



Neutral citation [2006] CAT 35

IN THE COMPETITION
APPEAL TRIBUNAL

Case: 1068/2/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

14 December 2006

Before:

Marion Simmons QC (Chairman)
Peter Clayton
David Summers

Sitting as a Tribunal in England and Wales

BETWEEN:

CASTING BOOK LIMITED (IN ADMINISTRATION)
(TRADING AS INDEPENDENT POSTERS)

Appellant

-and-

OFFICE OF FAIR TRADING

Respondent

Mr. Raymond Assirati appeared for the Appellant.

Mr. Meredith Pickford (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Heard at Victoria House on 24 October 2006

JUDGMENT (ADMISSIBILITY)

Introduction

1. In these proceedings the appellant, Casting Book Limited (in administration), trading as Independent Posters (“Casting Book”), seeks to appeal against a decision of the Office of Fair Trading (“OFT”), contained in a letter of 20 February 2006, closing its investigation into an alleged collective boycott by Trade Marks And Rights Holders Against Piracy (“TRAP”) and/or certain of its members (“the decision letter”). It appears that the OFT’s investigation came about as a result of a complaint it received from Independent Posters on 24 December 2004.
2. The OFT raised an objection to the appeal on the basis that it, the OFT, did not take a decision capable of being appealed to this Tribunal. This judgment deals with that preliminary question.

Summary of the Tribunal’s conclusion

3. In summary, our conclusion is that the OFT did not, in this case, take a decision as to whether or not the matters investigated amounted to an infringement of the Chapter I prohibition contained in section 2 of the Competition Act 1998 (“the Act”). In other words, the OFT did not take a decision capable of being appealed to this Tribunal by Casting Book pursuant to section 47(1)(a). Accordingly, Casting Book’s appeal is inadmissible.

Procedure before the Tribunal

4. Upon receipt of the notice of appeal on 28 April 2006, the Registrar of the Tribunal wrote to Mr Assirati noting that the appeal appeared to be out of time. Following receipt of observations by Mr Assirati, a hearing was fixed to consider the issue. That hearing took place on 13 July 2006. The Tribunal gave a ruling at the hearing to the effect that, on a balance of probabilities, Mr Assirati was notified of the decision letter on or after 28 February 2006, which meant that the appeal was lodged within time for the purposes of rule 8 of the Competition Appeal Tribunal Rules 2003, SI 2003/1372: [2006] CAT 16.

5. In its submissions for the hearing on 13 July 2006, the OFT had indicated that it wished, in any event, to challenge the admissibility of the appeal. At that hearing the Tribunal decided to determine the issue of admissibility as a preliminary issue. Case management directions were issued, leading to a hearing on 24 October 2006. The OFT filed its defence, which included its written submissions on the question of admissibility, on 24 August 2006.
6. Annexed to the OFT's defence were witness statements by Mr Edward Ray, Principal Case Officer at the OFT, and Mr Simon Priddis, Senior Director of Competition Casework at the OFT. Mr Ray led the case team which worked on the investigation. Mr Priddis took the ultimate decision to close the investigation. Mr Ray's witness statement, his second in this case,¹ explains the background to the appeal, summarises the steps taken in the investigation and the process leading up to his recommendation that the investigation be closed. Mr Priddis' witness statement explains (i) the selection and prioritisation by the OFT of casework at the material time, and (ii) his own role in the investigation and his decision that it should be closed.
7. By letter of 5 September 2006 the Tribunal asked the appellant to include, with its submissions on admissibility, a clarification of its case. Casting Book filed its submissions on admissibility and the requested clarification on 6 October 2006.

