



Neutral citation [2010] CAT 13

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1121/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

6 May 2010

Before:

VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) DURKAN HOLDINGS LIMITED
(2) DURKAN LIMITED
(3) CONCENTRA LIMITED

Appellants

- v -

THE OFFICE OF FAIR TRADING

Respondent

RULING ON COSTS AND PERMISSION TO APPEAL

1. On 28 April 2010, I handed down a ruling directing disclosure of certain documents sought by the OFT in relation to its defence of an appeal by Durkan Holdings Limited, Durkan Limited and Concentra Limited. Further details are set out in that ruling ([2010] CAT 12) and I adopt the abbreviations used therein.
2. The OFT now applies for its costs of the application for disclosure. It submits that it succeeded in every aspect of the application and that it had warned the Appellants that it would seek its costs if successful. The Appellants argue that each party should bear its own costs. Alternatively, the Appellants submit that whichever party is ultimately successful in relation to the so-called Control Issue should recover its costs of this application since the documents are said to be relevant to that issue.
3. Clearly the OFT was successful in its application in that I directed that the documents be disclosed. On the other hand, as noted by the Appellants in their submissions, as well as opposing the application as a matter of principle, they had invited the OFT in correspondence to make suggestions as to how the rights of defence could be protected if disclosure was given. The OFT did not respond to that invitation. In my order I gave certain directions designed to ensure that the rights of the Appellants' defence are protected, given that these documents could have been, but were not, requested during the OFT's investigation into the infringements. I am not convinced, contrary to the suggestion by the Appellants, that, had the OFT made such an offer in order to protect the Appellants' rights in pre-action correspondence, a hearing could have been avoided. But since the order I made differed in some important respects from the order that the OFT had been proposing, the just outcome in the circumstances is an order that each side should bear its own costs of this application.
4. The Appellants have asked that the one month time limit for requesting permission to appeal the disclosure ruling under rule 58(1)(b) of the Rules should be extended until one month from the notification of the Tribunal's final judgment on the appeal. This request seems to me unnecessary. If the Appellants wish to challenge my direction that the documents be disclosed to the OFT under the conditions set out in the ruling, they should seek to do so within the time limit set down in rule 58(1)(b)

of the Rules. It makes no sense to try to object to disclosure of documents at the end of the day, once those documents have been disclosed and, perhaps, relied on at the substantive hearing. If the Appellants are concerned to leave open the possibility of challenging the final decision on the basis of an alleged unfairness in the procedure adopted by the Tribunal in relation to these documents, then that possibility will be there without an extension of time of the kind requested. Where an appellant relies on procedural unfairness as a ground in an appeal against a substantive decision, he is not precluded from raising the point by the fact that he could have challenged the decision which started the decision-maker down the path which the appellant seeks to show was unfair: see the discussion of the Tribunal in *Orange Personal Communications Services Limited v Office of Communications* [2007] CAT 36, paragraphs [113] onwards.

5. I therefore direct that:

(a) each party bears its own costs of the application for disclosure;

(b) the Appellants' request for an extension of time to appeal the ruling on disclosure dated 28 April 2010 ([2010] CAT 12) is refused.

Vivien Rose

Charles Dhanowa
Registrar

Date: 6 May 2010