



**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No.: 1577/12/13/23

BETWEEN:—

**THE DURHAM COMPANY LIMITED**  
**(trading as MAX RECYCLE)**

Applicant

- v -

**DURHAM COUNTY COUNCIL**

Respondent

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**REASONED ORDER (PERMISSION TO APPEAL AND COSTS)**

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**UPON** the Applicant's application dated 2 February 2023 for review pursuant to section 70 of the Subsidy Control Act 2022 (the "**Application**")

**AND UPON** the Tribunal issuing its judgment on the Application on 27 July 2023 ([2023] CAT 50) (the "**Judgment**")

**AND UPON** the President directing that the parties file submissions addressing matters consequential to the Judgment

**AND UPON** reading the application dated 8 September 2023 by the Applicant for permission to appeal the Judgment

**AND UPON** reading the submissions and witness evidence of the Applicant and the Respondent dated 8 and 13 September 2023 regarding costs

**IT IS ORDERED THAT:**

1. The Applicant's application for permission to appeal is refused.

2. The Applicant shall pay 55% of the Respondent's costs (as per the Respondent's summary of costs dated 8 September 2023) (the "**Costs**"), such Costs to be subject to detailed assessment and assessed on the standard basis by a costs officer of the Senior Courts of England and Wales if not agreed.
3. Pursuant to Rule 104(2) the Applicant shall, within 28 days of this Order, pay the Respondent the sum of **£95,719.14**, being the Costs in the amount of £232,046.41, reduced by 25% as the assumed (but without prejudice) outcome of the detailed assessment to £174,034.81, and further reduced by 45% to reflect paragraph 2 of this order.

## **REASONS**

### Permission to Appeal

1. The Applicant seeks permission to appeal on the following grounds:
  - (a) **Ground One:** The Tribunal erred in law in holding that a subsidy as defined in section 2 of the Subsidy Control Act 2022 (the "**2022 Act**") cannot move within a single person which acts as both a public authority and an enterprise with respect to the same financial assistance.
  - (b) **Ground Two:** The Tribunal erred in fact and law to the extent that it held that the Respondent was not engaged in an economic activity when carrying out commercial waste collection.
  - (c) **Ground Three:** The Tribunal erred in fact and law in holding that no economic advantage accrued to the Respondent for the purpose of section 2(1)(b) of the 2022 Act.
  - (d) **Ground Four:** The Tribunal erred in law to the extent it found that the Council's statutory duties prevented it from charging customers of the commercial waste business so as to recover the full economic costs of that business.

2. The Applicant also submitted that the novelty of the issues considered in the Judgment provide a compelling reason to grant permission to appeal. This is the first application brought under section 70 of the 2022 Act, and the first occasion on which any English Court or Tribunal has been required to consider the question of a cross-subsidy.
3. The test for permission to appeal under CPR 52.6(1) requires that the Tribunal considers the appeal would have a real prospect of success, or there is some other compelling reason for the appeal to be heard.
4. We are not satisfied that any of the Applicant's grounds of appeal have a real prospect of success.
5. Ground 1 seeks to challenge the Tribunal's construction of the 2022 Act as to whether a person that is a public authority can grant itself a subsidy, according to sections 2 and 7 of the 2022 Act. This is not a case where the Tribunal was in any doubt about the interpretation of the 2022 Act.
6. In any case, even if the Applicant were to succeed on Ground 1, its application would fail for the reasons given in the alternative finding at paragraphs 40 to 44 of the Judgment.
7. Grounds 2 to 4 seek to challenge the Tribunal's alternative finding that even if the Defendant could have given a "subsidy", no such subsidy arises in this case. These grounds do not give rise to a real prospect of success on appeal, and contain a series of mischaracterisations of the Tribunal's findings, and include a number of issues of challenge which raise no point of law.
8. Grounds 2 to 4 mount several impermissible challenges to the Tribunal's factual findings in the Judgment. The Tribunal reviewed the Application on the basis of judicial review principles, as it was required to do by the 2022 Act. Accordingly, the Judgment does not engage in factual investigation nor engage in the resolution of questions of fact as would occur at a trial. In this case, there was no significant disclosure, and no witnesses were heard on either side. On a judicial review basis, the answer to the question as to whether a subsidy arose in this case was clear.