The contested decision

8. The decision letter explains that the OFT received a complaint in December 2004 alleging that certain members of TRAP had threatened several distributors that they would cease supplying them with official celebrity merchandise unless those distributors stopped supplying unofficial celebrity merchandise. The OFT informally gathered information and obtained a number of relevant documents. On 27 June 2005 the OFT decided to open a formal investigation into a possible infringement of the Chapter I prohibition by TRAP and/or its members. The decision letter records that the OFT issued a series of formal notices to TRAP, its members and various third parties (including some retailers and distributors) pursuant to section 26 of the Act, requiring

¹ Mr Ray's first witness statement dealt with matters concerning the question whether the appeal had been lodged within time.

the production of specified documents and the provision of specified information. As a result, the OFT obtained a number of relevant documents (paragraphs 4 to 6).

9. The decision letter points to the “limited scope” of the series of section 26 notices the OFT issued, explaining that it did not have a comprehensive set of the relevant documents or all the relevant information it would need to pursue the TRAP case. The decision letter states that the OFT had not developed its analysis and understanding of the factual context by discussing the documents with, or obtaining explanations from, the parties. Nor, the decision letter states, had the OFT investigated the economic effects of the parties’ conduct or considered matters relevant to the exemption criteria contained in section 9 of the Act: “in short, the OFT’s investigation was at an early stage” (paragraph 7). The rest of the decision letter reads as follows:

- “8. The OFT's Competition Enforcement Division ('CE Division') focuses its resources on priority investigations, so as to progress those investigations in a more timely and effective manner. In particular, this process of prioritisation is ongoing and involves reviewing all cases at key milestones during an investigation to ensure that pursuing that investigation continues to represent best use of the OFT's resources (and hence public money). CE Division is currently undergoing a substantial programme of change. The OFT is thus placing emphasis on these prioritisation reviews at the present time as the new approach to focusing the work of CE Division is bedded in.

9. The OFT has decided to close the TRAP Case on the basis that this case currently does not constitute an administrative priority. This decision has been taken for a number of reasons.

10. First, and most importantly, the OFT has weighed-up the potential benefits of pursuing the TRAP Case against the potential benefits of diverting those resources to other major cases that the OFT's CE Division currently has open. These alternative investigations include cases involving 'hard-core' cartel-type behaviour that cannot currently be progressed in a timely and effective manner due to CE Division's resource constraints. The OFT considers that the time and resources required to bring the TRAP case to a conclusion would be better spent on these other investigations given their very serious nature.

11. Second, one of the factors that the OFT takes into account, when prioritising cases is the likely level of consumer detriment. The level of consumer detriment is

likely to be related to the value of the products in question . Based on evidence obtained from the Section 26 Round, the value of the products in question appears to be markedly smaller than the OFT believed in June 2005 when it opened its formal investigation. These alternative figures suggest that the retail value of celebrity calendar sales is approximately 30% of the estimate originally provided to the OFT. The equivalent figures for the retail value of T-shirt sales and the retail value of poster sales are approximately 25% and 55% of the original estimates respectively. These lower figures appear to be consistent with contemporaneous documents. Accordingly, the OFT now considers that the likely level of any consumer detriment is lower than it originally believed. Accordingly, the TRAP Case is now a lower priority than at the time the OFT began its formal investigation.

12. Third, the OFT is mindful of the presence of illegal unofficial celebrity merchandise that infringes others' intellectual property rights. In particular, the OFT is aware of the risk that continuing its formal investigation may reinforce the position of suppliers of illegal unofficial celebrity merchandise. For example, the cost and disruption were the OFT to continue its investigation may undermine TRAP's legitimate activities against illegal unofficial celebrity merchandise. Further, insofar as companies are involved in the manufacture, sale and distribution of illegal unofficial celebrity merchandise, as well as legal unofficial celebrity merchandise, protecting their legitimate activities from any collective boycott is less of an administrative priority for the OFT.
13. Thus, for the reasons set out in paragraphs 9-12, the OFT has decided to close the TRAP Case on the basis that it currently does not constitute an administrative priority.
14. The OFT keeps its priorities under review. As existing investigations reach a conclusion, resources become available for new investigations. Accordingly, the OFT will remain vigilant and consider any evidence it receives concerning conduct in the celebrity merchandise industry that might infringe the Act.”

