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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1203/6/1/12

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14th January 2013

Before:

VIVIEN ROSE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

JOHN LEWIS PLC

Applicant

- and -

OFFICE OF FAIR TRADING

Respondent

- and -

DSG RETAIL LIMITED
COMET GROUP LIMITED (IN ADMINISTRATION)

Proposed Interveners

*Transcribed from Tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com*

CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Mr. Aidan Robertson QC (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Applicant.

Miss Maya Lester (instructed by the General Counsel of the Office of Fair Trading) appeared on behalf of the Respondent.

Mr. Philip Woolfe (instructed by SJ Berwin LLP) appeared on behalf of the Proposed Intervener, Dixons.

Mr. Fryderyk Hoffmann (of Bingham McCutcheon (London) LLP) appeared on behalf of the Proposed Intervener, Comet.

1 THE CHAIRMAN: Yes, Mr. Robertson.

2 MR. ROBERTSON: Madam Chairman, I appear for the applicant, John Lewis. My learned
3 friend Miss Maya Lester appears for the Office of Fair Trading, and my learned friend
4 Mr. Philip Woolfe appears for Dixons. I am not aware that there is anyone here appearing
5 on behalf of Comet, but I will be corrected if someone is here?

6 MR. HOFFMANN: Fryderyk Hoffmann, solicitor, on behalf of Comet.

7 MR. ROBERTSON: Madam, the Tribunal has sent out the draft agenda. The parties have given
8 you their comments in writing.

9 THE CHAIRMAN: What happened last Thursday? I was hoping that we would avoid this, but
10 perhaps you can bring us up to date with what discussions took place last Thursday.

11 MR. ROBERTSON: I think that is for Miss Lester for the OFT.

12 THE CHAIRMAN: Miss Lester, what happened?

13 MISS LESTER: I am told that, unfortunately, it was not possible for John Lewis's request to be
14 accommodated within appropriate amendments. Therefore, I am afraid we are in the
15 position that we were in when John Lewis issued its application.

16 THE CHAIRMAN: Right. So what are the issues then that I need to decide this afternoon?

17 MR. ROBERTSON: Perhaps if we just take it by the agenda, I think we are agreed that the forum
18 is England and Wales, for the hearing to be here in this building. As to interventions, there
19 are applications to intervene by Dixons and Comet. We have informed the Tribunal that
20 we, John Lewis, have no objection to those interventions. As to evidence and
21 confidentiality, as things currently stand, I do not think any of the parties see that any issue
22 arises.

23 As for the timetable for the application, I would just like to reiterate our gratitude for the
24 speed with which the Tribunal has listed this CMC. The principal issue is whether there
25 should be a preliminary hearing as to whether our application has been made in or out of
26 time. Our position is, as we have set out in writing, is that we resist that application. We
27 think that the most just economic and expeditious way of proceeding is for this Tribunal to
28 give directions for the OFT to serve its defence, for the interveners to serve their statements
29 of intervention, and for there to be a full hearing of our application ----

30 THE CHAIRMAN: Have there been any discussions between the four relevant parties currently
31 in court to resolve this matter, which seems to be eminently resolvable if people would
32 adopt a sensible attitude towards what is happening here. It does seem to me that to have a
33 day's hearing, let alone half a day and then potentially another day, is a great deal of time
34 and expense spent on something which it strikes me could be quite easily sorted out. I

1 know there was a meeting last Thursday. Remind me who was present at that meeting,
2 Miss Lester?

3 MISS LESTER: It was the OFT plus Dixons and Argos.

4 THE CHAIRMAN: But not John Lewis and Comet?

5 MISS LESTER: No, because the question was what could be accommodated within the context
6 of the undertakings in lieu, and those were the parties that had made the undertakings, and
7 that was the meeting which the OFT said it would assemble and did hold.

8 THE CHAIRMAN: Had there been any round table discussions amongst all those interested as to
9 how to come to some accommodation?

10 MISS LESTER: My understanding is that there has been a discussion between the OFT and John
11 Lewis, but not with all parties present, no.

12 MR. ROBERTSON: Madam Chairman, I think the position, as we see it from our perspective, is
13 that this was explained in a telephone conference between the OFT and John Lewis on 20th
14 December by Mr. Dan Moore on behalf of the OFT. He explained that their interpretation
15 of the undertakings in lieu, clause 2.3, was that the additional wording which we seek was
16 subject to the consent of the Steering Group assembled under the UIL, and, as we
17 understand it, the parties to the Steering Group, importantly Dixons, do not agree with what
18 we have requested, and that is why, regrettably, we find ourselves here. We certainly echo
19 your comments, this is eminently solvable. It is something which an amendment to the
20 website would take less than a day to implement. It is very straightforward. At the moment
21 our perspective is that Dixons are exercising a right of veto through clause 2.3 of the UIL.

