

JERSEY / JUDGMENT

Classic Herd Limited -v- Jersey Milk Marketing Board

[2014] JRC 127 (10 June 2014)

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judgment

the master:

Introduction

1. This is an application by the Jersey Milk Marketing Board ("the defendant") to strike out the entirety of the plaintiff's claim on the ground that it is scandalous, frivolous or vexatious or otherwise an abuse of process of the court further to Royal Court Rules 2004 6/13. The defendant brings its application because the defendant alleges that the plaintiff's claim is for breach of statutory duty and was brought outside the applicable limitation period for such claims namely three years and is therefore time barred. Despite the apparent simplicity of the defendant's application, the application gives rise to a number of

issues.

The test on a strike out application 2. In relation to whether I have power to strike out a claim that is prescribed, there was no real disagreement between the parties that I have power to do so. The commentary at paragraph 18/19/11 of the Rules of the Supreme Court ("the White Book") 1999 Edition notes that where a defendant pleads that allegations are prescribed "he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of process of the Court". 3. The Royal Court in *Re Wooley*

- [1991] JLR Note 11C, noted that where the limitation period had "clearly expired" a defendant could strike out a claim, not on the basis that there was no reasonable cause of action, but on the ground that the claim was frivolous and vexatious and an abuse of process of the court. 4. The commentary at paragraph 18/19/18 of the White Book under the heading 'abuse of process of the Court' noted that in a proper case the court can summarily prevent its machinery being used as a means of vexatious and oppression in the process of litigation. This principle was echoed by the Court of Appeal in *Minories v Arya Holdings*

[1994] JLR 149 . At page 165 Southwell J A held:- "where a prescriptive defence is raised and it is entirely clear on the pleadings and the other material before the Jersey Court that the prescriptive defence will in any event succeed, an action may be struck out as being an abuse of process." 5. I therefore agree with the parties that I have power to strike out a claim that is clearly prescribed either because such a claim is frivolous or vexatious or because it is an abuse of process. It would be a semantic exercise to resolve any distinction between the different ways in which the jurisdiction to strike out a claim that is time barred is formulated and I do not propose to do so. The status of the defendant 6. The plaintiff's claim arises out of the defendant's status as a body established by statute pursuant to the Milk Marketing Scheme (Approval) (Jersey) Act 1954 ("the Scheme"). The Scheme was made pursuant to the authority of the Agricultural Marketing (Jersey) Law 1953 ("the 1953 Law"). 7. Article 2(1) of the 1953 Law provides as follows:- "A scheme for regulating the marketing or the marketing and production of any agricultural produce may be submitted to the Minister by any persons (hereafter referred to as the "promoters") who satisfy the Minister that they are substantially representative of the producers of that produce:" 8. Article 2(6) provides as follows:- "If the Minister, after making any such modifications as aforesaid, is satisfied that the scheme submitted will conduce to the more efficient production and marketing of the regulated produce, the Minister shall submit the scheme to the States, and the States may, by Act, approve or reject the scheme and, if approved by the States, the scheme shall come into force on the date prescribed by the Act." 9. Article 4 of the 1953 Law provides for registration of producers under any scheme approved by the States. Article 8 sets out a number of requirements for running a scheme including that no sale of any regulated produce shall be made by any producer who is not registered or exempt from registration (see Article 8(1)(a)). It is also a criminal offence to sell produce in breach of any scheme (see Article 23(1)). 10. Paragraphs 29 to 34 of the Scheme provide as follows:- "PROHIBITION OF SALES BY UNREGISTERED PRODUCERS Subject to the provisions of the Law with regard to existing contracts and to the provisions of this Part of this Scheme, a producer who is not a registered producer shall not sell any regulated produce either in Jersey or elsewhere. GENERAL POWER TO REGULATE MARKETING Subject to the provisions of paragraph 28, the Board may regulate sales of any regulated produce by any registered producer by determining by prescriptive resolution all or any of the following matters, that is to say, the quality of such produce which may be sold, and the prices at, below or above which, and the terms on which, such produce may be sold by registered producers: Provided that the Board shall at no time determine the price at, below or above which any regulated produce may be sold without having first invited the opinion of the Minister and given consideration to that opinion as communicated to the Board within 28 days of such invitation. The Board may regulate the manner in which any regulated produce is to be graded, marked, stored, adapted or transported, for sale by or on behalf of registered producers. Subject to the provisions of paragraph 28, the Board may by prescriptive resolution require registered producers to sell any regulated produce, or such kind or description thereof as may from time to time be determined by the Board, only to or through the agency of the Board or to or through

the agency of such persons as may be authorized by the Board for that purpose and, in such a case, the Board may determine the times at which, the days on which and the places at which delivery of such produce shall be made by registered producers or any of them. If any registered producer contravenes any requirement made by the Board under paragraph 30, 31 or 32, the Board shall, subject to the provisions of paragraph 41, by resolution impose upon and recover from the registered producer such monetary penalty as the Board thinks just. MISCELLANEOUS POWERS The Board may -