The notice of appeal

10. Casting Book’s notice of appeal, which takes the form of a letter, states that Independent Posters was the manufacturer of posters of celebrities until it went into administration (caused, according to Casting Book, by the actions of TRAP and/or certain of its members). Its posters contain ‘unofficial’ celebrity photographs, which

are (according to Casting Book) perfectly legitimate and do not breach any copyright. Casting Book explains that unlike official celebrity merchandise, unofficial merchandise is not endorsed by the celebrity featured on the article in question. (At the hearing Mr Assirati told us that photos can be obtained legitimately from photo libraries for a modest sum.) Casting Book states that suppliers of unofficial celebrity merchandise compete on price with official celebrity merchandise.

11. The notice of appeal states that TRAP is an association of entities holding licences for the reproduction of celebrity images; that TRAP has a substantial number of members holding licences for the reproduction of images; and that together they control a substantial part of the market for such licences. The notice of appeal explains that a complaint was made to the OFT by Independent Posters and other producers regarding the conduct of members of TRAP. They complained that TRAP and/or its members were threatening retailers to stop supplying them with official merchandise if they stocked unofficial merchandise. According to Casting Book, a small retailer in particular was sent very threatening letters by TRAP.
12. Casting Book notes that an investigation was launched, which “indicated a case to answer on the part of TRAP”. Casting Book states that it understands that the OFT had concluded that TRAP was acting unlawfully. However, on 5 January 2006 the OFT wrote to Casting Book (among others) to inform it of the OFT’s provisional decision to close the investigation. Casting Book notes that the OFT wrote to it on 20 January 2006, stating that it had considered carefully a response to its provisional decision but had taken the “ultimate decision” to close the TRAP matter. The end of the notice of appeal is in the following terms:

“I understand that we may appeal this decision to the Tribunal and wish to do so because there was a cartel, the OFT investigated it and we understand concluded a case against TRAP was made out but refuse now to pursue it because of apparent administrative restrictions. In the absence of the OFT protecting us and the public against cartels what are we supposed to do when as usual cartels are organised by large companies with substantial funds and resources to eliminate smaller competitors offering competitive prices. This decision cannot be right and we seek that it be overturned and the OFT conclude its work.”

The witness statements of Mr Ray and Mr Priddis

13. As set out above, the OFT filed two witness statements with its defence. Mr Ray's witness statement deals with the process of the investigation into the matters raised in Independent Posters' complaint. He sets out the typical investigation process in a case handled by his branch ("CE4") of the Competition Enforcement Division ("CE Division") of the OFT. In those cases that are potential candidates for a formal investigation pursuant to section 25 of the Act, the case team may first gather information relating to the conduct in question and/or the priority to be attached to the matter with a view to the Branch Director deciding whether the case team should begin drafting a so-called "section 25 report". Such a report contains the case team's assessments of (i) why the case, in their view, passes the threshold for an investigation to be opened under section 25 and (ii) the relative priority of the case. It also summarises next steps. Ultimately, the decision to open an investigation under section 25 was one for the CE Division directors to take at a "Heads of Branch" meeting (paragraphs 8 to 9).
14. Mr Ray explains that once a formal investigation is under way, the case team will begin to gather further information, primarily pursuant to section 26 of the Act. The team will typically meet relevant parties and may informally visit sites. Mr Ray states that the information gathering exercise is both iterative and incremental. Information received will often have to be followed up, either for clarification or so as to fill in any gaps, or indeed because new issues emerge. The team will produce working papers summarising the evidence or analysing particular issues (paragraph 10). According to Mr Ray, the evidence-gathering phase may often last 1-2 years.
15. Mr Ray explains that whilst the Branch Director would keep up to date of broad progress being made, until mid-2005 there was no formal process for re-assessing the priority to be attached to particular cases. Since mid-2005, there has been a shift in emphasis towards reassessment at "milestones" in the investigation (paragraph 11).
16. Mr Ray then sets out the investigation process in the TRAP investigation. He explains that between 4 January 2005 (on which date the case file was opened) and 1 July 2005 (when Mr Assirati was informed that the OFT had opened a formal investigation) the case team, among other things, contacted Mr Assirati on a number of occasions and contacted nine companies it believed to be members of TRAP, inviting them to

