



Neutral citation [2010] CAT 24

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

Cases No: 1160 - 65/1/1/10

Victoria House  
Bloomsbury Place  
London WC1A 2EB

30 September 2010

Before:

VIVIEN ROSE  
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) IMPERIAL TOBACCO GROUP PLC**  
**(2) IMPERIAL TOBACCO LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

**CO-OPERATIVE GROUP LIMITED**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

**WM MORRISON SUPERMARKETS PLC**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

**(1) SAFEWAY STORES LIMITED**  
**(2) SAFEWAY LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

**(1) ASDA STORES LIMITED**  
**(2) ASDA GROUP LIMITED**  
**(3) WAL-MART STORES (UK) LIMITED**  
**(4) BROADSTREET GREAT WILSON EUROPE LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

**(1) SHELL U.K. LIMITED**  
**(2) SHELL U.K. OIL PRODUCTS LIMITED**  
**(3) SHELL HOLDINGS (U.K.) LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

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**RULING ON APPLICATION TO INTERVENE**

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1. These six appeals challenge the decision adopted by the Office of Fair Trading (“OFT”) on 15 April 2010 (“the Decision”). The Decision found that two manufacturers of tobacco products and ten retailers had infringed the prohibition in section 2(1) of the Competition Act 1998 by participating in agreements and/or concerted practices relating to the retail pricing of tobacco products.
2. An application has been made by Sainsbury’s Supermarkets Limited and J Sainsbury plc (together referred to as “Sainsbury’s”) to intervene in all six appeals in support of the OFT. Sainsbury’s was an addressee of the Decision and was found by the OFT to have engaged in unlawful anti-competitive conduct. However it was granted full immunity from penalty pursuant to the OFT’s leniency programme because of the information and assistance that it provided to the OFT about the alleged infringements.
3. Rule 16 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the “Tribunal’s Rules”) provides that where a person has a “sufficient interest” in the proceedings, the Tribunal has a discretion whether to allow the intervention and if so, on what terms or conditions. Most of the Appellants oppose Sainsbury’s’ application.

4. Sainsbury's relies on various factors which, it says, give it a sufficient interest. First, evidence of Sainsbury's employees and former employees is likely to be relied on extensively by the OFT in defending these appeals. At least one of the Appellants may also rely on such evidence. I do not consider that that provides Sainsbury's with an interest in the proceedings justifying permission to intervene. It is trite law that there is no property in a witness. A claimant may approach and speak to an individual employed or formerly employed by a company to ask for information and may call him to give evidence on the claimant's behalf. The employer or former employer of that individual does not thereby have an interest in the appeal sufficient to justify being made a party to the proceedings.
  
5. Sainsbury's is also concerned that it may suffer reputational damage and damage to its commercial interests as a result of the proceedings. None of the other parties can be relied upon, Sainsbury's says, to notice the potential for such damage or to take steps to prevent it. Mr Anderson, in-house Counsel for Sainsbury's, has lodged a witness statement identifying possible risks of damage: the risk that the proceedings might not stress adequately the fact that the proceedings relate to anti-competitive conduct which came to an end in 2003 and that Sainsbury's now has in place a rigorous compliance programme for its buyers; the risk of creating the impression that Sainsbury's customers were prejudiced compared to customers of the Appellants given the Appellants' assertions that the alleged agreements served to lower rather than raise retail prices; and the risk more generally of critical comments and scrutiny of Sainsbury's' role in the infringements.
  
6. Leaving on one side the question of whether such risks amount to a "sufficient interest" for the purposes of rule 16, I do not accept that they are serious enough to justify Sainsbury's becoming a party to these appeals. It is quite clear from the Decision, and will presumably be clear from the evidence that is placed before the Tribunal, that we are considering historic alleged infringements that were brought to an end some years ago. I do not see why any person who follows the progress of these appeals is likely to get the impression that that is not the case or that Sainsbury's customers were in any different position as a result of the alleged arrangements compared to customers of the Appellants. That provides no basis for adding another party to these already complex proceedings.

7. Sainsbury's argues that it wishes to intervene so that it can be reimbursed for any costs it incurs in assisting one or more of the parties during the course of the proceedings. Sainsbury's relies on the Tribunal's decisions in *Umbro Holdings Limited & Ors v Office of Fair Trading (Sportsworld's intervention)* [2003] CAT 25 and (*costs*) [2005] CAT 26. In that case Sports World International Ltd ("Sportsworld") had been the original whistleblower which brought the infringements to the attention of the OFT and had not appealed against the OFT's decision. It applied at the outset of the proceedings to intervene on grounds very similar to those now being advanced by Sainsbury's in these appeals. The Tribunal rejected that application. The Tribunal left open the question whether Sportsworld had a sufficient interest in the proceedings for the purposes of rule 16 and decided that as a matter of discretion, it was not appropriate for Sportsworld to be a party. However the Tribunal said at the end of its first ruling on the point ([2003] CAT 25):

