



Neutral citation [2009] CAT 34

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

Case Number: 1143/1/1/09

Victoria House  
Bloomsbury Place  
London WC1A 2EB

8 December 2009

Before:

THE HONOURABLE MR JUSTICE BARLING  
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

**FISH HOLDINGS LIMITED**

Proposed Appellant

-v-

**OFFICE OF FAIR TRADING**

Proposed Respondent

**APPEARANCES**

Mr George Peretz (instructed by a firm of solicitors) appeared on behalf of Fish Holdings Limited.

---

**JUDGMENT ON APPLICATION FOR AN EXTENSION OF TIME**

---

### *The application*

1. In decision (CA98/02/2009) dated 21 September 2009 entitled “Bid rigging in the construction industry in England” (“the Decision”), the Office of Fair Trading (“OFT”) imposed fines totalling £129.2 million on 103 construction firms in England which it found had engaged in cover pricing and other bid rigging activities contrary to the Chapter I prohibition contained in section 2(1) of the Competition Act 1998 (“the Act”).
2. The Decision was notified to the proposed appellant Fish Holdings Limited (“Fish Holdings”) on 21 September 2009. By a notice of appeal dated 20 November 2009 Fish Holdings seeks to appeal the Decision pursuant to section 46 of the Act.
3. By virtue of the combined effect of Rules 8, 64(2) and 64(4) of The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) (“the Tribunal Rules”), Fish Holdings accepts that the last day of the two month period for lodging an appeal to the Tribunal against the Decision was Monday 23 November 2009, i.e. the next business day after 21 November 2009 which fell on a Saturday.
4. Fish Holding’s notice of appeal was actually received by the Tribunal Registry on Thursday 26 November 2009. On the same day, the Registrar wrote to Fish Holdings to inform it that the notice of appeal would not be registered due to it being lodged out of time.
5. By an application dated 27 November 2009, Fish Holdings has applied for an extension of time under Rule 8(2) of the Rules until the time of actual receipt by the Tribunal of the notice of appeal.

### *The Tribunal Rules*

6. The procedural requirements relating to appeals are set out in the Tribunal Rules. Fish Holding’s application for an extension of time is governed by Rule 8 of the Tribunal Rules which is in the following terms:

**“Time and manner of commencing appeals**

8. - (1) An appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.

(2) The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional.

...”

7. The Tribunal’s *Guide to Proceedings* (October 2005), which has the status of a practice direction issued by the President pursuant to Rule 68(2), is intended to give practical guidance for parties and their legal representatives as to the procedures of the Tribunal. In so far as material, the Guide to Proceedings provides as follows:

**“SERVICE OF THE NOTICE OF APPEAL**

6.7 Under Rule 8(2) the notice of appeal which commences the appeal must be served on the Registrar of the Tribunal, and not on the respondent. Pursuant to Rule 63 there are at present two methods of serving the notice of appeal on the Registrar:

- by physically delivering the notice of appeal to the Registry of the Tribunal at the Tribunal address for service which is Victoria House, Bloomsbury Place, London WC1A 2EB (as notified on the Tribunal website); or
- by sending the application by first class post to that address.

...

*Personal service*

6.9 A document which is physically served on the Registrar at Victoria House may be deposited in the Registry between 9.30 am and 5 pm Monday to Friday. During those hours, documents should not be left at the reception desk on the ground floor of Victoria House. On arrival at the entrance to Victoria House in Bloomsbury Square contact should be made, via the central reception, with a member of the Registry’s staff who will take physical delivery of the document (see section 4 of this Guide on how to contact the Tribunal).

6.10 A notice of appeal must be served by 5 pm if it is to be treated as served on that day. Otherwise, it is treated as being served on the next business day (Rule 63(6)).

6.11 Documents delivered after 5 pm may be received by a member of the Registry staff, if the Registry is manned at the time of delivery. Parties should be aware that there is no guarantee that this will be the case. Documents should not be left at the main Victoria House reception if it has not been possible to contact the Registry after 5pm.

...

### **RESTRICTED POWER TO EXTEND TIME FOR APPEALING**

6.14 Under Rule 8(2), the Tribunal may not extend the two-month time limit for appealing ‘unless satisfied that the circumstances are exceptional’. The possibilities of obtaining an extension of the time limit for appealing are thus **extremely limited**. (The comparable rule in the Rules of Procedure of the CFI, which is to be found in Article 42 of the Statute (EC) of the Court of Justice, requires the party concerned to prove the existence of unforeseen circumstances or of force majeure: see *Hasbro v DGFT* [2003] CAT 1).”

