



Neutral citation: [2005] CAT 27

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1022/1/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB.

15 July 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
BARRY COLGATE
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

JJB SPORTS PLC

Appellant

and

OFFICE OF FAIR TRADING

Respondent

supported by

SPORTS WORLD INTERNATIONAL

Intervener

Mr. Mark Hoskins (instructed by DLA Piper Rudnick Gray Cary LLP) appeared for JJB Sports PLC.

Mr. Stephen Morris QC, Mr. Jon Turner and Miss Anneli Howard (instructed by the Director of Legal Services, the Office of Fair Trading) appeared for the Respondent.

RULING (PERMISSION TO APPEAL)

1. JJB seeks permission to appeal the Tribunal's judgments on liability and penalty in these proceedings under section 49 of the Competition Act 1998 ("the 1998 Act"). Although Rule 58 of the Tribunal's Rules (SI 2003 No 1372) envisages the possibility of an oral application for permission to appeal, we do not think that that is a sensible way to proceed in a complex case where the judgments on liability and penalty run to 301 and 94 pages respectively. When JJB originally applied orally for permission on 19 May 2005 we declined to hear the application on that date on the grounds that (i) we wished to hear all applications for permission to appeal together, and it was not yet clear whether other parties might seek permission (ii) it was unsatisfactory to proceed in a case such as the present, without any prior notice of the points of law to be taken being given to the OFT or, indeed, being formulated in writing for the Tribunal. We directed that an outline of the points to be taken was to be served on the OFT.

2. The resulting document entitled "JJB's Grounds of Appeal" dated 26 May 2005 is extremely scanty and does not refer to any authority. In his judgment concerning permission to appeal in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] EWCA Civ 796 Buxton LJ indicated in paragraph 15 that in an application for permission should: "1) Identify in precise terms the rule of law said to have been infringed; (2) Demonstrate where in the European jurisprudence that rule is to be found, by specific reference to the European authorities; (3) Demonstrate briefly from the Tribunal's judgment the nature of the error, by reference to the Tribunal's handling of the issue in question." In cases such as the present, that guidance should normally be followed also at the level of the Tribunal, to assist both the Tribunal and the Court of Appeal. Rule 58 provides that the parties have a month in which to prepare written grounds before the Tribunal, which should be ample time to do a proper job in most cases and was certainly ample time in the present case. If permission is refused by the Tribunal, the grounds presented to the Court of Appeal should, in principle, be the same as those presented to the Tribunal, if the system is to work effectively.

3. There is no appeal against the Tribunal's findings regarding one of the three findings of infringement made against JJB, namely the MU Agreement. JJB, the most prominent retailer in the sector, is now the only remaining appellant.
4. As regards the England Agreement, the first ground of appeal, ground 1a, is that the Tribunal erred in law "in that, given the high standard of proof applicable, it reached a conclusion on the evidence before it that was not reasonable."
5. Although in oral argument some mention was made of the Tribunal having made some error in the standard of proof, this was not particularised and no passage in Tribunal's judgment was identified in that regard. Any point about the standard of proof, if there was one, was not clearly formulated and we disregard it for the purpose of this application.
6. In any event in our judgment ground 1a is too vague to constitute a proper ground of appeal.
7. In oral argument it was contended that two earlier witness statements of the OFT's principal witness Mr. Ronnie were not wholly consistent with the later evidence which he gave to the OFT and upon which the Tribunal subsequently relied. In JJB's submission there was therefore a "plausible alternative explanation" which did not implicate JJB in the infringements, and the Tribunal had overlooked paragraph 57 of the judgment of the Court of Justice in *Joined Cases C-204/00 P etc Aalborg Portland A/S and others v Commission* [2004] ECR I-123, which provides:

"57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."
8. We do not see this as a point of law but as a point of fact dressed up as a point of law. We deprecate attempts to pick out one or two isolated pieces of evidence on the basis of which, it is alleged, the Tribunal made an error of law. The evidence on which an infringement was found against JJB in respect of the England Agreement is set out in detail at paragraphs 593 to 670 of the liability judgment and was in our

view entirely sufficient to support the findings of the OFT in the Decision. We dealt with Mr Ronnie's evidence at paragraphs 548 to 574 and 587 to 592, see also paragraphs 394 to 429 (pressure and complaints) and 503 to 586 (the evidence generally). Despite the fact of Mr Ronnie's earlier witness statements we found that Mr. Ronnie gave honest evidence in the witness box: see paragraphs 587 to 592.

