succeeded on the second issue in its argument that the decision was not as a subsidy within the meaning of the 2022 Act. In summary, the Tribunal reached this conclusion on the second issue for the following reasons. Max Recycle contended that the Council was cross-subsidising its commercial waste collection operations using its household waste collection operations. The essence of the point was that this alleged cross-subsidy permitted the Council to charge individual businesses at less than the rate that they would or could have charged had they run the commercial waste collection operation as an altogether separate, self-standing and independent operation.

The Tribunal noted that it was not possible for Max Recycle to identify any person, other than the Council itself, involved in the provision of waste collection or waste disposal services. As a result, the giver of the subsidy was the same person as the person on whom the alleged subsidy was conferred. Accordingly, there was no "subsidy" within the meaning of s.2 of the 2022 Act: (i) the advantage did not involve subsidisation, because the "economic benefit" simply circulated within one entity; (ii) the natural reading of the definitions of "public authority" and "enterprise" meant that when a person has been designated a "public authority" that person cannot also be an enterprise in relation to the advantage under consideration; and (iii) the language of the 2022 Act supported the Tribunal's conclusion. The Tribunal noted that there is no use in the 2022 Act of the term "undertaking" used in state aid law under arts 107–108 of the TFEU, and so there was a clear difference between the EU and UK regimes.

The Tribunal would have rejected the claim for other reasons, including because the Council's commercial waste collection operations were not carried on for an economic purpose, and were not therefore an "enterprise" by virtue of s.7(2) of the 2022 Act. This provision contains an exemption from the scope of the subsidy control regime which has no legislative counterpart in either EU State aid law or the Trade and Cooperation Agreement.

Max Recycle's claim was therefore dismissed. The Tribunal refused Max Recycle's application for permission to appeal and ruled on costs by Reasoned Order on 11 October 2023.

Procedural considerations in the CAT proceedings

Although s.70 proceedings can be described as a statutory judicial review, there are a number of considerations which arise differently in the CAT from those which arise in typical commercial judicial review proceedings before courts under CPR Pt 54 in England and Wales and the equivalent procedures in Scotland[12] and Northern Ireland.[13]

Time limits

There is a short one-month time limit for making an application, rather shorter than the normal three month time limit in typical judicial review cases. This time limit starts running from the relevant date as specified in r.98A of the Competition Appeal Rules[14] as inserted by s.71 of the 2022 Act. The relevant date varies according to the circumstances, and failure to meet the time limit will normally be fatal to a claim. Rule 98A(7) provides that "The Tribunal may not extend the time limits provided for in this rule unless it is satisfied that the circumstances are exceptional." Where however (i) there is a duty to make an entry in respect of a subsidy or scheme on the subsidy database under s.33 of the 2022 Act, and (ii) that is not done, the time limit under r.98A will not begin to run.[15] That does not, however, mean that a claimant can delay indefinitely in bringing a challenge. The CAT has power to refuse relief in its discretion on grounds of undue

[11] *Durham Co Ltd (t/a Max Recycle) v Durham CC* [2023] CAT 50.
[12] Chapter 58, Court of Session Rules.
[13] Order 53, Rules of the Court of Judicature (NI) 1980.
[14] The Competition Appeal Tribunal Rules 2015 (SI 2015/1648).
[15] This is a feature of r.98A which is easily overlooked. The one month time limit runs from the relevant date. Where there is no post-award referral, the earliest time can begin to run is the transparency date (see r.98A(2)(a) and (c)). The transparency date never occurs see r.98A(4)(b)(i) if there is duty to make an entry on the subsidy database and that duty is not discharged.

delay or detriment to good administration: see s.72(8) of the 2022 Act.[16] Accordingly, even where time under r.98A does not begin to run, applicants will be well-advised to act promptly.

Permission

Unlike judicial review before a court in any of the UK jurisdictions, there is no initial requirement that the CAT is required to grant permission for the claim to proceed.[17] In place of permission, the CAT in the *Durham* case held a first case management conference remotely on 17 February 2023, i.e. two weeks after the claim was filed. At this CMC the President of the CAT (sitting alone) made a number of procedural directions. It is in principle possible for a respondent to invite the CAT to strike out an application under r.11 of the CAT Rules. The grounds for doing so are, however, relatively narrow, and do not merit strike out simply because the test for permission would not be met. Such applications are likely to be rare.