comment on the allegations that had been made. A reply was received to the effect that TRAP denied being aware of or involved in any incidents where its members had refused to supply companies that stocked unofficial celebrity merchandise.

17. Mr Ray explains that at a “Heads of Branch” meeting on 27 June 2006 it was resolved to open a formal investigation. However, Mr Ray was explicitly informed that “there was a need to review at various stages the strength of the evidence and the priority attached to it” (paragraph 24).
18. Mr Ray states that on 1 and 4 July and 2 August 2005 the OFT issued a series of section 26 notices with the primary purpose of requesting documents and background details of the industry. Replies were received in July and August 2005. TRAP’s response to the notice of 2 August 2005 contained figures on the estimated value of retail and wholesale sales of celebrity merchandise to UK consumers in 2004. Mr Ray notes that these figures were substantially lower than Mr Assirati’s estimates of the value of the products in question (provided to the OFT on 28 January 2005) (paragraph 31).
19. Mr Ray notes that during the summer of 2005 there was an increasing shortage of resources within CE4; indeed the acting CE4 branch director had informed senior management that staffing was a serious problem. That shortage of resources affected the case team working on the TRAP investigation (paragraph 32).
20. Mr Ray explains that on 5 September 2005 he sent an email to the acting branch director of CE4 explaining that, in his view, the documents the case team had received were promising, that there were a number of possible avenues, but that the team had not fully digested the documents and there were a lot of follow-up questions. He added in that email that the team had not met the parties, and so did not know what their justification might be. He also noted that the investigation was not progressing quickly “given the resource crunch”. Mr Ray explains that after 13 October 2005 he was the only member of the case team working on the TRAP case (paragraphs 33 to 34). He further explains that following an informal site visit to Camden market on 14 October 2005, which emphasised to him the significant presence of illegal celebrity merchandise, he was “somewhat nervous about the probity of some of the companies that were likely to benefit were the TRAP case to continue” (paragraph 35).

21. Mr Ray explains that on 17 October 2005 he prepared a note for Mr Chris Mayock, CE4's new branch director, saying that the investigation was a "young case", that the case team had been hampered by the departure of a number of case officers. He summarised his own view of the TRAP investigation, which was that whilst the evidence was promising, there was the question of whether the case was an administrative priority. On 7 December 2005 Mr Ray sent Mr Mayock another note recommending the closure of the case on grounds of administrative priority. This latter note was sent to Mr Priddis the next day. Mr Ray exhibits Mr Priddis' response, which was to the effect that he agreed with the recommendation. Mr Ray then sets out the formal steps taken to close the case (paragraphs 36 to 39).
22. Mr Ray then explains in some detail the evaluation process leading up to his recommendation to close the file. He states among other things that whilst there was promising evidence, a considerable amount of work needed to be done: in Mr Ray's view, producing an infringement decision would have required at least another 18 months' work. For example, the 'story' would have needed to be completed, the documentary record being fragmented, and the OFT would have needed to contact a number of key parties. In addition, further legal research and evidence gathering would have been required on a range of issues, including: whether or not any collective boycott constituted an 'object' restriction; what the effect was of any collective boycott; market definition; assessment of market power/appreciability; and the applicability of any exemption. Over and above such research and evidence gathering, the OFT would have had to devote further resources to carrying out the necessary procedural and administrative requirements (paragraphs 40 to 52).
23. As set out above, Mr Priddis' witness statement explains the reorganisation of CE Division, the selection and prioritisation of cases and his involvement in the decision to close the TRAP case.
24. The objective of the reorganisation of CE Division was "to improve the direction of casework and to support the delivery of results consistent with the OFT's overall enforcement strategy and priorities" (paragraph 5). The OFT wished to deliver "more efficient progression and prioritisation of [its] competition caseload", the main challenge being how to use its resources to best effect (paragraphs 6 and 7). Mr Priddis