- (1) buy any regulated produce;
 - (2) produce from milk any products or by-products;
 - (3) sell, grade, pack, store, adapt for sale, insure, advertise and transport any regulated produce;
 - (4) buy and sell or let for hire to any registered producer, anything required, and to be utilized by the registered producer wholly or mainly, for the production, adaptation for sale or sale of any regulated produce;
 - (5) co-operate with any other person in doing any of the things which the Board is empowered to do by virtue of the foregoing provisions of this paragraph;
 - (6) encourage, promote or conduct schemes of co-operation among producers of any regulated produce, or research and education in connection with the production and marketing of any regulated produce."
11. There are also powers to impose penalties on producers who act in breach of the Scheme (see Paragraph 41). Factual Background up to 2005 12. In January 1955 the defendant passed a resolution requiring all milk produced by registered producers to be sold to the defendant. It was common ground between the parties that the effect of the Scheme and the 1955 resolution was to require a producer to register and to sell milk exclusively to the defendant. 13. In June 2001 a second resolution was passed setting up a licensing scheme dealing with matters such as milk collection, sampling, testing procedures, payments to producers and the welfare of livestock. 14. Around the same time a quota system was introduced by the defendant limiting the amount of milk products that each producer was permitted to produce. Milk products produced up to the quota were guaranteed to be purchased by the defendant at a particular price. Any products produced in excess of the quota were purchased only at a lower price of 10p per litre. 15. In May 2003 the plaintiff informed the defendant that it wished to sell products directly to consumers as an independent business and sought an exemption from the Scheme to do so. This led to discussions between the parties. The Competition (Jersey) Law 2005 16. On 1 st May, 2005, the Competition (Jersey) Law 2005 ("the Competition Law") came into force apart from Parts 2 and 3. Parts 2 and 3 came into force on 1st November, 2005. The Competition Law is described as "A Law to promote competition in the supply of goods and services in Jersey". 17. The Competition Regulatory Authority (Jersey) Law 2001 had established the Jersey Competition Regulatory Authority ("JCRA") which body is now known as the Channel Islands Competition Regulatory Authority ("CICRA"). However, it was the Competition Law that gave

the JCRA and the CICRA substantive powers to address issues of competition. 18. For the purposes of this application the relevant provisions are found in Articles 8, 16 and 51 which provide as follows:- "8 Prohibition on hindering competition

- (1) Except as otherwise provided by this Part, an undertaking must not make an arrangement with one or more other undertakings that has the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey.
- (2) ...
- (3) An arrangement prohibited by paragraph (1) is in this Law referred to as an anti-competitive arrangement.
- (4) An arrangement is void to the extent that it is, or contains or is tainted by an anti-competitive arrangement.
- (5) The fact that an arrangement may have no legal effect, does not bind the parties to it or could not be enforced by action in any court or by any other means does not prevent the arrangement being prohibited by paragraph (1).
- (6) An arrangement may be prohibited by paragraph (1) although not every party to it is an undertaking so long as at least 2 are. 16 Abuse of dominant market position
- (1) Except as otherwise provided by this Part, any abuse by one or more undertakings of a dominant position in trade for any goods or services in Jersey or in any part of Jersey is prohibited.
- (2)
- (3) For the purpose of this Article an abuse of a dominant position may consist of a failure or refusal to do something. 51 Civil action
- (1) A person has a duty not to breach Article 8(1), 16(1) or 20(1), or a direction.
- (2) A breach of that duty is actionable by an aggrieved person.
- (3) The Court may grant such relief as it considers appropriate, including awarding punitive or exemplary damages.
- (4) If a breach of duty mentioned in paragraph (1) is committed by a commercial entity with the consent or connivance of, or is attributable to neglect on the part of an officer of the entity, that officer is also liable in the same manner as the entity for the breach of duty.
- (5) The Authority or an aggrieved person may seek from the Court -
 - (a) an injunction to restrain any actual or apprehended breach of the duty mentioned in paragraph (1); or

