Neutral Citation Number: 2017 EWHC 766 (CH)

Case No: HC-2016-002039

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2017

Before :

MR JUSTICE NORRIS

- -

Between :

Seafood Holdings Limited	**Claimant**
- and -	
(1)My Fish Company Limited	**Defendants**
(2) Gary Apps	
(3) Benjamin Philip Coupe	
(4) Mark Ormiston	
(5) Mark Hadland	

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Christopher Cook and David Went (instructed by **Mills & Reeve LLP**) for the Claimant
Martin Budworth and Douglas Cochran (instructed by **JMW LLP**) for the Defendants

Hearing date: 2 December 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NORRIS

Mr Justice Norris :

1. Seafood Holdings Limited ("Seafood") is a national supplier of fresh and frozen fish and seafood products to (principally) hotel chains, pubs, and restaurants. One of its eight depots was based at Fleetwood. One of the key customers of the Fleetwood depot was a supermarket chain known as E H Booth & Co Ltd ("Booths"): Seafood suppled Booths with wet fish for the fish counters in store and with pre-packed Booths-branded fish. The Sales Director of Seafood, the branch manager of the Fleetwood depot and the former account manager for Booths was Gary Apps ("Mr Apps"). He parted company with Seafood with effect from 31 March 2015 under the terms of a Settlement Agreement dated 2 April 2015 ("the Agreement").

2. One of the terms of the Agreement was that Mr Apps would not without the prior written consent of Seafood solicit the custom or business of any relevant customer of Seafood for a period of three months from 31 March 2015.

3. On 9 April 2015 Mr Apps incorporated My Fish Company Limited ("My Fish") for the purpose of trading in the same line of business as Seafood. On 6 August 2015 Booths gave notice terminating the Seafood supply contract with effect from 5 September 2015. Seafood say that on 7 August 2015 Booths became a customer of My Fish for the supply of wet and prepacked fish, for which purpose My Fish took delivery of packaging and labelling machinery which must have been ordered in May 2015.

4. The other defendants are former employees of Seafood (as traders or managers connected with the Booths account) who joined Mr Apps at My Fish.

5. The establishment of a directly competing business by a former senior employee, which new business attracts customers and former employees of his own former employer, can occur without any wrongdoing. But Seafood say that the business now conducted by My Fish was arranged by the individual Defendants whilst they were still its employees and that the Defendants have acted in breach of contract or breach of fiduciary duty or as part of a conspiracy to injure Seafood by unlawful means. The Defendants contest this, and Seafood's case must be proved at trial.

6. But in addition to defending Seafood's claim My Fish and Mr Apps bring a counterclaim. The broad factual foundation for the claim is the allegation that Seafood began a campaign of pressuring numerous UK fish wholesalers and other suppliers to the industry not to supply My Fish with any products or services, and in some cases that it threatened to withdraw all of Seafood's purchases from the supplier if it did trade with My Fish. The cause of action relied upon is "causing loss by unlawful means" i.e. (a) wrongful interference by Seafood with the actions of a third party in which My Food has an economic interest and (b) an intention on the part of Seafood thereby to cause loss to My Food. The "wrongful interference" or "unlawful means" identified are (a) one common law wrong ("economic duress, being agreements made on illegitimate commercial pressure") and (b) two alleged breaches of the Competition Act 1998 ("the competition law claims").

7. First, it is alleged that Seafood's activities amounted to an abuse of a dominant position in the market (i) by the imposition of unfair trading conditions on suppliers or (ii) by making contracts with suppliers subject to acceptance of

supplemental obligations having no connection with the subject of the contract, contrary to section 18 of the 1998 Act ("the dominance claim"). The "market" relied on is the wholesale supply of wet fish and seafood in the United Kingdom to trade buyers (including retailers, such as Booths and ordinary fishmongers, restaurants and contract caterers). It is alleged that this market is worth £600 million annually, and that Seafood has a 21-25% share of the market i.e. of the selling market. It is accepted that the share is at a level below that at which a rebuttable presumption of dominance arises: but it is argued that Seafood was in a position in the market to have an appreciable influence on the conditions under which competition will develop and was able to act largely in disregard of the conditions under which competition would naturally develop.

