



Neutral citation [2010] CAT 21

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1164/1/1/10

Victoria House
Bloomsbury Place
London WC1A 2EB

6 September 2010

Before:

VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(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

RULING ON APPLICATION TO AMEND NOTICE OF APPEAL

1. The Appellants (“Asda”) 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. Asda have applied to amend their Notice of Appeal served on 16 June 2010 by adding two further forms of relief to the concluding paragraph of the Notice. The application arises from the fact that during the course of the OFT's investigation into tobacco pricing, Asda entered into an "early resolution agreement" with the OFT. Under this agreement, broadly speaking, Asda agreed not to contest the allegations of infringement made by the OFT in return for a reduction in the fine that the OFT would otherwise have imposed.
3. Clause 7 of the agreement provides that if Asda appeal to the Tribunal against the Decision, the OFT "reserves the right" to apply to the Tribunal to increase the penalty imposed on Asda (see clause 7(a)) and to require Asda to pay the OFT's full costs of the appeal regardless of the outcome of the appeal (see clause 7(b)). Clause 11 of the agreement provides – again broadly speaking – that if there is a breach of the provisions of the agreement, the OFT may terminate the agreement and impose a penalty for the infringements.
4. On 29 June 2010 the OFT wrote to Asda notifying them that the OFT intends to ask the Tribunal to increase the penalty imposed on them pursuant to clause 7(a) of the agreement. The letter concluded with the following:

"For the avoidance of doubt, the OFT considers it is entitled to exercise its rights under Clauses 7(b) and 11 of the agreement but does not intend to do so at this time".
5. Far from avoiding doubt, however, this sentence generated further correspondence between the parties, culminating in the current application by which Asda seek to add two claims for relief. First they seek an order that the OFT should pay their costs if their appeal is successful or that Asda should not be required to pay the OFT's costs in that event. Secondly they ask for a declaration that the OFT does not have the right to terminate the agreement and impose a fine pursuant to clause 11 of the agreement.
6. It is regrettable that these hares were set running by the letter of 29 June 2010. But I am satisfied that Asda's attempt at a pre-emptive strike in relation to powers which the OFT says it has, but that it is not going to exercise, should not succeed. So far as the "right" in clause 7(b) is concerned, the question of costs will be determined at the end of the appeal in the usual way. Where the OFT has in mind that it intends to seek the

costs of the appeal from an appellant in Asda's position, even if the appeal succeeds, it may well be advisable for the appellant to be put on notice of that intention as soon as possible so that it is not taken by surprise by an application in those terms at the end of the case. However, the purport of the OFT's letter was to precisely the opposite effect. I do not consider that any response to the reference to clause 7(b) in that letter is necessary or appropriate.

7. So far as clause 11 is concerned, again, the OFT is making clear that it does not intend to assert the right it claims to have to activate that procedure. There is therefore no need for the Tribunal to consider whether any such right exists. In any event, I agree with the point made by the OFT that if, contrary to its stated intention, the OFT were to treat the power in clause 11 as having been triggered by Asda's conduct, it would need to follow the procedure outlined in clause 12 of the agreement and arrive at a separate decision. Any appeal by Asda would need to be a challenge to that later decision and could not be part of the current appeal.
8. Asda's application to amend is therefore dismissed.

Vivien Rose

Charles Dhanowa
Registrar

Date: 6 September 2010