- (b) a declaration that a person has breached Article 8(1), 16(1) or 20(1), or a direction.
- (6) If the Authority or an aggrieved person has reasonable grounds for suspecting that there will be a breach of the duty mentioned in paragraph (1) by a commercial entity the Authority or person may seek an injunction from the Court to restrain any action by an officer of the entity that could cause the breach of duty by the entity.
- (7) The Court may grant an injunction under this Article on such terms as it considers appropriate.
- (8) This Article has effect whether or not the Authority or aggrieved person has exercised or is proposing to exercise any other powers under this Law.
- (9) In this Article, "aggrieved person" means a person who has suffered or is likely to suffer economic loss or damage as a result of an actual or apprehended breach of Article 8(1), 16(1) or 20(1), or of a direction." Factual background from 2005 onwards 19. By May 2005 the plaintiff and the defendant's negotiations about the plaintiff selling its products direct to consumers had resulted in heads of terms described in the order of justice as the "2005 Heads". It is clear from the pleadings that in 2005 there were meetings between the parties and the then head of the JCRA, Mr. Charles Webb, about the 2005 Heads and possibly about the Scheme more generally. Who was present at such meetings and what was said is not a matter that can be resolved for the purposes of this application. What I do note is that the plaintiff alleges that the 2005 Heads are not binding on either party. The defendant alleges they are binding. The plaintiff further alleges that the 2005 Heads were void as a result of Article 8(4) of the Competition Law set out above. The defendant denies this allegation. 20. Discussions between the plaintiff and the defendant continued in 2006 and 2007. The central thrust of those discussions was the plaintiff's desire to sell milk and milk products independently i.e. outside the Scheme. 21. In 2007 the parties reached further heads of terms (referred to in the order of justice as the 2007 Heads) which were intended to replace the 2005 Heads. The 2007 Heads were conditional upon the plaintiff's and the defendant's agreement on a sum of money that one of them would have to pay to the other in respect of the operation of the Scheme prior to July 2007. No such agreement was ever concluded and therefore the plaintiff now alleges and seeks a declaration that the 2007 Heads have no effect. The defendant in its answer specifically admits this allegation at paragraph 32 and as a consequence denies the necessity of the court needing to give any declaration to that effect. 22. In its order of justice the plaintiff seeks three heads of damage as follows:- (i) £26,000 being the amount that the plaintiff claims to have lost by not being allowed by the defendant to sell surplus milk to other retailers between November 2006 and July 2007. Paragraph 46 of the order of justice pleads as follows: "In 2008, the defendant in purported reliance on its powers under the Scheme and in particular the First Resolution, refused to permit the plaintiff to sell surplus milk to other retailers, despite it having agreed in the 2007 Heads that the plaintiff could sell liquid milk to whosoever it wished commencing from July 2007." Paragraph 50 pleads:- "the plaintiff seeks a declaration that Articles 31, 32, 33 and 34 of the Scheme are incompatible with the Competition Law, further and/or alternatively the