22 THE CHAIRMAN: Yes, Mr. Woolfe?

23 MR. WOOLFE: Madam, it is probably best if I rise to respond to that. First of all, I should make
24 it clear that Dixons have no objection to having a round table discussion with everybody
25 present, if that were to be a way which could resolve matters.

26 However, I would emphasise three points. First of all, it is not simply within Dixons' gift.

27 It is also the OFT who are part of the Steering Group and have a view of the way the whole
28 website should operate with regard to other people on it, and Argos, who are not here before
29 you today, but who are not a member of that Steering Group.

30 The second point is that what John Lewis propose by way of amendment to the website, in
31 terms of technically how they would be loaded on to the website, no doubt they may be
32 quite quick as a matter of adjusting text essentially. However, we would say that they take
33 the website away from its original intent under the undertakings in lieu in quite substantial
34 ways. If John Lewis were to actually have its extended warranties listed, together with the

1 other non-bundled extended warranties, it would directly contradict the wording as well as
2 the intent of the undertaking in lieu. If it is a matter of listing John Lewis by name where
3 they are not within the scope of the website, it is not clear how that comes within the scope
4 or intent of the undertakings in lieu in the first place. Those are matters which the OFT has
5 in mind as well as us.

6 I simply point that out in order that you understand the nature of the problems. We do not
7 object to having a discussion with everybody.

8 THE CHAIRMAN: Miss Lester, do you think this is something which is capable of being
9 resolved if there was a discussion amongst the different parties which was chaired by the
10 OFT?

11 MISS LESTER: I cannot say whether it is capable of being resolved. I know the OFT has no
12 objection to having a meeting with everyone, but so far obviously it has tried to
13 accommodate what John Lewis has sought, and it simply has not been possible. There is
14 certainly no objection to holding an additional meeting.

15 Of course the OFT's position, as you will have seen, is that this was all decided in any event
16 in June, and so on. John Lewis's views were taken into account at that time and a final
17 decision was made, and there have been many subsequent discussions in correspondence
18 setting out the reasons why it has not been possible to accommodate John Lewis' concerns,
19 and an additional meeting at which again it was not possible to resolve those concerns, and
20 that is why we are here today. There is certainly no objection to an additional discussion
21 with everyone present.

22 THE CHAIRMAN: Let us proceed as far as the agenda is concerned. The interventions, there is
23 no objection from John Lewis. There are no confidentiality problems. There is this
24 timetable point about whether to have an initial hearing about the date on which the
25 decision was taken. Then there is the issue of whatever timetable we set leading up to a
26 hearing, which you say would be about a day.

27 MR. ROBERTSON: Yes, madam, and that is on the basis of service of detailed skeletons and
28 then strict time limits for the oral argument, normal Tribunal practice. We would like to
29 have that hearing listed as a consequence of today's CMC with the directions leading up to
30 it, because that will concentrate people's minds.

31 We have been in discussions with the OFT about this since the middle of last year, and it
32 has gone on for far too long.

33 THE CHAIRMAN: Yes, thank you. As far as the interventions are concerned, you presumably
34 no particular objection or axe to grind?

1 MISS LESTER: No.

2 THE CHAIRMAN: As far as the timetable is concerned, are you still pressing for this
3 preliminary point on when the decision was taken?

4 MISS LESTER: We are. We think that if that is heard – one suggestion for the Tribunal would
5 be that it could be disposed of without a hearing, on paper, but it does seem to us eminently
6 sensible to hear it as a preliminary point and resolve it first. If we are right on this point
7 then there is no need for the Tribunal to consider anything more. I think it is just not right
8 to say that the proportionate course is to hear all arguments together, because there are four
9 grounds of application that John Lewis has raised, and there is simply no need for anyone to
10 spend time and money dealing with those points at all if we are right on this really quite
11 simple timing point. So our proposal would be either a short hearing – half a day was my
12 suggestion, it could be less, but it seems to me that by the time you have had interventions
13 saying something about timing, realistically it is half a day, or no hearing at all, but
14 certainly to have that issue disposed of first, and obviously if we are wrong on that then
15 directions to hear the other issues.

16 THE CHAIRMAN: As far as what is going to happen about the website in between now and this
17 matter being resolved?

18 MISS LESTER: The current proposal is for the website to go live on 31st January. John Lewis’
19 notice of application makes it clear that it does not see its application as a bar to that taking
20 place. I think in para. 101 of the notice of application John Lewis says that there is no
21 question of the application affecting the ability of the OFT to launch the website. If John
22 Lewis’ application is successful the changes John Lewis seeks can easily and quickly be
23 implemented. So I think the parties are agreed that this application is not a bar to the
24 website continuing in any event. The OFT, I would say, is concerned that if it is wrong on
25 the timing point and there is to be a full hearing that it is not unduly compressed. Clearly
26 there are four grounds that have been raised and need to be responded to.
27 Currently, as we see it, no party is suggesting a further delay to launch the website in any
28 event so we would propose that there be a preliminary resolution of the timing point and
29 then a normal timetable for directions, but the current proposal is 31st January, all else being
30 equal.