8. Second, it is alleged that Seafood's activities involved the making of agreements having as their object the prevention, restriction or distortion of competition, contrary to section 2 of the 1998 Act ("the object infringement claim"). (The matters prohibited by section 2 of the 1998 Act are sometimes referred to as "the Chapter I prohibition"). The argument is that by its activities in relation to its suppliers Seafood is raising barriers to the entry of My Fish into the downstream (selling) market.

9. The introduction of the competition law claims into the Counterclaim has had a radical effect on the action both procedurally and substantively. Whereas the claim and the defence, and that part of the counterclaim that relies upon economic duress, involve issues of private law to be determined between two business rivals, competition law is quasi-public, having as its object the

protection of consumers (not of business competitors), so that the Court is required to look beyond the immediate interests of My Fish and consider the interests of the market which it serves: see At-the-races v BHB [2007] EWCA Civ 38 at [215]. Because of that a different procedural regime applies.

10. By this application Seafood seeks summary disposal of the competition law claims advanced by My Fish. It is said that the competition law claims ought to be struck out pursuant to CPR 3.4(2)(a) or (c) as not disclosing any reasonable grounds for bringing economic tort claim based upon them. Alternatively it is said that summary judgment ought to be given under CPR 24.2 on the grounds that My Fish has no real prospect of succeeding in its case that Seafood has committed an economic tort by reason of the competition law claims.

11. It is artificial to consider only the pleaded case (and assume it to be true) when evidence has also been adduced on either side which (if material) could either underpin an application to amend the statement of case or demonstrate that a pleaded fact cannot be established. I shall therefore focus on the application for summary judgment: but, as will immediately appear, that is not to say that the pleaded case can simply be disregarded.

12. It may be taken that I have well in mind the principles upon which the jurisdiction conferred by CPR 24 is to be exercised (and in particular to the summary of the applicable principles made by Lewison J in Easy Air [2009] EWHC 339 (Ch)). Roth J (when giving judgment in Sel-Imperial Ltd v British Standards Institution [2010] EWHC 854 (Ch)) made reference to an earlier statement of those principles by Lewison J, and then (at [16] to [18])

went on to make particular observations about their application to competition law claims in these terms:-

> "I would add, with regard in particular to competition law claims (or defences), that where the area of law is in the course of development the court should be cautious "to assume that it is beyond argument with real prospect of success that the existing case law will not be extended or modified" so as to encompass the basis of argument advanced… Moreover, it is important that competition claims are pleaded properly. To contend that a party has infringed competition law involves a serious allegation of breach of a quasi-public law, which can lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of and how that is alleged to violate the law. As Laddie J observed in BHB Enterprises v Victor Chandler International Ltd [2005] EWHC 1074 (Ch) at [43] "*These are notoriously burdensome allegations, frequently leading to extensive evidence, including expert reports from economists and accountants. The recent history of cases in which such allegations have been raised illustrates that they can lead to lengthy and expensive trials.*" Subsequent experience only reinforces the accuracy of that observation. This is not to adopt an over technical approach to pleadings. It is consistent with the overriding objective to enable the case to be dealt with expeditiously and fairly. It is only through the clear articulation of each party's position in its statement of case, with appropriate factual detail, that the other side can know what case it has to meet and what issues any experts have to address, and that the court can effectively exercise its case management powers."

13. I intend to follow that guidance. But I make clear that I do not understand it to impose some higher "survival" threshold for competition claims than that laid down in CPR 24 itself: nor, if that threshold is crossed, does it mean that the expense and burden of adjudicating upon such competition claims justify the Court saying that My Fish is not entitled to require Seafood to engage in it. Further, I understand the guidance to require My Fish in this case to plead those matters of which it ought to have knowledge, because of the former involvement of its human actors in the Seafood business or because of the

availability of expert evidence, and to do so with a degree of particularity appropriate to a case not involving some secret cartel.

