



Neutral citation [2011] CAT 2

IN THE COMPETITION
APPEAL TRIBUNAL

Cases: 1162/1/1/10
1163/1/1/10

Victoria House
Bloomsbury Place
London WC1A 2EB

21 February 2011

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

RULING ON DISCLOSURE

1. On 15 November 2010 the Tribunal made an Order in Cases 1160 to 1165/1/1/10 (“the Post-SO Disclosure Order”) requiring the OFT, in relation to each of the appeals, to disclose in electronic form non-confidential versions of documents placed on its case file after 24 April 2008 (excluding documents already disclosed to the Appellants and excluding documents that deal with procedural matters only). 24 April 2008 was the date on which the OFT issued its statement of objections (“SO”) in this case.
2. The OFT wrote to the Tribunal on 22 December 2010 listing 25 documents which it had determined should be disclosed and stating that non-confidential versions of those documents had been sent to the Appellants.
3. The Tribunal now has before it an application by Morrison and Safeway (“the Applicants”) asking the Tribunal to order the OFT to disclose a schedule itemising all documents placed on the case file after 24 April 2008 that have not already been disclosed, describing each document and explaining the reasons for non-disclosure (“the Application”). The Applicants are not applying for inspection of any of these documents. Instead they seek a schedule of undisclosed post-SO documents in order to allay concerns that they have about the way in which the OFT has sought to comply with the Post-SO Disclosure Order.
4. In the Application, made in a letter dated 17 January 2011, the Applicants state first that they are concerned that the OFT “may have taken an inappropriately expansive view” of the documents which deal with procedural matters only and which are therefore excluded from the ambit of the Post-SO Disclosure Order. Secondly, they submit that the OFT has unilaterally decided that certain categories of documents should fall outside the scope of the Post-SO Disclosure Order even though those documents are not expressly excluded from the OFT’s obligations by the words of that Order. Thirdly, the Applicants say that their concerns are heightened by the fact that the OFT has itself acknowledged that it made errors in applying its own criteria. They refer in this regard to the fact that in its letter to them of 18 November 2010 the OFT identified four categories of documents that it would disclose but then by 22 December 2010 the OFT had found 25 more documents it was obliged to disclose.

5. In approaching an application of this kind the Tribunal must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it (see e.g. Case 1008/2/1/02 *Claymore v OFT* [2004] CAT 16, at [113]). In response to the Application, the Tribunal asked the OFT to provide a more detailed description of the criteria it has used to identify categories of documents which it treated as falling outside the scope of the Post-SO Disclosure Order.
6. As regards the first concern raised by the Applicants, the OFT has stated that it classified documents as concerning “procedural matters only” if they did not contain any reference to substantive matters in the case. Such documents included, for example, documents that solely contained confidentiality representations, documents dealing solely with disclosure requests, correspondence relating to how to access documents on computer discs, meeting arrangements and requests for extensions of time. If there was uncertainty as to whether a document was procedural only, the OFT says it erred on the side of caution and disclosed the document. There were 900 documents in this category that have therefore not been disclosed to the Applicants.
7. In our judgment, these criteria are entirely reasonable and do not indicate that the OFT has adopted an unduly expansive definition of “documents that deal with procedural matters only” within the meaning of the Post-SO Disclosure Order. It would certainly be disproportionate to require the OFT to itemise 900 documents falling within this category.
8. As regards the other categories of document that the OFT decided should be treated as falling outside the Post-SO Disclosure Order, the OFT told us that it excluded these documents because it adopted the approach it adopts under the Competition Act 1998 (Office of Fair Trading Rules) Order 2004 (S.I. 2751 of 2004) (“the OFT Rules”). We take this to mean that because rule 5(3) of the OFT Rules entitles the OFT to withhold confidential information and internal documents from undertakings to which it grants access to the file, the OFT regarded itself as entitled to withhold those documents when complying with the Post-SO Disclosure Order.
9. We note that after Ashurst LLP (acting for Imperial Tobacco) first raised the question of disclosure of post-SO documents in November 2010, the correspondence between

the parties on this point did refer to the exclusion of internal documents and confidential information (see the letter from the OFT to the Tribunal dated 5 November 2010 and the letter from Ashurst also dated 5 November). The Order as drawn up by the Tribunal did not expressly make these exclusions. The proper course for the OFT once it began implementing the Post-SO Disclosure Order would have been to seek clarification from the Tribunal as to whether it should withhold internal or other classes of documents, rather than simply interpret the Tribunal's Order as excluding them. However, we have no doubt that appropriate exclusions would have been incorporated into the Post-SO Disclosure Order had the point been raised by the parties. In the circumstances we do not regard the OFT's decision to exclude these documents as casting doubt on the propriety of its overall approach to compliance with the Post-SO Disclosure Order.

10. As to the scope of the exclusions, the OFT has told us that documents were regarded as "internal" in accordance with the definition of an "internal document" in rule 1(1) of the OFT Rules, namely that it is (a) a document produced by, or exchanged between, any of the OFT, a regulator or another public authority, or (b) a document produced by any person from time to time retained under a contract for services by any of the OFT, a regulator or another public authority in connection with such a contract. There were 170 documents falling into this category.
11. The OFT also excluded 400 documents it classified as "Without prejudice" confidential communications about early resolution agreements. These followed a letter from the OFT sent to all of the addressees of the SO on 24 April 2008. The OFT excluded 15 documents related to turnover information provided by the parties then under investigation in response to notices issued under section 26 of the Competition Act 1998. These documents were not disclosed because those documents were understood to be confidential. Finally a further 20 documents related to the OFT's decision not to make a finding of infringement in relation to Tesco's trading arrangements with Imperial Tobacco and Gallaher. In the OFT's view those documents were not disclosable in light of the Tribunal's Ruling of 27 October 2010. These definitions seem sensible and are not unduly broad.

12. Finally, we do not agree that the disclosure of a further 25 documents in December 2010 indicates that the OFT must have made mistakes in the disclosure exercise it reported having carried out in its letter of 18 November 2010. As the OFT has explained, the letter of 18 November was written shortly after the Post-SO Disclosure Order had been made and should have made clear that it represented the OFT's initial response. The fact that further documents came to light once the OFT had carried out a more thorough exercise does not raise concerns about the standard of their compliance.
13. The Applicants refer to the serious nature of the findings in the Decision and the severe financial penalties which it imposed. However the suggestion that the opportunities for advancing the Applicants' case against the Decision will somehow be compromised by the non-disclosure of a schedule of documents is unfounded. We do not consider there is any evidence to suggest that the OFT has interpreted the Post-SO Disclosure Order as entitling it to withhold exculpatory document to which the Applicants should have access. We consider that a requirement that the OFT produce a schedule of the many hundreds of documents that it has withheld would be disproportionate and unnecessary.
14. The Tribunal therefore unanimously dismisses the Application.

Vivien Rose

Adam Scott

David Summers

Charles Dhanowa
Registrar

Date: 21 February 2011