9. In any event, the Tribunal fully took into account the thrust of *Aalborg Portland*, which is cited at paragraph 206 of the liability judgment, which is that concerted practices often occur in a clandestine way and can be proved only by circumstantial evidence. In the present case much of the evidence was direct. Paragraph 57 of *Aalborg Portland* does not, in our view, mean that wherever a party alleges what he says is a reasonable alternative explanation, he must be found not guilty of a concerted practice. Everything depends on the totality of the evidence, which we considered at length. We cannot see any point of law in this ground.
10. Ground 1(b) refers to paragraph 659 of the liability judgment, where the Tribunal states:

“... if one retailer A privately discloses to supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition.”
11. It is submitted that that formulation is wrong as a matter of law because it overlooks the need for subjective collusion between A and C and that EC case law properly interpreted establishes that two undertakings cannot be parties to an agreement or concerted practice in the absence of subjective collusion between those parties.
12. A passage from Professor Whish's textbook, not mentioned in the ground of appeal, was read to us, but no copies provided.
13. We observe first that the observations made by the Tribunal in paragraph 659 was not dispositive of the case, since in the preceding paragraphs the Tribunal found that Mr. Ronnie did go back to JJB to tell them that Sports Soccer had agreed to raise its

price on the England shirt: see paragraph 658, but more particularly paragraphs 645 to 655 which set out the essential basis for our factual conclusion that JJB was party to a concerted practice in relation to the England shirt. No challenge is made to those findings, which apply the law as set out in paragraphs 638 to 641 to which no challenge is made either. The evidence as a whole set out at paragraphs 394 to 429, and 503 to 670, needs to be taken into account. The analysis as regards JJB begins at paragraph 597.

14. Paragraph 659, which begins “for example”, is an illustration of where, in our view a concerted practise may arise, but our findings on this aspect of the case against JJB are grounded in paragraphs 637 to 656, not 659. In any event, the essence of a concerted practice is in our view the idea of “reciprocal contact” as made clear by Case 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663 and Cases T-25/95 etc. *Cimenteries v Commission* [2000] ECR II-491, cited at paragraphs 638 to 641. A concerted practice does not have to have all of the ingredients of “an agreement”. In our view there is no basis for permission to appeal under ground 1(b).
15. Thirdly, under ground 1(c) it is said that the Tribunal erred at paragraph 664 of the liability judgment in formulating the following:

“... if a competitor (A) complains to a supplier (B) about the market activities of another competitor (C), and the supplier B acts on A’s complaint in a way which limits the competitive activity of C, then A, B and C are all parties to a concerted practice to prevent, restrict or distort competition.”

JJB’s submission here is based on the same argument to the effect that this formulation is wrong in law because again it overlooks the fact that absent some form of subjective collusion or “mental consensus” between A and C, there can be no agreement or concerted practice which involves A and C.

16. Paragraph 664 has no effect on our primary finding of fact that JJB was party to the England Agreement, made on the basis of all the evidence. We point out that paragraph 664 is an additional finding of the Tribunal, see paragraphs 663 and 669, based on what is set out in Section XI of the liability judgment and does not affect the findings of facts against JJB in paragraphs 593 to 658. The further findings of fact we make are in our view fully supported by the facts as set out at paragraphs

663 to 669 and the cases cited at paragraph 664. No arguable point of law with a reasonable prospect of success arises out of this ground.

17. One substantive ground of appeal (Ground 2) is advanced in respect of the MU Centenary Shirt Agreement which (as explained orally but not in the grounds) is to the effect that the Tribunal erred in dealing with part of Mr. Fellone's evidence which, according to JJB, indicated that JJB's intention in seeking and receiving confirmation that Sports Soccer would not discount was to avoid a situation in which Umbro might dispose of the stock on a clearance basis. Again, we see this as an attempt to pick out one isolated element of evidence without regard to the whole mosaic set out at paragraphs 933 to 989 of the judgment. Our findings of fact are at paragraphs 975 to 989. The point on which JJB relies is mentioned at paragraph 977, but ignores among other things the entirety of paragraphs 975, 976 and 979. The analysis at paragraphs 984 to 989 which follows does not seem to us to raise any arguable point of law. This is pure point of fact. Again, we would caution against picking out small bits of evidence in a complicated case such as this.
18. As regard the penalty, the first point taken, which is not set out in the written grounds of appeal, is that there is a virtually unfettered right to appeal to the Court of Appeal on penalty under section 49(1)(a) of the 1998 Act which is independent of the right of appeal on a point of law pursuant to section 49(1)(c). As we said in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading (Reasons For Refusing Permission To Appeal)* [2002] CAT 5, permission to appeal should be refused in relation to the amount of a penalty if there were no grounds for supposing that the penalty was manifestly excessive or wrong in principle. In our view the very fact that permission must be sought on an appeal on penalty means that a material error by the Tribunal must be established: The test applied by Court of Appeal Criminal Division of "manifest error or wrong in principle" seems to us a reasonable approach by analogy.
19. The penalty is ultimately a matter of judgment and appreciation, and depends on the whole facts of the case. Our judgment as regards JJB is to be found in particular at paragraphs 155, 158, 162, 164, 169, 170 (in particular), 172, 188-191, 192-194, 200 and 201 (in particular). Paragraphs 170 and 201 are in the following terms:

“170. In the present case we think that a deterrent measure under Step 3 was fully justified as against JJB. JJB was the largest sports goods retailer, with a relatively high profile and, as the evidence before the Tribunal showed, a strong market position and strong buying power. JJB had no hesitation in seeking to pressurize Umbro to respect its wishes: section XI of the Liability Judgment. In our view, only deterrent penalties on powerful companies such as JJB are likely to secure the objectives of the Act.”

“201. We have also borne in mind that JJB has not accepted any responsibility for the infringements proved, and has made no offer to make amends. No mitigation therefore arises in that regard: see *Argos and Littlewoods v OFT* [2002] CAT 13 at paragraphs 237 to 238. Having regard to JJB’s United Kingdom turnover of £659 million in the year to 31 January 2001, we do not think a penalty of around 1 per cent of turnover is at all excessive in the circumstances, bearing in mind the objectives, including deterrence, set out in paragraph 1.8 of the *Guidance*. Indeed the penalty imposed on JJB could be regarded as moderate when compared, in relative terms, to the penalty imposed on Umbro.”

20. These were the grounds on which we fixed JJB’s penalty, and we are unpersuaded of any error.

21. Ground 3 (on penalty) is in these terms:

“At paras 101-120 and 134-152 of the penalty judgement the Tribunal:

a) failed to find that the OFT had failed to have proper regard to the Director General of Fair Trading’s *Guidance* as to the Appropriate Amount of Penalty, OFT 423, March 2000 (“the *Guidance*”), as required by s.38(8) of the 1998 Act;

and

b) itself failed to have appropriate regard to the *Guidance*

so that neither the OFT nor the Tribunal identified the correct relevant product market as required by paragraph 2.2 and footnote 7 of the *Guidance*.”

22. The Tribunal’s overall approach to penalty is at paragraphs 101 to 106. Paragraphs 107 to 116 of the penalty judgment, which refer to paragraph 2.3 and footnote 7 of the OFT *Guidance*, set out what is in our view the correct approach to be adopted by

the OFT in the Decision and the Tribunal in its Judgment in relation to defining the relevant product market.

23. In relation to the relevant product market (socks and shorts as well as shirts) this issue was considered in paragraphs 117-152 of the penalty judgment. The Tribunal found that the OFT was correct to consider the effect on replica kit generally. Accordingly, the Tribunal has taken account of the OFT's guidance but has adopted a broad brush approach in its analysis of the penalty imposed: see paragraph 196 (and paragraphs 202-206, where the Tribunal performed a cross-check on the conclusion as to penalty). JJB's argument that the Tribunal is bound by the OFT's Guidance has no statutory basis and would prevent the Tribunal from correcting injustice.
24. In our view, what are the "products affected by the infringement" is a question of appreciation and fact rather than a point of law.
25. The remaining grounds of appeal (4 to 7) are in our view questions of appreciation. As regards Ground 4, the starting percentage of 9% was the same for JJB, Allsports and MU. The England Direct Agreement was a minor matter and JJB's success on that issue was not an appropriate factor to affect the starting percentage to be applied in respect of the other infringements. The multiplier of 3 (Ground 5) was in our view appropriate for JJB, Allsports and MU.
26. The Tribunal's observations at paragraphs 203 (pressure) and 204 to 205 (MU Centenary Shirt) are part of a "cross-check" (see paragraph 202) in the Tribunal's approach to arriving at the penalty. They are matters of appreciation, which take into account JJB's pressure set out in Section XI, notwithstanding paragraphs 426 to 428, and the Tribunal's findings of fact on the MU Centenary Shirt.
27. We have therefore not found any basis in the grounds of appeal advanced by JJB to give permission to appeal.