plaintiff seeks a declaration pursuant to Article 51(5) of Part 9 of the Competition Law that the defendant has breached Article 8(1) and/or Article 16(1) of the Competition Law." (ii) The second head of damage the plaintiff seeks is £11,052.00 being the amount the plaintiff says was wrongfully deducted by the defendant from amounts it paid to the plaintiff during 2006 and 2007. The amount of deductions and the fact they were made is admitted by the defendant in its answer. The deductions were made from the price paid for milk sold by the plaintiff to the defendant. The plaintiff argues that these deductions were an abuse by the defendant of its powers under the Scheme. The defendant denies this allegation and contends that the deduction was made on the basis of independent advice. (iii) The third amount claimed is the sum of £52,500 being losses suffered by the plaintiff by the plaintiff not being permitted by the defendant to sell its quota under the Scheme. The plaintiff argues it was required to produce a quota of 350,000 litres but was not permitted by the defendant to sell to others and the defendant would not buy back the quota pursuant to the Scheme. The defendant denies the allegation and argues that by this time the plaintiff had resigned as a registered producer under the Scheme. 23. Advocate Robinson on behalf of the defendant informed me that the plaintiff had ceased to be part of the Scheme since resigning in July 2007. Although the terms of the Scheme have not been altered since they were approved in 1954, the reality is that the plaintiff is no longer subject to the Scheme and appears not to have been so since it resigned in July 2007. The plaintiff is therefore free to pursue its own activities and sell milk and milk related products direct to consumers. I also note that on the defendant's website it now describes itself as a "voluntary cooperative". 24. The matters pleaded in the order of justice were first raised in correspondence by Messrs Voisin in a letter dated 5 th February, 2009, on behalf of the plaintiff. Messrs Appleby responded on 22 nd June, 2009. There was a further exchange of correspondence in October and November 2011 and a letter before action sent by Voisins in June 2013 with proceedings being issued on 29 th July, 2013. The defendant's answer was filed on the 11 th October, 2013. Paragraph 4 of the answer expressly raised a limitation defence that both the matters complained of and any losses suffered had occurred more than three years prior to the claim being issued and therefore the whole of the claim was time barred. 25. Paragraph 3 of the reply in response to the limitation defence is as follows:- "it is denied that the plaintiff's claim is time barred either to the extent that it relates to any losses suffered more than three years prior to the date of issue of the claim or at all. It is also denied that the prescription period for bringing tortious actions runs from the date when the plaintiff suffered the alleged loss. The prescription period for actions founded on tort begins to run when all the necessary prerequisites for a cause of action to accrue are present." 26. Paragraph 7 of the reply pleads- "Accordingly, it is a necessary prerequisite for the activation of a suit under Article 51 of the Competition Law that the Court declare void the aspects of the Agricultural Marketing Law and the Scheme and the defendant's actions taken pursuant thereto as pleaded in the order of justice. Until such time as the Court has made the declarations sought in the order of justice, the prescription period in respect of an action in damages under Article 51 of the Competition Law cannot, as a matter of law, have begun to run. Accordingly, far from being time barred, the plaintiff's claims for damages as pleaded in the order of justice are not yet

even subject to the effluxion of any prescriptive period applicable to them." 27. The relief sought by the plaintiff in its order of justice is as follows:- "WHEREFORE the plaintiff prays that after the proof of these facts that are alleged herein the Court might order the defendant to pay the plaintiff: 1. Damages to be fully assessed; 2. Interest on item 1 above for such a rate as the Court might deem just; 3. The costs of this action. WHEREFORE the plaintiff prays that after the proof of these facts that are alleged herein the Court declare the following that: 4. The 2005 Heads are of no effect; 5. By the 2005 Heads the defendant has breached Article 8(1) and/or Article 16(1) of the Competition Law; 6. The defendant's decision to delay consent to the plaintiff to sell its milk to third parties is a breach of Article 8(1) and/or Article 16(1) of the Competition Law; 7. The 2007 Heads are of no effect; 8. The defendant's refusal to allow the plaintiff to take up the Buy Back Scheme was a breach of Article 16(1) of the Competition Law; 9. The defendant's refusal to allow the plaintiff to sell its quota to third parties was a breach of Article (8(1) and/or Article 16(1) of the Competition Law; and that 10. Articles 31, 32, 33 and 34 of the Scheme are incompatible with the Competition Law." The arguments 28. The defendant's argument is that the claims brought by the plaintiff are allegations of breaches of a statutory duty and therefore the claim is out of time having been brought outside the three year prescription period. The defendant further argues that a claim for breach of statutory duty is a claim in tort. Article 2(1) of the Law Reform (Miscellaneous Provisions)(Jersey) Law 1960 provides that three years is the applicable limitation period from the date that a cause of action accrues. The particular statutory duties the defendant is alleged to have breached are Articles 8 and 16 of the Competition Law. As a matter of English Law, (which it was argued reflected the law of Jersey), claims under the equivalent of the Competition Law fall within the category of a claim for breach of statutory duty. I was referred to *Garden Cottage Foods Limited v Milk Marketing Board*

[1984] AC 13 at page 141 where Lord Diplock stated:- "A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty." Article 86 is the relevant provision of EU Law upon which Article 16 of the Competition Law is based. 29. The defendant also drew my attention to Article 51 of the Competition Law, which sets out that an aggrieved person, as defined in paragraph 51(9), may action a person for breach of duty. Such a claim can include an allegation of a breach of Article 8(1) or Article 16(1) of the Competition Law. The definition of an aggrieved person covers someone who has suffered or is likely to suffer economic loss or damage as a result of an actual or apprehended breach of Articles 8(1) or 16(1). 30. The defendant therefore contends that any cause of action the plaintiff may have come into existence immediately upon a breach of Articles 8 or 16 by the defendant where such a breach caused or was likely to cause loss or damage to the plaintiff. For limitation purposes time starts to run from this point and nothing more is required. 31. The plaintiff in response