14. So far as the pleaded case is concerned

(a) the market identified by My Fish is the market in which both it and Seafood sell ("the downstream market");

(b) the allegation is that Seafood occupies a dominant position in that downstream market;

(c) that dominant position is said to derive from its 21-25% share of the market and from the fact that it has only one main rival (M&J Seafoods) which itself has only an 18% share of the defined market;

(d) the activities of which My Fish complains is in the market in which both it and Seafood buy ("the upstream market");

(e) there is no allegation that Seafood occupies a dominant position in that upstream market;

(f) according to the unchallenged evidence adduced by Seafood its purchasing activities account for about 2% of the upstream market.

15. The question for decision is whether Seafood can persuade me that there is no real prospect that My Fish can bring home the competition claims by establishing these pleaded facts. As Counsel for My Fish reminded me applying the "no real prospect of success" test on an application for summary judgment can be more difficult than trying the case in its entirety: see the observations of Mummery LJ in Doncaster Pharmaceuticals Group [2006] EWCA Civ 661 at [5]. But the question has been raised and it is my duty to answer it.

16. I consider first the dominance claim. Section 18 of the 1998 Act addresses conduct on the part of an undertaking which amounts to abuse of a dominant position in a market, prohibiting it if it may affect trade within the United Kingdom. This requires a complainant:_

    (a) to identify the market;

    (b) to establish the defendant's dominant position in the UK;

    (c) to prove relevant conduct;

    (d) to establish that it may affect trade within the UK.

17. The market is clearly identified in My Fish's statement of case and does not require further comment. It is the downstream selling market.

18. As regards a "dominant position", received learning requires My Fish to establish that Seafood is in

> "a position of economic strength …. which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers there… a position [which] does not preclude some competition... but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop , and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."

That is a citation from Hoffman La Roche [1979] ECR 461 at [38] and [39].

19. The existence of a dominant position will invariably be established by expert evidence, of which there is, as yet, none. (The absence is a little surprising). But it may be assumed that any expert evidence will take into account any guidance issued by the European Commission ("EC") and by the Competition and Markets Authority ("CMA").

20. The EC has issued "Guidance on the Commission's Enforcement Priorities" in relation to abusive exclusionary conduct by dominant undertakings (OJ [2009] C54/02). Paragraph 14 says:-

> "The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations… "

21. In 2004 the predecessor of the CMA issued Guidance on "Abuse of a dominant position" which remains current. Paragraph 4.18 states:-

> "The OFT considers it unlikely that an undertaking will be individually dominant in its share of the relevant market is below 40%, although dominance could be established below that figure in other relevant factors such as the weak position of

> competitors in that market and high entry barriers provided strong evidence of dominance."

22. One example of where competitors are not in a position effectively to constrain the conduct of an undertaking which holds less than 40% of the market is where the remaining market is highly fractured and where the ratio between the market share held by the major market participant and that of its nearest rival is high. Thus in British Airways (2003) Case T-219/99 BA held only a 39.7% share of the relevant market, but its nearest rival (Virgin Airways) held but a 5.5% share, and the remaining participants even smaller shares.

23. Another is where competitors are not in a position to constrain the conduct of an undertaking is where the allegedly dominant undertaking has access to financial resources far in excess of other participants. An example of the articulation of that principle in the context of a capital intensive industry is United Brands [1978] ECR 207. In that connection it is said that Seafood has 9 depots nationwide, an annual turnover of £125 million and is part of the large Bidvest Group (which has an annual turnover of £11 billion): see paragraph 69.9 of the Counterclaim.

24. As to "conduct" section 18(2) of the 1998 Act provides:-

> "Conduct may, in particular, constitute such an abuse if it consists in (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts. "

25. As to effect upon the market, no specific effect on trade within the UK is pleaded. But the general nature of My Fish's case is that Seafood "has used its market power in such a way as to raise entry barriers" (para. 69.8 of the Counterclaim) in that the range of suppliers to which My Fish can look is restricted and it cannot obtain competitive prices. The one example pleaded is that it is alleged (though controverted in other evidence) that the access of My Fish to supplies of haddock from Jack Wright of Fleetwood was prevented and that supplies from alternative providers cost an extra £1.50 per kilo. (In Further Information provided by My Fish other instances of requests by Seafood to suppliers not to supply My Fish are pleaded, but it is not suggested in those cases that My Fish was inhibited from obtaining supplies from alternative suppliers at competitive prices).