31 THE CHAIRMAN: As far as the point about whether the letters that were sent in June amounted
32 to a final decision or not, just remind me where the OFT is as regards what else, if anything,
33 you would need to serve on the Tribunal in order for that matter to be resolved?

34 MISS LESTER: The timing point as it were?

1 THE CHAIRMAN: Yes.

2 MISS LESTER: The point has been set out but we would issue a notice of rejection or strike out,
3 an application notice, and there would then obviously be need for John Lewis to respond to
4 that, but it is simply a question of an application for a rejection ----

5 THE CHAIRMAN: They served evidence, but I cannot remember whether the evidence deals
6 with the negotiations and why presumably you say there was not a final decision in June.

7 MR. ROBERTSON: It is dealt with in detail because it was flagged up in the OFT's response to
8 our letter before claim, and therefore it is dealt with in detail in the notice of application,
9 and if you like I can take you to those paragraphs. It is also dealt with in detail in Mr.
10 Ambler's witness statement.

11 THE CHAIRMAN: Yes, that is what I wanted to see.

12 MR. ROBERTSON: It is paras. 39 and 40 of Mr. Ambler's witness statement, and in the notice
13 of application it essentially runs from para.31 through to 57. I should say, just to respond to
14 Miss Lester's submission that the Tribunal deal with this without an oral hearing, if you
15 were to direct a hearing of the preliminary issue in our submission there should be an oral
16 hearing. Were this in a judicial review in front of the High Court we would have a right to
17 an oral hearing on a permission issue such as this and therefore we would like the
18 opportunity to take the Tribunal through the evidence and just explain why what the OFT
19 says is the end of the process on 27th June 2012 was, in fact, only the beginning of a process
20 of engagement between the OFT and John Lewis.

21 THE CHAIRMAN: That is what I am trying to find out. I am trying to find out whether there
22 was anything else that would need to be before the Tribunal in terms of evidence if the
23 Tribunal were to decide that point on the papers.

24 MR. ROBERTSON: I think that depends on the nature of the evidence, if any, that the OFT
25 would serve in support of their application for effectively summary Judgment on this point,
26 because we might then need to have the right to reply.

27 THE CHAIRMAN: What I am trying to explore is whether there is sufficient information before
28 the Tribunal for me, for example, to set the date for a one day hearing of this, and then go
29 away and look at the material that there is and decide whether or not we are able to come to
30 a decision on the timing point without having to go through the formal process of an
31 application with evidence and then reply evidence if the matter is already set out in the
32 pleadings and in Mr. Ambler's witness statement. Is there anything else that we would need
33 in order to decide the point, apart from the benefit, of course, of your oral submissions.

34 MR. ROBERTSON: We have served everything we think we need to rely upon at this stage.

1 THE CHAIRMAN: Yes.

2 MR. ROBERTSON: Obviously subject to anything else that the OFT put in, we may then need to
3 have the right to reply.

4 THE CHAIRMAN: Would you then want to put in anything more on that?

5 MISS LESTER: What the Tribunal has so far is John Lewis's case on the timing point, but you
6 do not have any of the OFT's submissions or evidence on the point. I am not suggesting it
7 is going to be long, but we would want to have the opportunity, whether it is in an
8 application notice with a short supporting witness statement or a letter, the form does not
9 really matter, but briefly our case on why we say this was resolved in June, because, as I
10 say, John Lewis has helpfully set it out because it was flagged in correspondence as being
11 an issue, but so far you do not have the Office's case responding, as it were to John Lewis's
12 case on that. I do not expect it to take long. We would be able to put those documents in in
13 a matter of days from now.

14

15 MR. WOOLFE: Madam, just to reassure you on the speed with which this could be done, we are
16 unlikely to have very much to say about time, because the nature of it is that it is between
17 John Lewis and the OFT. We would like the opportunity to put in something short in
18 writing at the same time as the OFT in advance of the hearing ----

19 THE CHAIRMAN: On this point or generally?

20 MR. WOOLFE: On this point if it were to be heard, we would not seek any delay before that and
21 it would be very short.

22 THE CHAIRMAN: And, Mr. Robertson, what do you say about what is going to happen in the
23 interim? Is that the correct reading of that paragraph in your application, that you do not
24 mind the website going live now and it can be tweaked if tweak there needs be at a later
25 stage?