contends that, because the declaration sought by it relates to the public law functions of the defendant, until the plaintiff had obtained relief as a matter of public law the plaintiff has no claim for damages. The plaintiff's argument is that the grant of public law relief must necessarily pre-date any prospective relief granted by private law. The plaintiff further argues that a declaration setting aside the public law functions of the defendant had to predate any application made on private law grounds. Accordingly time had not started to run at all as no such declaration had been made by the Court. 32. As an alternative submission, which was raised during the course of argument but not in its skeleton, the plaintiff argued that its claim was brought in contract because the arrangement between the plaintiff and the defendant was contractual in nature and therefore the relevant prescription period was ten years rather than three years. 33. In response to the plaintiff's submissions, the defendant argued that the plaintiff's primary submission was inconsistent with the express language of Article 51. It was clear from reading Articles 51(1) and 51(9) together that any alleged breaches became actionable as soon they either caused actual loss to a plaintiff or at least where a plaintiff was likely to suffer economic loss or damage. The defendant contended in particular that there was no need for the Court to make a declaration for a cause of action to be constituted in respect of any relevant loss that the plaintiff claimed to have suffered. 34. The defendant further argued that the granting of a declaration was simply one of the remedies available to the Court. The remedies could be all or any of an award of damages, an injunction or a declaration. A declaration was not a prerequisite to an award of damages under Article 51. In addition it was circular for the plaintiff to argue that a declaration was required in advance of any other relief where such a declaration was one of the remedies provided for by Article 51 itself. 35. The defendant further submitted, as a matter of English and European Law upon which the Competition Law was closely based, that there is no requirement to obtain any declaration whether from the European Commission or from any national court before a cause of action comes into being. 36. I was firstly referred to the case of *An Bord Bainne Co-operative Ltd (Irish Dairy Board) v Milk Marketing Board* [1984] 2 C. M. L. R. 584. The action brought by the Irish Dairy Board sought an injunction seeking to prevent the Milk Marketing Board, an English statutory corporation, from differentiating the price at which they sold milk. Damages were also claimed. The basis of the claim was that the Milk Marketing Board had acted contrary to certain regulations of the European Commission on the selling of milk and also had abused its dominant position contrary to Article 86 of the Treaty of Rome. The language of Article 86 is reflected in Article 16 of the Competition Law. 37. Paragraph 15 of the judgment stated as follows:- "Against this background we can express our reasons for dismissing the appeal in a very few words. The Irish Dairy Board's claim for damages admittedly based upon alleged private law rights whether or not it is also based on public law rights. If it can make good its case on the facts and the private law, the court will have no discretion whether or not to grant relief. The Order 53 procedure is wholly inappropriate to any non-discretionary claim and the prosecution of such a claim by the procedure of an action is in no way an abuse, or as we prefer to style it 'a misuse', of the process of the court. It is a

completely proper use of that process. The claim for an injunction does indeed enable the court to exercise a discretion, but only as to the choice of remedy, i.e. damages or injunction, not as to granting any remedy at all. Although the plaintiffs would, if necessary, have contended that there are no public law issues, we assume for present purposes that Neill J. was right to reject this contention. However, we can see no way in which they can be severed from the private law issues and, if they can, we do not think that they should be. As it was put in argument, the public and private law issues were not even collateral one to another. They are inextricably mixed-'homogenised' is the term which springs to mind in the context of the subject matter of the dispute." 38. Secondly I was referred to *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*