26. In Jobserve v Netwrok Multimedia [2001] EWCA Civ 2021 Mummery LJ said (at [12]) that *in general* whether there had been an abuse of a dominant position was a complex question of mixed fact and law that should be determined at trial. But Seafood has persuaded me that on the evidence now available (and taking into account such prospective evidence, including expert, as it is appropriate to weigh in the scale) there is no real prospect of My Fish making good its case that it has abused a dominant position in the market.

27. First, the market in which Seafood is said to be "dominant" is the market for the wholesale *supply* of wetfish and seafood. But the market in which its alleged abusive conduct takes place is the market for the *purchase* of wetfish. In the market for the purchase of wetfish Seafood (with its 2% share) is by no stretch of the imagination "dominant".

28. It is not impossible for abuse to be committed by a non-dominant participant in one market which has an effect on the market in which the participant is dominant. But special circumstances would be required.

29. One example is Tetra-pak Interational SA (Case C-333/94 P). There Tetra Pak held 78% of the overall market in aseptic and non-aseptic carton packaging, seven times more than its closest competitor. Within the aseptic market it held a quasi-monopolistic 90% share, but it did not enjoy similar dominance in the non-aseptic market. But its customers in the one market were also potential customers in the other.

> "Given its almost complete domination of the aseptic markets, Tetra Pak could also count upon a favoured status of the non-aseptic markets. Thanks to its position on the former markets, it could concentrate its efforts on the latter by acting independently of the other economic operators. "

But there are plainly no such associative links relevant in the present case and none is pleaded.

30. Another example is BPB Industries (Case T-65/89). British Gypsum operated both in the plasterboard and in the building plasters markets. In the former it competed against importers of plasterboard. British Gypsum applied a system of priority deliveries of building plaster to builders' merchants who did not deal in imported plasterboard. The question was whether British Gypsum's conduct in the building plaster market (in which it was not dominant) constituted an abuse of its dominant position in the plasterboard market (in which it was). It was held that it did, because the possibilities for builders' merchants to acquire substitute building plaster was small on account of the technical characteristics of the product (which limited the possibilities of

substitution and of changing supplier, and created a position in which the builders merchant was dependent upon a particular supplier). There is no suggestion in this case that the relevant wet fish or seafood have particular characteristics which make substitutions of supply impossible.

31. In the instant case no such special circumstances are pleaded. What is said (and may be assumed to be correct on this application) is that Seafood has made it known to suppliers that if they seek to supply both Seafood and My Fish then the custom of Seafood will be reconsidered (and that one supplier has on that ground declined supply) and that this combination of events demonstrates the connection between the wholesale supply and the wetfish purchase markets.

32. In my judgment, from the facts pleaded or evidenced it is not possible to construct a real case that Seafood is able to leverage its 25% share of the supply market so as to facilitate abusive and unconstrained conduct in relation to its 2% share of the purchasing market. The fact that suppliers offer established customers one price and new customers a higher price is not of itself indicative of abuse of market dominance by the established customer.

33. Second, I do not consider that there is a real prospect of My Fish establishing that Seafood is "dominant" in any market. The expert evidence will indicate that (absent special circumstances) the general rule is that a 40% share is required. It will advert to the possibility that in certain circumstances a lower share will suffice (though at the hearing nobody could demonstrate that a 25% share has *ever* been held sufficient). The only circumstances relied on as

showing that the instant case is not within the general rule were (a) comparative shares and (b) financial strength.

34. The unchallenged evidence is that Seafood's best-placed competitor (M & J Seafoods) has a 18% share compared with Seafood's 21-25%. The ratio is virtual parity, not a multiple. It is not realistic to say that Seafood's 21-25% share gives it the power to behave to an appreciable extent independently of M & J Seafoods (with its 18% share) or to act largely in disregard of a competitive climate in which M & J Seafoods is an actor.