Forum

The President directed that the forum for the application in the *Durham* case was England and Wales. This direction had limited relevance as judicial review in the three UK jurisdictions operates under the same substantive jurisprudence.[18] However, it is relevant when it comes to permission to appeal as the forum dictates whether any appeal lies to the Court of Appeal in England and Wales, the Inner House of the Court of Session or the Court of Appeal in Northern Ireland: see s.76 of the 2022 Act.[19]

Interventions

The President set a deadline for applications for permission to intervene. In the event, one commercial waste recycling business applied to intervene in support of Max Recycle, but this application was rejected in a ruling given on 17 March 2023 for failure to demonstrate a sufficient interest in the outcome of the main application, beyond a general commercial interest in a positive outcome for Max Recycle. This is a further illustration of the Tribunal's more recent inclination not readily to accede to applications for permission to intervene.[20]

Directions to the substantive hearing

As explained above, the President directed the Council to serve its defence by 22 March 2023 as to the three issues identified by the Tribunal for the main hearing. The Council was directed to serve with the defence such "disclosure as is necessary to discharge the [Council's] duty of candour as regards" the three issues identified by the Tribunal for the main hearing.

The parties were also given liberty to make short written submissions as to the need for any other questions other than three issues identified by the Tribunal to be determine, further disclosure, witness statements and expert reports. In the event, an application for permission to adduce further evidence of fact by Max Recycle was refused by the Tribunal on 10 May 2023.

The President directed the parties to serve an agreed statement of facts, also to identify areas of disagreement. This was served on 21 April 2023.

Skeleton arguments were exchanged on 23 June 2023.

The hearing took place before a three-member Tribunal, i.e. not a single judge as would occur in typical judicial reviews before the courts of the various jurisdictions in the UK. Sitting with the President, who is also a High Court judge, were Lord Young, who is a judge of the Outer House of the Court of Session, and Professor David Ulph CBE, who is now Professor Emeritus in the School of Economics and Finance at the University of St Andrews.

Judgment was handed down on 27 July 2023. As the proceedings are now at an end, there is to be no further judicial recycling of Max Recycle's grievances; it will have to seek to pursue its case outside of the courts and tribunals.

Final comments

On any view, this was a remarkably quick resolution of this quite legally and factually complex dispute under the 2022 Act. From the application being made to refusal of permission to appeal in a substantively heavy case took little more than eight months, and indeed the final judgment was handed down less than six months after the application was first made. The authors are not aware of any other jurisdiction in Europe in which a case of this complex legal and factual nature would have been dealt with anything like as so thoroughly and with such expedition.[21]

Three particular points of practice arose during the course of the proceedings which appear to the authors to be of potentially wider significance for future subsidy control litigation in the CAT.

[16] See also *British Gas Trading* [2023] EWHC 737 (Admin) at [134]–[159] (considering the equivalent position under s.31(6) of the Senior Courts Act 1981).

[17] CPR r.54.4 (E&W); Rules of the Court of Session r.58.7 (Scotland, as amended with effect from September 2015—prior to then permission was not formally required in Scotland); O.53, r.3(1) of the Rules of the Court of Judicature (Northern Ireland) 1980.

[18] There are certain differences between the relief available in England and Wales and Northern Ireland (see s.72, and s.72(9) which applies only in England and Wales) on the one hand and Scotland on the other: see s.73.

[19] See for example *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36; 2009 S.L.T. 10, in which a merger judicial review was heard at the CAT in London, applying Scots substantive public law with a right of further appeal to the Inner House of the Court of Session in Edinburgh. No appeal from the rejection of the claim was sought in that case and by consent no order for expenses (i.e. costs) was made.

[20] See, for example, *JD Sports Fashion Plc v Competition and Markets Authority (Frasers Group intervention)* [2020] CAT 17.

[21] Thus the Administrative Court of England and Wales (exercising of course a much broader jurisdiction) currently deals with about 70% of hearings within nine months of permission being granted, which is still commendably quick.