- [1992] 21 A. C. 6. In that case Dr Roy sued for payment of an allowance withheld by the defendant on the basis that Dr Roy had failed to devote the required amount of time to acting as general practitioner. One of the issues before the Court was whether a litigant could to a public law act or decision and so should have been brought by judicial review. The House of Lords held that a litigant could enforce such a right by ordinary action. Lord Bridge at page 628H stated as follows:- "It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstances that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more that it can prevent him from setting up his private law right in proceedings brought against him." Lord Lowry at page 650F-G stated:- "The existence of any dispute as to entitlement means that he would be alleging a breach of his private law rights for a failure by the committee to perform their public duty. If the committee's argument prevails, the doctor must in all these cases go by judicial review, even when the facts are not clear. I scarcely think that this can be the right answer." Decision 39. The arguments raised by the parties raise a number of issues which I will deal with in turn. 40. Firstly, it is necessary to consider the effects of the Scheme. The relevant powers of the defendant contained in Paragraphs 30 to 34 of the Scheme, in summary, gave it power to regulate sales of milk and milk products. At least until 2007, anyone who was not registered could not sell any regulated produce under the Scheme whether in Jersey or elsewhere. The defendant's board also had a power to fine contained in paragraph 41. I therefore agree with the plaintiff that the defendant for the purposes of the present application was at all material times a body exercising public law functions. 41. Secondly, I need to consider the effect of the Competition Law. What this creates are rights which any person may exercise to challenge undertakings that make an arrangement with other undertakings that hinders competition (Article 8) or undertakings who abuse a dominant position (Article 16). A person includes a firm or company (see the Interpretation (Jersey) Law 1954). 42. An undertaking for the purposes of the Competition

Law is defined as a person who is carrying on a business and includes an association whether or not incorporated. The plaintiff argues that the defendant falls within this definition. The defendant argues that it is not an "undertaking" under the terms of the Competition Law when operating, in the matter complained of by the plaintiff, in a regulatory capacity. I note that Article 4 of the Competition Law provides that the statute extends to the States or "a body created by an act of the States" insofar as such body is "carrying on a business". The definition of 'business' includes any economic activity, trade or profession whether or not carried on for profit - see Article 1 of the Competition Law. For the purposes of this application it is arguable that the defendant falls within the scope of the Competition Law and in making my decision I have proceeded on the assumption that it does so, without making any finding to that effect. 43. I have also reached the view that any claim which pleads a breach of the Competition Law is a private law claim not a public law claim. The rights under the Competition Law can be invoked by any person if they allege a breach of Articles 8 or 16. The complaint might be dealt by referring the matter to the CICRA with that body then exercising its powers. However, a complaint can also be brought before the courts. Article 51 expressly recognises the right to action a breach of Articles 8 or 16 as long as the plaintiff falls within the definition of an aggrieved person. The action can be brought against any entity, public or private, that falls within the scope of the Competition Law and the definition of carrying on a business. The plaintiff's claim is therefore a mixture as it invokes a private right namely an allegation of breaches of the Competition Law in respect of a body exercising public law functions namely the defendant. The position under Jersey Law is therefore no different from the position of English Law and the extract from the Garden Cottage case and the quotation of Lord Diplock I have referred to above. 44. The view I have reached is consistent with the Royal Court (Competition) Rules 2005 . Under these rules where an allegation of a breach of Article 8 or 16 of the Completion Law is made (as well as other matters not relevant to this application), the CICRA has to be notified of such proceedings within two days of the order of justice being issued and may apply to be joined as a party to the proceedings. This did not occur in this case. The rules also require the CICRA to be notified if an allegation of a breach of Articles 8 or 16 is raised in an answer or other pleading in response to an order of justice. If the CICRA elects to take part in the proceedings it becomes a party and directions are given on the same basis as directions can be given to any other party to proceedings. There is no special treatment or different approach simply because the CICRA has become a party to a claim between two litigants. 45. I also regard this case as one where public law and private law issues cannot be severed and, as in the Irish Dairy Board case, they are inextricably mixed. The plaintiff alleges that the defendant as a public body, in passing resolutions requiring milk be sold through the defendant, has acted in breach of two private law rights, namely Articles 8 and 16 of the Competition Law. Just like Dr Roy in *Roy v Kensington and Chelsea* , the plaintiff has asserted an entitlement to a subsisting right in private law which right involves the examination in part of a public law issue. However the need for such an examination cannot prevent the plaintiff from seeking to establish his right by way of action commenced by way of order of justice.