#### *Fish Holding’s submissions*

8. Fish Holdings acknowledges that its notice of appeal was not received in time in accordance with the Tribunal Rules. However, Fish Holdings requests that the Tribunal make an order that the time limit be extended pursuant to Rule 8(2) so that the notice of appeal received by the Registry on 26 November be treated as having been duly sent and received in accordance with Rule 8(1).
  
9. In respect of the “exceptional circumstances” justifying an extension of time, Mr Peretz, who appears for Fish Holdings, relies in particular upon the combined effect of the following:
  - (a) Due to an administrative error, the notice of appeal was sent by post to the wrong address, i.e. the Tribunal’s previous address in New Court, Carey Street, London.
  
  - (b) The recipient of the notice of appeal at Carey Street, rather than informing Royal Mail that the Tribunal was no longer at that address and refusing to accept the package, apparently took it on themselves to accept delivery of the package and forward it by post to the Tribunal’s current address at Victoria House, Bloomsbury Place, London.
  
10. In support of its application, Fish Holdings filed a witness statement by a partner in the firm of solicitors acting on its behalf. The solicitor explains the facts surrounding the administrative error. Those facts were, in summary, as follows. While preparing the covering letter to accompany the notice of appeal on 19 November 2009, he used the address found at Rule 5 of the Tribunal Rules, namely the Tribunal’s former address at

New Court, 48 Carey Street, London WC2A 3BZ. On the same day, having liaised with counsel, the solicitor was informed that the address for service of documents had changed and was now Victoria House, Bloomsbury Place, London. He explains that he subsequently asked his secretary to change the address as well as make various amendments to the appeal documents. The documents were duly amended, but the address on the covering letter was not – an error for which the solicitor accepts responsibility. The package containing the notice of appeal was therefore sent on Friday 20 November by Royal Mail’s Guaranteed Next Day Delivery service to the wrong address.

11. The solicitor states that when he had not received an acknowledgement from the Registrar by the morning of 26 November, he instructed his secretary to contact the Tribunal Registry. His secretary was informed by a member of the Registry that the package had been sent to the Tribunal by ordinary surface mail. As already noted, later that day the Registrar wrote to Fish Holdings to inform it that the notice of appeal would not be registered due to it being out of time.
12. As a result of further enquiries, it appears that the package of documents had been signed for when it arrived at Carey Street. In addition, and despite having been sent via the Royal Mail’s Guaranteed Next Day Delivery service, the notice of appeal was not in fact delivered to the Carey Street address until 24 November, i.e. the day after the time limit set down in Rule 8 of the Rules.
13. Mr. Peretz submits that several facts are pertinent to the question of exceptional circumstances. First, the Decision is an extremely lengthy and complex document which has taken Fish Holdings and its advisers time to get to grips with. Second, it is said that it was entirely reasonable for Fish Holdings to rely on Royal Mail’s service to guarantee delivery within the United Kingdom by 1pm on the next business day following posting. That guaranteed delivery by 1pm on Monday 23 November. Third, as I have already said, he submits that what occurred at Carey Street following delivery was not foreseeable and was exceptional. In these circumstances it is said that the case is an exceptional one and that the Tribunal should exercise its discretion in favour of extending time. In support of this he also argues that the OFT will suffer no prejudice in the event that the Tribunal grants its application, referring to the fact that the time for

filing the defence in all related appeals against the Decision has been extended until further order. Finally, Mr Peretz also notes that the ground of appeal raised by the proposed appellant is confined to a single short point.

14. By letter to the Tribunal of 1 December 2009 the OFT indicated that it did not propose to make any submissions in relation to the present application unless invited to do so by the Tribunal.

#### *Analysis*

15. The Tribunal Rules do not permit the Tribunal to extend the time limit in Rule 8(1) unless it is satisfied that the circumstances are exceptional.
16. The Tribunal Rules are clear as to the time within which a notice of appeal has to be received. The importance of adhering to those time limits (which are for the benefit of all litigants as well as the Tribunal, and which are in the interests of legal certainty) has been emphasised on a good many occasions by the Tribunal, not least in the decisions in *Hasbro UK Limited v DGFT* [2003] CAT 1 and *Prater Limited v Office of Fair Trading* [2006] CAT 11. In *Prater* the then President, Sir Christopher Bellamy, made the following general observations in relation to Rule 8:

“The time limit for commencing an appeal under Rule 8(1) is central to the Tribunal’s Rules and the entire case management system operated by the Tribunal. In that context the need for clarity and certainty is paramount. The Tribunal receives a great number of complex and lengthy documents in many different kinds of cases, often within short deadlines. It is imperative that the present Rules be strictly observed.” (paragraph 30)

17. I have anxiously considered whether the circumstances in which the time limit came to be missed, or any other circumstance of this case, could be regarded as “exceptional” so as to give rise to a discretion to consider extending time. The Tribunal has been based at its current address since 2003. That address is identified in the Tribunal’s Guide to Proceedings, which has been available since 2005. The correct address was in fact known to Fish Holdings’ solicitor once he had consulted counsel. It is true that the Tribunal’s address for service is recorded in Rule 5 of the Tribunal Rules as “New Court, 48 Carey Street, London WC2A 3BZ”. However, Rule 5 continues: “or such other address as may be notified in the London, Edinburgh and Belfast Gazettes and on the Tribunal Website.” The Tribunal’s website records the present address, as does the

front page of every one of the Tribunal's judgments and also, as I have said, the Guide to Proceedings.

18. More generally, it could also be said that Fish Holdings' representatives were rather optimistic in relying upon the commercial guarantees offered by Royal Mail in order to ensure that the notice of appeal was received by the Tribunal in time, particularly when the notice of appeal was committed to that organisation towards the very end of the period allowed for lodging the document with the Tribunal. Sadly, experience shows that in circumstances where the time remaining for lodging documents is very short the only way to be sure that an important document reaches the Tribunal in time is to arrange for personal delivery. In this connection, Rule 63 of the Tribunal Rules allows for a number of possible options for service, including personal delivery. Whichever option is chosen, it is the sole responsibility of the parties and their legal representatives to ensure that the time limits for filing court documents are complied with. The Guide to Proceedings expressly recommends at paragraph 6.1 that appellants do not wait until the last possible moment to lodge appeals – this ensures that any last minute hitches can be avoided. Where, in a triumph of hope over experience, a document is entrusted to a third party service provider, it is prudent to telephone the Registry to check that it has arrived, and to do so in good time to be able to take remedial action if it has not been received.
19. I do not think that what happened when the documents arrived at the Carey Street address, already a day out of time, can properly be described as unforeseeable. No doubt the person who signed for the package thought they were being helpful in forwarding it, as indeed may have been the case had the documents been sent earlier. But, even if the documents had arrived at Carey street by 1pm on the previous day in compliance with the contractual guarantee, and even if the recipient had acted in the way Mr Peretz suggests they should, by refusing to accept the documents, there is absolutely no certainty that they would have reached the Tribunal's Registry within the four hours then remaining. This would have required the Royal Mail to have got a message pretty promptly to Fish Holdings or its representatives or to the Tribunal.
20. I am therefore afraid that none of these matters point to exceptional circumstances. On the contrary, it all seems rather predictable given that the documents were sent to the

wrong address with a view to their being delivered there only just before the expiry of the time limit.

21. Mr Peretz made certain other points either as supporting the existence of exceptional circumstances or as going to the exercise of discretion on the assumption that the threshold of exceptionality had been crossed, or possibly both. As for the point made about the complexity and length of the Decision being challenged, the Tribunal has received twenty five further appeals against the Decision within the time limit laid down by Rule 8(1). Nor do I consider that the nature of the issues raised in the proposed appeal can assist the proposed appellant. As to the argument that there would be no prejudice to the OFT by extending time, I do not agree. Where no challenge to a decision is lodged with the Tribunal within the time allowed for doing so, the OFT and everyone else is entitled to assume that the decision in question is definitive. Where, exceptionally, time is extended that assumption is undermined. It seems to me that there is some inevitable prejudice to legal certainty in that regard, as well as in the effort and expense entailed in defending the decision and in processing the appeal. It is for these reasons that the circumstances must be exceptional before time can be extended.
22. I am sorry to say that in the present case I cannot identify any circumstances which could be regarded as exceptional within the meaning of Rule 8(2). I am unable to see how that description of the circumstances here could be justified without seriously compromising future compliance with the time limit in Rule 8(1). I am aware that this decision is disappointing and unfortunate for all concerned, and I have considerable sympathy for Fish Holdings and its advisers.
23. In light of the above, Fish Holding's application for an extension of time under Rule 8(2) of the Tribunal Rules is refused.

The President

Charles Dhanowa  
Registrar

Date: 8 December 2009