Duty of candour

First is an evidential issue relevant to anyone advising parties engaged in judicial review about disclosure, whether before the CAT or more generally in courts with a common law judicial review jurisdiction. The duty of candour requires a respondent to judicial review proceedings to make full and frank disclosure of all material facts to the applicant and the Tribunal. The existence of the duty means that compulsory disclosure of documents is rarely necessary or appropriate in judicial review proceedings.

In the *Durham* case, the Council made very substantial efforts to comply with the duty of candour, including by filing detailed witness evidence and disclosing the key contemporaneous documents. In a footnote to its judgment, the Tribunal stated the Council had contravened the duty of candour by making redactions for legal professional privilege to two documents. In the authors' (not disinterested) view, this footnote should be treated with caution: the requirements of the duty of candour was not the subject of oral argument at the hearing, and the redactions to one of the two documents was not queried by the Tribunal in the hearing.

Privilege

Second, those advising respondents should be aware of the novel approach to privilege redactions adopted by the Tribunal. The Tribunal held that privilege redactions could not be made unless the redacted text was "severable" from the remainder of the document. This is contrary to recent High Court authority, which is not referred to in the ruling.[22] The Tribunal also held that privilege redactions could not be made because of the absence of the involvement of a lawyer. However, the dissemination by a non-lawyer of confidential legal advice, even in summary form, is privileged.[23]

The Tribunal also stated that privilege could not be claimed over the redacted parts because the dominant purpose of the documents was "not to give advice, but to record a decision and its reasons". This is not the law where legal advice is referred to in otherwise unprivileged documents.[24] If it were right, there would be very serious implications for judicial review claims generally: it would mean that privilege could not be claimed over sections of Ministerial submissions quoting privileged legal advice given the dominant purpose of the submission is to make a recommendation for a decision. Public authorities will wish to give careful thought to how legal advice is recorded and disseminated in light of the judgment.

Costs

The third point of practice concerns costs before the Tribunal. The President decided following the CMC to cap Max Recycle's recoverable costs at £50,000, and the Council's at £60,000, despite (i) holding that the starting point was that costs should follow the event; (ii) having not sought costs budgets from either party, and (iii) recognising at the CMC that a reasonable and proportionate amount of costs to incur in defending the application might be in the region of £250,000. The cost caps the President imposed were thus "limiting caps", fixed irrespective of the actual likely level of the parties' reasonable and proportionate costs. The Council appealed against these caps.

While noting that the President's aim of seeking to ensure costs did not become excessive in applications under s.70 was a laudable one, the Court of Appeal held that the Tribunal had no power to impose limiting costs caps, which it described as "artificial and arbitrary", in the absence of authorisation by Tribunal Rules or legislation. The risk of excessive costs being incurred should be addressed either through detailed assessment at the end of proceedings, or costs budgeting at an early stage by analogy with CPR r.3.19.

The Court of Appeal's judgment indicates that a difference approach to costs capping will apply in the CAT compared with judicial reviews before the courts, where limiting costs caps may be imposed to facilitate access to justice under the *Corner House* principles.[25] It also has the effect that, unlike claims for judicial review before the courts, costs budgeting by analogy with CPR r.3.19 may occur at an early stage in future applications under s.70 of the 2022 Act before the CAT.

At the end of proceedings, the Tribunal made an issues-based costs order reflecting the fact that while the Council was the overall winner, Max Recycle had succeeded on the distinct issue of whether there was a subsidy. The Council was awarded 55% of its reasonable and proportionate costs by the Tribunal, in the agreed sum of £100,000. This might be said to illustrate the potential injustice (and burden on public funds) of capping costs in the manner the President had initially sought.

[22] *Al Sadeq v Dechert LLP* [2023] EWHC 795 (KB); [2023] 1 W.L.R. 3749 at [224] (Murray J).
[23] *R. (on the application of Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35; [2020] Q.B. 1027 at [45] (Hickinbottom LJ).
[24] Hollander, *Documentary Evidence*, 14th edn (London: Sweet & Maxwell, 2021), at para.16-02.
[25] *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600; codified in the Criminal Justice and Courts Act 2015 ss.88–90 in England and Wales. The principles are applied in Scotland and Northern Ireland.