



Neutral citation [2010] CAT 28

IN THE COMPETITION
APPEAL TRIBUNAL

Cases No:1160/1/1/10
1162/1/1/10
1163/1/1/10
1164/1/1/10

Victoria House
Bloomsbury Place
London WC1A 2EB

27th October 2010

Before:

VIVIEN ROSE
(Chairman)
ADAM SCOTT OBE TD
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

B E T W E E N :

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

Appellants

- 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

REPRESENTATION:

Mr. Mark Howard Q.C. and Mr. Tony Singla (instructed by Ashurst LLP) appeared on behalf of the Appellants Imperial Tobacco Group Plc and Imperial Tobacco Ltd.

Mr. Pushpinder Saini Q.C., Mr. Meredith Pickford and Mr. Tristan Jones (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellants WM Morrison Supermarkets Plc and Safeway Stores Ltd and Safeway Ltd.

Mr. James Flynn Q.C. and Mr. Robert O'Donoghue (instructed by Norton Rose LLP) appeared on behalf of the Appellants Asda Stores Ltd, Asda Group Ltd, Wal-Mart Stores (UK) Ltd and Broadstreet Great Wilson Europe Ltd.

Mr. Paul Lasok Q.C., Ms. Elisa Holmes and Mr. Rob Williams (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

Heard at Victoria House on 18 October 2010

RULING ON DISCLOSURE

1. The Appellants challenge the decision adopted by the Office of Fair Trading (“OFT”) on 15th 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. This ruling adopts the abbreviations and terminology used in the Decision. The Decision records that the OFT initially included Tesco plc (“Tesco”) in the list of retailers under investigation. However, when the OFT had reviewed the parties’ responses to the statements of objections, it decided not to proceed to a finding of infringement against Tesco.
2. The OFT’s case file includes, we have been told, contemporaneous evidence relating to the relationship between Tesco and the tobacco manufacturers, for example correspondence between Tesco and those manufacturers. The disclosure applications now brought by ITL, Morrisons, Safeway and Asda, however, seek a different category of documents within the possession of the OFT, namely documents relating to the OFT’s decision not to make a finding of infringement in relation to Tesco’s trading arrangements. The documents sought include internal OFT papers and any correspondence between the OFT and Tesco relating to the OFT’s decision, in effect, to drop proceedings against Tesco.
3. Disclosure applications are governed by rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003). Rule 19 provides broadly that the Tribunal may give directions for the disclosure between, or the production by, the parties of documents or classes of documents. The general approach to disclosure before the Tribunal is that it is not automatic. It may be ordered by the Tribunal, usually upon a request by a party to the proceedings, and the Tribunal must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it: see *Claymore v OFT (Recovery and Inspection)* [2004] CAT 16, at [113].
4. Our unanimous opinion is that the documents sought in these applications are irrelevant to the issues before us in these appeals and that disclosure should not be ordered.

5. The Appellants submit that the documents are relevant because their notices of appeal squarely raise points arising from the fact that the OFT did not find that Tesco had infringed the Chapter I prohibition. Mr Saini QC, who appeared on behalf of Morrisons and Safeway, pointed us to paragraph 149 of Morrisons' notice of appeal where it asserts that the OFT failed to consider the implications of the fact that Tesco was not party to an infringing agreement. First, Morrisons argues, in so far as the OFT relies on the existence of other alleged agreements on this market as evidence that Morrisons was party to an infringing agreement, that reliance must be undermined by the fact that Tesco, the largest retailer in the affected market, was not found to be party to an infringement. Secondly, Morrisons says, in so far as the OFT relies on an assertion that ITL had an overall strategy for retail prices (to achieve parity and differential requirements between competing tobacco brands) as evidence that Morrisons was party to an infringing agreement, that reliance is similarly undermined by the failure to establish that Tesco was part of that overall strategy. In our judgment, these points arise from the uncontested fact that the OFT concluded that it did not have sufficient evidence of an infringing arrangement between Tesco and the manufacturers. It is not part of the Tribunal's function to consider why the OFT arrived at that conclusion. The documents sought are not relevant either to support or contradict these aspects of Morrisons' appeal.
6. Morrisons also argues (paragraphs 150 onwards of its notice of appeal) that there is no reason why the OFT should have considered the evidence, particularly evidence of communications between Tesco and ITL, as being insufficient to support a finding of infringement in Tesco's case but should have treated the same kinds of communications between Morrisons and ITL as establishing an infringement. As Mr Saini put it in submissions before us: "if that is damning evidence against us why is it also not damning evidence against Tesco?". This submission was adopted by the other Appellants who argue that the documents are relevant to the question whether there was any proper basis on which the OFT could distinguish between the evidence against Tesco and the evidence against the Appellants.
7. The Tribunal does not consider that its principal task in these appeals is to examine in detail the evidence that existed against Tesco and then compare and contrast this with the evidence relied on as against the Appellants. The question for the Tribunal is not

whether the evidence against the Appellants is different from or stronger than the evidence against Tesco but simply whether the evidence against the Appellants supports the finding that they committed the infringements in the manner described in the Decision. The fact that there was no finding of an anti-competitive agreement between Tesco and the manufacturers are part of the factual background - perhaps an important part. However, the OFT's evidence in respect of Tesco's trading arrangements with the tobacco manufacturers does not operate in these proceedings as some kind of threshold or benchmark which must be exceeded before the Tribunal can uphold a finding of infringement against the Appellants.

8. Similarly, as regards the Appellants' challenge to the OFT's "theory of harm" set out in the Decision, the question for the Tribunal is whether that theory of harm is correct and if so whether it properly applied to the conduct of the Appellants. It is not incumbent on the OFT to show that its theory of harm operates in a way which exonerates Tesco but condemns the Appellants. The question of how that theory of harm would have applied to the conduct of Tesco, had Tesco been before the Tribunal, is not a matter that we need to consider because the OFT's findings in respect of Tesco's conduct are not challenged before the Tribunal.
9. The question of access to all or part of the OFT's case file including any contemporaneous material concerning Tesco's relationship with the manufacturers was not the subject of submissions at the hearing before the Tribunal. If a comparison between that material and the evidence against the Appellants is said to be relevant, that is a factor which can be taken into account by the Tribunal if and when it considers any future application for disclosure. The OFT's evaluation of that comparison at the time it made the decision not to proceed against Tesco and the reasons for that decision are not relevant in these appeals and we do not see how they could assist us in determining them.
10. We therefore dismiss these applications for disclosure.

Vivien Rose

Adam Scott

David Summers

Charles Dhanowa
Registrar

Date: 27th October 2010