IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1577/12/13/23

BETWEEN:

THE DURHAM COMPANY LIMITED (TRADING AS MAX RECYCLE)

Appellant

- v -

DURHAM COUNTY COUNCIL

Respondent

REASONED ORDER

UPON reading the Appellant's Notice of Appeal dated 2 February 2023

AND UPON reading the Respondent's Defence dated 22 March 2023

AND UPON reading the witness statements of Messrs Phillip Oliver Sherratt and Ian Peter Hoult dated 22 March 2023

AND UPON reading the Appellant's application for permission to amend its Notice of Appeal and its Particulars of the Decision dated 21 April 2023 (the "**Amendment Application**")

AND UPON reading the Appellant's application for permission to adduce further factual evidence dated 21 April 2023 (the "**Evidence Application**")

AND UPON considering the written submissions of the Appellant and the Respondent dated 28 April 2023 and 4 May 2023 respectively regarding the Amendment and Evidence Applications

IT IS ORDERED THAT:

1. The Appellant be granted permission to amend its Notice of Appeal and Particulars of the Decision as set out in the Amendment Application, with the exception of the proposed amendment to add new paragraph 45(e1).

2. The Appellant be refused permission to adduce further factual evidence as requested in the Evidence Application.

3. The Respondent shall have permission, if so advised, to make any consequential amendments to its Defence. Such amended Defence shall be filed by 5pm on 3 June 2023.

4. The Appellant shall pay the Respondent's costs of and occasioned by its Amendment and Evidence Applications. These costs shall not be subject to the costs cap imposed by the Tribunal's judgment [2023] CAT 14. The mode of assessment of these costs is to be determined and ordered after the Court of Appeal has handed down its decision in the Respondent's appeal against the Tribunal's judgment [2023] CAT 14.

REASONS

The Applications

1. The Appellant has applied for permission to amend its Notice of Appeal, dated 2 February 2023, and its Particulars of the Decision, dated 24 February 2023. It has also applied for permission to serve further factual evidence on the following issues: (i) the practice of weight-based charging for trade/commercial waste collection and disposal services; (ii) the maximum weight capacity of various sizes of waste bins; and (iii) the maximum weight of various sizes of bins lifted by other trade/commercial waste collection providers.

2. The Appellant submits that the proposed amendments to its Notice of Appeal fall into three categories:

   (a) **Category One:** amendments which update facts set out in the Notice of Appeal in light of further information and disclosure provided with the Defence.

(b) **Category Two**: amendments which introduce an alternative plea as to the decision under appeal.

(c) **Category Three:** amendments which introduce an alternative plea as to the nature of the economic advantage conferred by the Respondent on its own arrangements for collecting trade/commercial waste (the "**45(e1) Amendment**"). The Appellant contends that the Respondent provides itself with assets, employees and disposal contracts at below market value, due to flaws in the tool used to estimate the weight of waste collected, which in turn is used to estimate the costs associated with the collection of that waste.

3. The Appellant's application to serve further factual evidence relates to the 45(e1) Amendment. It seeks to adduce evidence regarding the reliability of the apportionment tool used by the Respondent to estimate the weight of trade/commercial waste bins lifted. The Appellant submits this evidence will support its alternative case of economic advantage.

4. The Respondent only opposes the 45(e1) Amendment and the Evidence Application.

The Parties' Submissions on the Applications

5. The Appellant submits that the 45(e1) Amendment is made in light of evidence adduced for the first time in the Respondent's Defence. That evidence relates to the Respondent's assumptions regarding the weight of trade/commercial waste bins lifted. The Appellant argues that the Defence and the accompanying witness statements explain for the first time the Respondent's tool for estimating average weights of trade/commercial waste bins lifted – the "WRAP apportionment" tool. The Appellant disputes the accuracy and reliability of that tool for bin weight. The Appellant argues that in circumstances where the Respondent purports to set its charges for collection of trade/commercial waste to recover all of the actual costs of that collection, and those calculations are based on a weight-based apportionment tool, failure to assess that weight accurately will lead to a subsidy. It submits that use of the WRAP apportionment tool may lead to an under-estimation of the weight of trade/commercial waste collected, and therefore under-recovery of costs, leading to an economic advantage.