"We are, however, conscious of the fact that circumstances may arise in which it is convenient for Sports World International to follow these proceedings closely. As far as we can see there is no objection to Sports World, if so advised and if it so wishes, collaborating with the Office of Fair Trading in supplying information to the Office of Fair Trading and assisting with the presentation of the Office of Fair Trading's case. I stress the Office of Fair Trading's case and not Sports World's case. If circumstances were to arise in which fairness required that we heard directly from Sports World then we, the Tribunal, would be open to a second application, either for a formal intervention or for Sports World to be heard, as it were, informally. That is a bridge we are prepared to cross if and when it arises, so we are not entirely, as it were, slamming the door to Sports World at this stage."

8. Much later, after the Tribunal had delivered its judgments on the issues of liability ([2004] CAT 17) and penalty ([2005] CAT 22), Sportsworld made a renewed application to intervene in order to claim the costs incurred by it during the course of proceedings. In its ruling on 15 July 2005 ([2005] CAT 26) the Tribunal granted permission to intervene for the purpose of claiming costs only. The Tribunal found that Sportsworld did have a sufficient interest to intervene:

"The Tribunal takes the view that, insofar as Sportsworld was the whistleblower, had co-operated in the administrative proceedings before the OFT, and had an interest in defending its commercial interests and reputation and the reputation of its directors, Sportsworld had an interest in establishing the facts relied on in the Decision, in particular that it had been subject to pressure by other participants to the agreements, all of which, in our view gives Sportsworld "a sufficient interest in the outcome" within the scope of rule 16(1)."

9. In that ruling, the Tribunal alluded to the possible difficulty created by the fact that CPR Rule 48(2) allows the court to make an order for costs in favour of a non-party (provided that the non-party is added as a party to the proceedings for the purpose of

costs only), whereas rule 55(2) of the Tribunal's Rules states that the Tribunal may only make an order in relation to the payment of costs "by one party to another". In that case, however, the parties did not contest the power of the Tribunal to make an order in Sportsworld's favour in relation to costs incurred by Sportsworld before it had been granted permission to intervene. In its ruling on 11 October 2005 in *JJB Sports PLC v OFT* [2005] CAT 34, the Tribunal ordered the appellants to pay Sportsworld a proportion of the costs claimed. The Tribunal drew careful distinctions between the costs of providing general assistance and cooperation to the OFT in the preparation of the OFT's defence of the appeals (costs which were not considered recoverable) and more direct costs of, for example, assisting the Tribunal in respect of various applications for disclosure of Sportsworld documents (costs which were recoverable).

10. In the light of the *Umbro* case I am prepared to accept that Sainsbury's' position as regards any future application for reimbursement of the costs it may incur during the course of the appeals should be protected. It has a sufficient interest in the proceedings to that extent. In the light of the wording of rule 55(2) of the Tribunal's Rules, it is appropriate to grant a very limited permission to intervene for that purpose now rather than at the end of the appeal proceedings.
11. Finally, Sainsbury's raises the point that the OFT has provided the Appellants with drafts of witness statements provided to the OFT by Sainsbury's employees, even though Sainsbury's had asserted to the OFT that the statements were privileged and not to be disclosed. The Appellants argue that this is an issue between the OFT and Sainsbury's and that if Sainsbury's wishes to challenge the OFT's proposed disclosure of documents then it should do so by way of judicial review proceedings. That would not be a satisfactory way to proceed. If Sainsbury's wish to challenge the admissibility of documents then the Tribunal should be able to consider such a challenge in the exercise of its case management powers. In the *Umbro* proceedings, the Tribunal after rejecting Sportsworld's application to intervene, nonetheless allowed Sportsworld to participate in hearings about the disclosure of documents as an informal observer of the proceedings. However, since Sainsbury's has applied to intervene on this basis and it appears likely that issues on disclosure will arise, it would be better for permission to intervene to be granted at this stage for the purpose of any disputes as to the admissibility of documents in which Sainsbury's claims privilege or confidentiality.

12. In the light of this, I consider that Sainsbury's has demonstrated an interest sufficient to justify an application to intervene to protect its position in relation to the possible recovery of costs at the end of proceedings and in order to challenge any use in the proceedings of documents in which it claims privilege or confidentiality. As regards any wider intervention I am doubtful whether Sainsbury's has shown a sufficient interest and in any event in the exercise of my discretion I refuse permission for any wider intervention.
  
13. This raises the question of what conditions need to be set for Sainsbury's' intervention on those narrow grounds. At present I do not consider that it would be appropriate for Sainsbury's to submit a statement of intervention nor for it to be served with notices of appeal or be part of the confidentiality ring that has been set up for this case. But this is a matter that can be discussed further at the case management conference fixed for 18 October 2010.

Vivien Rose

Charles Dhanowa  
Registrar

Date: 30 September 2010