



Neutral citation [2012] CAT 13

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1188/1/1/11

B E T W E E N:

(1) TESCO STORES LTD
(2) TESCO HOLDINGS LTD
(3) TESCO PLC

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

ORDER

UPON reading the Appellant's ("Tesco") application, by letter dated 20 April 2012, for a direction that it may deal with new issues said to arise from the Respondent's ("OFT") skeleton argument dated 4 April 2012 in the witnesses' evidence in chief

AND UPON reading the written submissions filed by the OFT on 20 April 2012

AND HAVING REGARD TO the Tribunal's powers under rules 19(1) and 22(1)(c) of the Competition Appeal Tribunal Rules (S.I. 1372 of 2003)

AND UPON this direction being communicated to the parties by letter sent on behalf of the Chairman on 20 April 2012

IT IS ORDERED THAT:

1. Tesco, if so advised, file and serve a witness summary from each relevant witness setting out those issues which, they say, are new points arising from the OFT's skeleton argument and supporting evidence, and summarising what additional evidence, if any, the witness intends to give on those issues.
2. Any witness summary should be filed and served no later than four working days before that witness is due to appear before the Tribunal.

3. The witness be asked, as part of his or her brief evidence in chief at the hearing, whether he or she believes that the facts set out in their witness summary are true.

REASONS

It is standard practice in this Tribunal that a party who intends to adduce factual evidence at trial must provide the other parties with a written statement in advance of the evidence which the witness is expected to give. In my judgement, fairness requires that Tesco adduce any evidence – responding to the new points said to arise from the OFT’s skeleton argument and supporting evidence – in an appropriate form and in advance of that witness giving evidence. The OFT is entitled to have at least an indication, in advance of a witness taking the stand, of the matters that that witness will address in evidence in chief. I consider that this approach is the fair and proper approach to conducting this appeal.

Freshfields’ letter of 20 April 2012 (on behalf of Tesco) mentions various practical difficulties in producing further witness statements by the date of the hearing. Given those difficulties, and by analogy to CPR 32.9(1), I consider that it is appropriate for Tesco, if so advised, to prepare a witness summary of (a) the evidence, to the extent known, which would otherwise be included in a witness statement of the relevant witness and (b) in relation to any evidence that is not yet known, the matters about which Tesco proposes to question the witness in chief. This is consistent with the Tribunal’s general approach to evidence being “guided by overall considerations of fairness, rather than technical rules of evidence” (see e.g. *Argos and Littlewoods v OFT* [2003] CAT 16, at para. 105).

For the avoidance of doubt, I expect that any witness summaries should be confined to the new points that are said to arise from the OFT’s skeleton argument and supporting evidence. Any witness summary should be filed and served no later than four working days before the relevant witness is due to appear before the Tribunal.

Lord Carlile of Berriew Q.C.
Chairman of the Competition Appeal Tribunal

Made: 20 April 2012
Drawn: 23 April 2012