6. The Appellant argues that, given the timing by the Respondent of the provision of information about the WRAP tool, it is unreasonable to expect it to set out a fully detailed and evidenced case on its flaws. It argues that there was an asymmetry of information before service of the Defence and consideration of the matters revealed therein now need proper consideration.

7. The Respondent submits that the 45(e1) Amendment is not coherent or properly particularised. No particulars are given in support of the allegation that the WRAP tool is inaccurate. The Respondent further submits that the Appellant's Evidence Application provides no indication as to the substance of the 45(e1) Amendment, including no indication as to the alleged flaws in the WRAP tool. Further, the 45(e1) Amendment does not contain any criticism of the Respondent's specific approach to apportionment, which does not exclusively use the WRAP tool. It submits that the 45(e1) Amendment is merely vague criticism of the WRAP tool.

8. The Respondent notes that the WRAP tool is a published document which is freely available and was annexed to the Defence. The Appellant ought to be able to identify concisely what it is alleged to be inaccurate. It also notes that mere inaccuracy in the WRAP tool would not by itself mean an economic advantage had been conferred.

9. The Respondent argues that if the Tribunal agrees with its submissions regarding the 45(e1) Amendment, the justification for the Evidence Application falls away.

Analysis

10. I agree with the Respondent that the Appellant's case regarding the 45(e1) Amendment is insufficiently particularised. The 45(e1) Amendment states only that the WRAP apportionment tool is an "*inaccurate proxy*" to estimate the weight of trade/commercial waste collected. No indication is given as to the substance of the case.

11. Further, even on its own terms, the proposed amendment is insufficient to amount to an allegation of a subsidy decision having been made. The 45(e1) Amendment alleges inaccuracies and flaws in the WRAP apportionment tool, which the Appellant submits lead to below-market payments for the Respondent's assets, employees and disposal

contracts, which are used by the Respondent's trade/commercial waste collection arrangements. The 45(e1) Amendment contains no description of a decision. An error or calculation inaccuracy does not amount to a decision.

12. Accordingly, the 45(e1) Amendment is refused.

13. I also refuse the Evidence Application. It is parasitic to the 45(e1) Amendment and without that amendment serves no purpose.

Costs

14. The Respondent seeks its costs occasioned by the Appellant's Amendment Application. It submits that some amendments involve withdrawing allegations, whilst others, whilst pleaded in the alternative, seek to remedy deficiencies in the pleadings.

15. The Appellant submits that the amendments flow directly from matters raised for the first time in the Defence. It argues that these were matters that occurred after commencement of proceedings, or which should have been more fully explained in pre-action correspondence. Other amendments are insubstantial. Costs of the amendment, it submits, should follow the event.

16. The Tribunal enjoys a wide discretion in the award of costs – see Rule 104(2) to (4) of the Tribunal Rules 2015. The standard order is that an amending party should pay the costs occasioned by an amendment where an amendment is not resisted. Where an amendment is resisted, costs are normally awarded to the "winner". The Respondent has not resisted the proposed amendments in Categories One and Two. It has successfully resisted the proposed amendment in Category Three. For these reasons, the Respondent should recover its costs occasioned by the Amendment Application, and costs occasioned by the Evidence Application.

17. In my judgment dated 21 March 2023 I imposed a costs cap of £60,000 on the Respondent as from 17 February 2023. The costs occasioned by the Amendment and Evidence Applications should not be subject to this costs cap. At the date of that judgment, an application for an amendment of pleadings was not envisaged.

Sir Marcus Smith Made: 10 May 2023

President of the Competition Appeal Tribunal Drawn: 10 May 2023