Rather, subject to this application, consideration of the defendant's actions and their basis in law is part of the legal issues and factual matrix that a trial court would have to consider to decide whether the plaintiff's claim were established. 46. However, to establish such a private law right does not need a declaration to be sought in advance of any other step or as a pre-cursor to time starting to run for the purposes of limitation. Firstly, I consider it is impossible in this case to separate any private law aspects from public law aspects of the plaintiff's claim. Secondly, if I am wrong in this view, it is certainly impracticable to do so. Any such attempt would increase the complexity of the dispute and cost. There is also the danger of a court considering the same factual issues twice and possibly reaching inconsistent findings. Thirdly, Advocate Hoy's contentions are inconsistent with the language of Article 51 itself. The power to grant a declaration is simply one of the remedies available to the court. It is not a pre-cursor to any other relief being granted. Fourthly, no authority was produced to me by Advocate Hoy in support of his contention that a declaration is necessary as a pre-requisite to time starting to run or before the court granting any other relief. 47. In reaching this view I recognise that there may be cases when the actions of a public body are challenged on a basis which requires an application for judicial review. As an example, if the plaintiff sought to challenge an exercise of powers vested in the defendant because the action was either outside the defendant's powers or was irrational or perverse, to apply a classic judicial review test, such proceedings should not be commenced by way of order of justice. However, the possibility of a judicial review application against the defendant does not mean the plaintiff is not entitled to claim damages for breach of duty by invoking the Competition Law for the reasons I have set out above. It may be, in determining whether or not damages are payable or other relief might be granted, that the court has to review the defendant's exercise of its powers in a manner that could overlap with an approach taken on a judicial review application. That does not mean that a determination of the public law aspects of a case has to be heard in advance of determination of private law issues. It also does not remove a private law right of action recognised by the Competition Law. 48. In my view a plaintiff, wishing to allege a breach of the Competition Law against another entity, which happens to be a public body and which arguably falls within the remit of the Competition Law, may do so by an action commenced by an order of justice. All the allegations whether they are public or private law nature will be resolved by the court following the normal procedures applicable to any action commenced before it. 49. In light of the above I now turn to consider whether the plaintiff's claims are prescribed as the defendant argues. Insofar as the claims are claims in tort, I agree with the defendant that any claim in tort is prescribed because the matters complained about occurred, at the latest by the end of 2007, and the proceedings were commenced long after three years had elapsed. There is also in my view no question here of prescription being suspended. The plaintiff was able to formulate its claims, albeit in a slightly different manner in correspondence sent to the defendant, by a letter dated 5 th February, 2009, from Messrs Voisin & Co. The allegations made in that letter are essentially the same as those pleaded in the order of justice. Proceedings were only issued in July 2013 nearly four and a half years later. However, if

the plaintiff's claims are claims in contract then these claims are not prescribed because the applicable limitation period for claims of breach of contract is ten years from the date of the breach. 50. I now turn to consider whether the plaintiff's claims are claims for breach of statutory duty or claims for breach of contract as Advocate Hoy contended. Firstly, I need to consider whether a claim for breach of statutory duty is a claim in tort. In *JFSC v Black*

[2002] JLR 443 , Southwell J. A., at paragraph 20, in giving the judgment of the Court defined a tort as follows:- "The essentials of a right of action in tort, and therefore of an action "founded on tort" for the purposes of art. 2(1) of the 1960 Law, were considered by me when delivering the judgment of the Court of Appeal in *Arya Holdings Ltd v Minorities Fin Ltd* (1). Those essentials include a duty owed to the plaintiff by the defendant otherwise than by virtue of a contract or trust, whether pursuant to Jersey common law or statute, a breach of this duty by the defendant, and actual or threatened damage caused by and flowing from the breach (which in some torts may be assumed), giving rise, accordingly, to a right of action which the plaintiff can require the court to uphold." 51. The issue of whether a breach of statutory duty can give rise to a cause of action was considered by the Royal Court in *Dobson v Public Services Committee*

[2003] JLR 446 and *Syvret v Chief Minister*

[2011] JLR 343 . In both cases the Royal Court recognised that whether a claim could be brought for breach of statutory duty depended on whether the statute, as a matter of construction, conferred a private right of action either generally or on individuals falling within a class of persons to whom the duty was owed. Article 51 of the Competition Law, as I have noted above, clearly recognises the right to bring a claim for breaches of Articles 8 and 16. Generally, such claims, having regard to the language of Article 51 will be claims for breach of duty, and therefore tortious. Therefore they will be subject to a limitation period of three years. However it is necessary to look at each of the heads of claim to consider if they are claims in tort or whether they are claims in contract, as Advocate Hoy asserts. 52. The first Head of claim is the claim for lost sales in the sum of £26,943. The allegation at the heart of this claim is that, as a result of the defendant's delay in amending the Scheme to be compatible with the Competition Law, the plaintiff was deprived of the higher return it would have received, had it been allowed to sell its surplus on a wholesale basis rather than being forced to sell to the defendant. I regard this complaint as one that directly arises out of the exercise of functions by the defendant under the Scheme. However I do not regard the Scheme as contractual. Rather it imposed a regulatory regime on the plaintiff. I regard the plaintiff's complaint under this head in essence as being that the regulatory regime created by the Scheme was a prohibition hindering competition or an abuse of a dominant position. It was therefore a direct attack on the Scheme and how its powers were exercised by the defendant. In my view therefore the complaints under this Head are for a breach of statutory duty where the applicable limitation period is three years. The sum of £26,943 is therefore prescribed and must be struck out. 53. I have