26 MR. ROBERTSON: Being realistic about it, if this matter is substantively resolved relatively
27 quickly then we may suffer some financial loss in the interim, but provided that is not too
28 much of an interim then we do not get to the threshold for applying for interim relief at first
29 blush.

30 Just to respond to what is being suggested as to this detail of getting into how the decision
31 was taken in mid-2012 and then thereafter what happened. This is essentially the full
32 factual inquiry that the Tribunal will need then to hear the substantive application. So once
33 you are on top of those facts in our submission the most sensible way is to have the full
34 hearing and just get on with applying the law relating to our grounds to those facts. We

1 view the prospect of a preliminary hearing with dismay because it just will be a recipe for
2 yet more delay, and as I have already said this matter has gone on for far too long as it is.

3 THE CHAIRMAN: Is there anything else anybody wants to say as regards that point or any other
4 point?

5 MISS LESTER: Just two short points. One is I am told that there may be some flexibility on the
6 date that the website goes live if that would assist in timetabling, so 31st January is not a
7 date set in stone. Secondly, at the risk of repeating myself just to respond to the point Mr.
8 Robertson has already made, the timing point really is a very short point and there is only
9 one issue the Tribunal would have to resolve, which is when was the website decision, as
10 defined by John Lewis, made? It is really not right, with respect, to say that once the
11 Tribunal has got its head around that that the rest is really quite short, because after that the
12 substantive notice of application raises all the issues about why did the OFT take the
13 decision that it did which it characterises as the 'website decision', and it is unfair and
14 unlawful in all the ways set out in the notice of application, but you do not really need to get
15 to all of that just to decide what was the decision that was made in June, and was there a
16 separate decision made in November, so it really will save a considerable amount of time.

17 THE CHAIRMAN: Which is the document that you say sets out the actual decision at the end of
18 June?

19 MISS LESTER: The final decision document which is tab 4 of John Lewis's application bundle.
20 The final decision on an MIR. The very short point is if the Tribunal looks, without wanting
21 to obviously argue the point, the Tribunal looks at paras. 3.7 to 3.9 of that document which
22 are internal pages 15 and 16, (tab 4) that is the OFT's final decision to accept undertakings.
23 I am referring you to 3.7 to 3.9, where the OFT considers the point raised by John Lewis
24 and explains its decision. There is some correspondence, you may not want to look at now,
25 at tab 6 of the attachments to Mr. Ambler's statement is a letter of 27th June, which sets out
26 the OFT's decision.

27 THE CHAIRMAN: Have the parties had a chance to consider when a day, either just pencilling it
28 in, in case we decided against you on the timing point, or in the event that we decide to
29 bundle the two matters together, when is it that we are looking for?

30 MR. ROBERTSON: We are very flexible; I would have thought any date in February.

31 MISS LESTER: The same for us.

32 MR. WOOLFE: Madam, we have nothing to disagree with on time, only to say in the interests of
33 proportionality we do want to have time to see what the OFT say, even just a week, before

1 we put our intervention in, in order we do not duplicate and do not repeat and thin out
2 where necessary.

3 THE CHAIRMAN: I will rise for a few minutes and look at the Tribunal's diary and then let you
4 know what I've decided to do.

5 (Short Break)

6 THE CHAIRMAN: Although I see there is some force in what the OFT say about the desirability
7 of saving costs, or potentially saving costs, by determining the timing issue first, I consider
8 that that renders this whole process too complicated, and in fact the best thing to do is to
9 have a day's hearing to cover and dispose of all the issues raised in this challenge.

10 What I propose therefore to do is grant permission to Comet and Dixons to intervene and to
11 set a timetable leading to a hearing on 27th February. What I propose is this: the defence
12 and any evidence in support be filed by 31st January. The interveners should then have their
13 one shot, which need not be a formal statement of intervention, but can be in the form of a
14 skeleton, by 11th February.

15 Then I propose there be simultaneous exchange of skeletons by John Lewis and the OFT by
16 19th February, and bundles lodged by 22nd February for, as I say, a day's hearing on 27th
17 February.

18 I also propose to direct that there be a meeting between the OFT, John Lewis, the
19 interveners and Argos by no later than 24th January, and for the OFT to write to the Tribunal
20 by close of play on 25th January, to let us know whether it has been possible, getting all the
21 parties round the table, to resolve this matter.

22 Does anyone have any points they want to make on that timetable?

23 MR. ROBERTSON: Not on behalf of John Lewis.

24 MR. WOOLFE: No, madam.

25 MISS LESTER: No, thank you, madam.

26 THE CHAIRMAN: Very well, we will draw up an order and circulate that in due course.

27 Thank you very much.
28 _____