35. As to financial strength, it is not clear upon what basis this of itself is said to be significant. Finance does not (on the evidence) play some extraordinary role in the wetfish and seafood wholesale supply market: of course, access to working capital is often a problem for a new business, and a new business may both be more dependent on cashflow and (because of its very newness) may find it difficult to secure lengthy credit terms. But these are simply The Facts of Life: they are not a function of the presence of a "dominant" competitor in the market. But assuming that "financial strength" is relevant, on unchallenged evidence M & J Seafoods has 12 nationwide depots, is part of the Brake Group (with an annual turnover of £3.2 billion), which is itself part of the Sysco Corporation which has a global annual turnover of $50 billion. By none of these measures is Seafood arguably "dominant".

36. My Fish argued that the mere fact that Seafood acted as it did arguably demonstrated market dominance. Reliance was placed on the decision in Hilti (1987) 30.787 where the Court said at [71]-[72]:-

> "…Hilti's commercial behaviour …..is witness to its ability to act independently of, and without due regard to, either competitors or customers on the relevant markets in question… This behaviour and its economic consequences would not normally be seen where a company was facing real competitive pressure…. The freedom of action which had exercised in these markets with a disregard for other competitors and even customers such as distributors, is evidence of this dominance. By its behaviour and power derived from its position in the cartridge strip market Hilti has been able to severely limit any effective competition from independent producers of guilty compatible nails…"

A reading of the report demonstrates that the Hilti's conduct of which complaint (and which provide the context for the sentences relied on) was made was far removed anything alleged in this case.

37. In my judgment even if My Fish proved all the facts pleaded it would not demonstrate that Seafood thereby abused a dominant market position and thereby committed an unlawful act for the purposes of the economic tort. I will therefore give summary judgment for the Claimant on paragraph 69(a) of the Counterclaim.

38. But My Fish has its second competition claim, that Seafood's activities involved the making of agreements having as either their object or their effect the prevention, restriction or distortion of competition within the United Kingdom, contrary to section 2 of the 1998 Act ("the object infringement claim").

39. The relevant "agreements" are in the instant case the alleged arrangements between Seafood and its suppliers that those suppliers (identified in Response 18 of its Further Information dated 30 June 2016) would not supply My Fish, although it must be observed that such arrangements are neither pleaded with particularity nor evidenced. These are agreements made in the "upstream

market" where Seafood has a 2% share. In assessing whether there is a substantial argument that such "vertical" agreements are contrary to section 2 account must be taken of a number of factors.

40. First, such agreements are not of the type generally regarded as infringing. In the Guidance on Object Restrictions (C(2104) 4136) the Commission identified agreements of minor importance which did not appreciably restrict competition. In relation to vertical agreements (i.e. agreements between non-competitors such as suppliers and customers) the focus was on agreements which fix minimum resale prices or which impose restrictions limiting sales in particular territories or to particular customer groups i.e. obligations of that sort imposed by the supplier on his customers (rather than by the customer on his suppliers). Obligations imposed by the customer on the supplier are only addressed in paragraph 3.3 of the Guidance. (Apart from certain special agreements arising in the motor vehicle sector) this paragraph relates to restrictions imposed by a buyer of components upon the supplier of the components, restricting the supplier's right to sell them as spare parts to end users or repairers or other third party service providers. The terms of the Guidance give no grounds for thinking that the imposition of a term by a customer in a purchase agreement that "the supplier can sell to any other potential customer save X" creates a restriction "by object". All customer is saying is "You either supply him or me: the choice is yours".

41. Second, many vertical supply agreements (even of the core types) are block exempt from the Chapter I prohibition. Section 10 of the 1998 Act provides that an agreement is exempt from the Chapter I prohibition if it is exempt from

the Community prohibition by virtue of a Regulation. Commission Regulation 330/210 addresses vertical agreements. It provides in Recital (5) that

> "the benefit of the block exemption established by this Regulation should be limited to vertical agreements which it can be assumed with sufficient certainty that they satisfy the conditions of article 101(3) of the Treaty"

and it provides for a block exemption.

42. The rationale for the block exemption approach is explained in recitals (6) and (7) of the Regulation. Certain types of vertical agreements can improve economic efficiency within the distribution chain by facilitating better coordination and the optimisation of sales and investment levels. The likelihood that such efficiency enhancing effects will outweigh any anti-competitive effects depends on the degree of the market power of the parties to the agreement i.e. on the extent to which parties to a vertical agreement face competition from other suppliers whose goods may be substituted. Recital (8) then provides:-

> "It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30%, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution, and allow consumers a fair share of the resulting benefits."