9. The Applicant's grounds are cumulative. Given we do not consider any of them to have a realistic prospect of success, the appeal is bound to fail.
10. We have considered whether there is any other compelling reason why permission to appeal should be granted in this case. In other circumstances, guidance from the Court of Appeal might be of assistance on the construction of the new subsidy control regime under the 2022 Act and its relationship to EU state aid law (i.e. the subject-matter of Ground 1). We consider the 2022 Act to be clear, and the point to be obscured by the fact that the Applicant advanced but lost on other grounds (i.e. the subject-matter of Grounds 2 to 4). This is not a case where the Tribunal should usurp the Court of Appeal's ability to act as its own gatekeeper. There will be other subsidy control cases raising the point of the scope of the 2022 Act more cleanly, and there may be a compelling reason to give permission to appeal in relation to the issues raised by Ground 1 in another case.

#### Costs

11. Rule 104(2) of the Competition Appeal Tribunal Rules SI 2015/1648 states that the Tribunal may make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
12. Rule 104(4) sets out a number of factors which may be taken into account when making a costs order, including the conduct of the parties in relation to the proceedings, and whether a party has succeeded on part of its case, even if that party has not been wholly successful. Rule 104(5) sets out that the Tribunal may make a summary assessment of costs or direct that costs be dealt with by detailed assessment.
13. The starting point in applications for review under section 70 of the 2022 Act is that costs follow the event. The Respondent is clearly the winner in terms of the overall outcome of these proceedings.
14. It is common ground between the Tribunal and the parties that an issues-based order is appropriate, to reflect that there were two clear and distinct issues before the Tribunal – whether there had been a “subsidy” (the “**subsidy issue**”), and whether there had been

a “decision” (the “**decision issue**”) – with the Respondent the winner in relation to the former and the Applicant in relation to the latter (see *CMA v Flynn Pharma* [2022] UKSC 14, paragraph 140).

15. This Tribunal indicated in the Judgment that it was minded to make an issues-based costs order on a summary basis, netted off to 100% such that the appropriate order would be no order as to costs.
16. Having read the parties’ submissions, the Tribunal considers that an issues-based costs order remains the correct approach. However, for the reasons set out below, it considers that a deduction of the Respondent’s costs, without a further order that the Respondent pay the Applicant’s costs of the decision issue, is the more appropriate course.
17. The Respondent submitted that a deduction of 10% should be made from its costs, using a broad-axe percentage based estimation of the likely additional costs incurred as a result of the Respondent’s arguments relating to the decision issue. The Applicant submitted that the Tribunal should make an order netting off the Applicant’s costs of the decision issue and the Respondent’s costs of the subsidy issue, and that the most sensible net position was no order as to costs.
18. The Applicant submitted it was appropriate to order the Respondent to pay the Applicant’s costs of the decision issue, on the grounds that the Respondent pursued the decision issue unreasonably (citing *Pigot v Environment Agency* [2020] EWHC 1444 (Ch) and *R (Viridor Waste Management) v Revenue and Customs Commissioners* [2016] 4 WLR 165). We do not accept that submission. The Respondent’s arguments in relation to the decision issue were reasonable ones, even if they were unsuccessful. In such circumstances, we find that a deduction only of the Respondent’s costs should be made.
19. The Applicant also submitted that a 40% reduction should be made in the Respondent’s allowable costs for the subsidy issue on the basis that the Judgment decided that issue on the strength of an argument that was not initially advanced by the Respondent. This was the first challenge brought under section 70 of the 2022 Act. It is unsurprising that the parties – and the Tribunal – were required to review the provisions of that Act on

the basis of first principles, and all parties were given that latitude by the Tribunal given that this was (as stated) the first case heard under the 2022 Act.

20. As noted in the Judgment, the decision issue occupied a considerable amount of space in the written submissions and time at the hearing. However, the decision issue only arose from mid-May 2023, when the Applicant amended its pleadings to include the decision issue. Balancing the fact that a significant portion of the Respondent's costs were incurred in preparation for and attendance at the hearing, where the decision issue was clearly important and time-consuming, and the late stage at which the decision issue arose in proceedings, we apply a 45% discount to the Respondent's costs.

**Sir Marcus Smith**  
President

**Professor David Ulph, CBE**

**Lord Young, KC**

Made: 11 October 2023

Drawn: 11 October 2023