reached the same view in relation to the allegations at paragraphs 55 to 60 of the order of justice. The plaintiff's complaint here is that it was not allowed to sell 350,000 litres of milk to the defendant or by way of private sale. Paragraph 58 of the order of justice states as follows:- "The defendant's refusal to permit the proposed sale of quota as above was a breach of its duties under the Scheme as set out at paragraph 4 above and/or a breach of Article 8(1) and/or Article 16(1) of the Competition Law and the plaintiff seeks a declaration to this effect." 54. Again I regard these claims as being claims in tort relating to the operation of the Scheme where the limitation period is three years. I therefore also strike out these claims on the basis they are clearly prescribed. 55. The third aspect of the plaintiff's claim relates to charges and deductions made from the price of milk sold by the plaintiff to the defendant in the total sum of £11,052.00. 56. The view I have reached in relation to this head of claim is that it is not a claim in tort unlike the other claims which I have struck out. The complaint in summary is that the defendant has wrongfully withheld monies due to the plaintiff for milk sold by the plaintiff to the defendant. This sale in my view is a contract arising out of the Scheme as distinct from a complaint relating to how the defendant exercised its powers in relation to the Scheme. The contract is that the plaintiff sold milk to the defendant for an agreed price, part of which the price had not been paid by the defendant to the plaintiff. 57. In my view it does not matter that the plaintiff alleges that these deductions were contrary to the provisions of the Competition Law. This part of the claim is still a claim for breach of contract because the defendant has failed to pay monies, said to be due to the plaintiff, for milk sold by the plaintiff to the defendant. 58. I appreciate that in future cases a party will have to analyse carefully the nature of its relationship with a public body where it is considering an action based on a breach of provisions of the Competition Law. That is a consequence of the scope of the Competition Law which can apply to public bodies carrying on a business and which covers any type of relationship that might be anti-competitive. In some cases there will be a contract; in others not. Each case will require its own analysis of the relationship between the parties. In my view, where the relationship is a contractual one, then the limitation period is ten years where the party is seeking to set aside part of a contract or resist obligations under that contract by invoking provisions of the Competition Law. In the absence of a contractual arrangement, any claim that is otherwise brought under Article 51 of the Competition Law, is subject to a limitation period of three years because the claim is a claim in tort for breach of statutory duty. 59. Finally, I agree with Advocate Robinson that there is no basis to seek a declaration that the 2007 Heads are of no effect when this is agreed between the parties.

Conclusion

60. For the reasons set out above I therefore strike out those parts of the plaintiff's claim which relate to the claims for £26,943 and £52,500. I also strike out related declaratory relief sought insofar as it relates to these two heads of claim. I refuse to strike out the claim for £11,052.00, as being prescribed, as I regard this claim as being a claim for breach of contract

against the defendant. 61. In light of my decision I firstly invite the plaintiff when this judgment is handed down to set out how it wishes to proceed and in particular whether it wishes to amend its order of justice in light of this judgment. Secondly, given that I have struck out the vast of majority of the plaintiff's claim, I wish to be addressed on whether I should stay the plaintiff's claim, as it survives this decision pursuant to Rule 6/28 of the Royal Court Rules 2004 , to allow the parties to mediate the remaining issue in dispute. Authorities Royal Court Rules 2004. Rules of the Supreme Court 1999 Edition. Re Wooley

[1991] JLR Note 11C . Minories v Arya Holdings

[1994] JLR 149 . Milk Marketing Scheme (Approval)(Jersey) Act 1954. Agricultural Marketing (Jersey) Law 1953. Competition (Jersey) Law 2005. Competition Regulatory Authority (Jersey) Law 2001. Law Reform (Miscellaneous Provisions) (Jersey) Law 1960. Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 13. An Bord Bainne Co-operative Ltd (Irish Dairy Board) v Milk Marketing Board [1984] 2 C. M. L. R. 584. Roy v Kensington & Chelsea & Westminster Family Practitioner Committee [1992] 21 AC 6. Royal Court (Competition) Rules 2005. JFSC v Black

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