43. In the operative part Article 2 of the Regulation then provides a block exemption for vertical agreements. Article 3 limits the exemption in this way:-

> "The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services on the market share held by the

> buyer does not exceed 30% of the relevant market on which purchases the contract goods or services. "

44. On the uncontroversial evidence the suppliers identified by My Fish in Response 18 of the Further Information do not represent a 30% share of the supplier market, and Seafood does not represent a 30% share of the purchasing market. So the arrangements identified by My Fish are exempt from the Chapter I prohibition.

45. My Fish argue that the block exemption does not apply if the arrangement can be categorised as imposing a severe restriction on competition and so caught by the Chapter I prohibition irrespective of the market share of the undertakings concerned. My Fish seek to categorise the arrangement as one for exclusive supply (although it is "exclusionary" rather than "exclusive" since at best its terms do not require suppliers to sell exclusively to Seafood, but only to exclude My Fish from their customer list): and then argue that this amounts to anti-competitive foreclosure of other buyers. However according to the Commission Notice giving "Guidelines on Vertical Restraints" C(2010)2365 a consideration of anti-competitive foreclosure involves analysis of both the "upstream" and "downstream markets". Thus paragraph 194 of those Guidelines states:-

> "The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to impose exclusive supply which forecloses other buyers from access to supplies. The importance of the buyer on the downstream market is however the factor which determines whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected. Negative effects may arise where the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30%. Where the market share of the buyer on the upstream market

> does not exceed 30%, significant foreclosure effects may still result, especially where the market share of the buyer on his downstream market exceeds 30% and the exclusive supply relates to a particular use of the contract products."

46. It is not, in my judgment, arguable that any such agreement as is alleged between Seafood and its suppliers not to supply My Fish falls outside the block exemption. No individual supplier has (and all relevant suppliers together do not have) a 30% share of the market in which My Fish and Seafood purchase, and Seafood does not have a 30% share of the identified downstream market.

47. Further, this is not a case in which Seafood's vertical supply agreements are part of concerted action by it and a number of its competitors. So this is a case in which the complainant will have to plead and prove the terms of the agreement, the economic and legal context of which it is part (and in particular the functioning and structure of the market identified in the Counterclaim) with a view to establishing that competition in that market is significantly weakened: see Allianz Hungaria Biztosito Case c-32/11 at [36].

48. On the pleaded case and on evidence so far adduced (and on the evidence which it may be anticipated will be given by experts who pay attention the guidance of the relevant authorities) this cannot be established even if one focusses tightly upon the anti-competitive foreclosure effects on potential entrants such as My Fish. My Fish (whose principals have an intimate knowledge of Seafood's suppliers and customers) identifies only one species of wet fish where its substitute supply is at a price higher than that payable by Seafood, and adduces no evidence that, having regard to the functioning and structure of the market for the sale of wet fish and seafood to trade buyers,

competition in that market is significantly weakened (bearing in mind that in a competition claim one is concerned with the market as a whole and not with a particular business competitor).

49. In my judgment even if My Fish proved all the facts pleaded it would not demonstrate that Seafood had made agreements with its suppliers which had as their object the prevention, restriction or distortion of competition and thereby committed an unlawful act for the purposes of the economic tort. I will therefore give summary judgment for the Claimant on paragraph 69(b) of the Counterclaim.

50. I therefore grant the relief sought by Seafood. This means that the Counterclaim proceeds without the competition claims. The effect of this is that the Competition Practice Direction no longer applies and the claim and counterclaim will proceed an ordinary commercial dispute between former employer and former employees about the establishment of a new business, and will be case-manged accordingly.

51. I will hand down its judgment in Manchester on 7 April 2017. I do not expect attendance of legal representatives. I will receive the written submissions of Seafood as to costs and its proposals for the directions in the action by 25th April 2017 and those of My Fish in response seven days thereafter (in the event that agreement on those matters is not possible).