states that the role of Senior Director Competition Casework (which he occupied at the material time) was, in summary, “(a) to ensure that CE Division’s anti-trust caseload is properly progressed according to realistic project plans; (b) to ensure that casework selection, processes and priority setting are robust, evidence-based and consistent with OFT Board direction... (c) to take responsibility for, and to oversee, the processes for filtering and dealing with complaints and enquires received by CE Division; and (d) to lead and coordinate the formation of case teams and ensure that appropriate resources are available during the lifetime of the case” (paragraph 9).

25. As for the selection and prioritisation of casework, Mr Priddis sets out the six broad factors used by the OFT, namely (i) the likely extent of consumer detriment caused by the alleged infringement; (ii) the strength of the evidence available; (iii) the type of infringement; (iv) any aggravating and mitigating factors; (v) policy considerations, (such as whether the case has precedent value or is in a priority area); and (vi) whether enforcement action under the Act is the most appropriate way of dealing with the issue and the OFT is the most appropriate body to undertake enforcement action (paragraph 11). The OFT also reviews the priority of a case at “key milestones” (paragraph 13).
26. According to Mr Priddis, it was agreed at a “Heads of Branch” meeting on 27 June 2005 that a formal investigation should be opened in order for the case team to conduct one round of information gathering pursuant to section 26 of the Act, following which there would be a further review of whether to continue with the formal investigation. The information gathered indicated that the size of the relevant market, and hence the extent of any consumer detriment, might be significantly lower than originally thought. This indication, together with the difficulty of distinguishing between “unofficial legal” and “illegal” celebrity merchandise suggested to Mr Priddis in November 2005 that the priority weighting of the case was likely to slip (paragraphs 17 to 20).
27. Mr Priddis then explains that on 7 December 2005 he received Mr Ray’s note recommending closure of the case. Mr Priddis’ provisional expectation, based on this note and on his own understanding of the case, was that this case was unlikely to result in a formal non-infringement decision. He states, however, that there were various points suggesting that the case might no longer constitute an administrative priority and that it was incumbent upon him to take into account broader considerations with regard

to CE Division's entire antitrust caseload (paragraphs 22 to 29). According to Mr Priddis, the following prioritisation and resourcing issues were particularly pertinent at the time he considered the proposal to close the TRAP case: (i) within CE4, there were significant resourcing constraints due to staff departures and vacancies; (ii) at that time, the TRAP case team comprised only Mr Ray. Therefore, in order to progress the case, it would have been necessary to allocate additional staff resources to the case, with knock-on implications for the staffing of other cases; (c) CE Division as a whole was facing a "resource crunch" such that certain existing high priority cases were not sufficiently resourced to enable timely and effective case progression; and (d) Mr Priddis was also aware of a number of imminent matters which would require significant CE Division resources in the near future. Mr Priddis states that he therefore endorsed the proposal to close the TRAP case (paragraphs 31 to 32).

The OFT's submissions

28. It is convenient to set out the OFT's submissions first. As set out above, the OFT submits that it did not take an appealable decision. It refers the Tribunal to its previous case law on the question of what constitutes an appealable decision, in particular to *BetterCare* [2002] CAT 6, *Freeserve* [2002] CAT 8, *Claymore* [2003] CAT 3 and *Aquavitae* [2003] CAT 17. In particular, it draws the Tribunal's attention to paragraph 122 of *Claymore* and to paragraph 206 of *Aquavitae*.
29. Applying the law to the facts of this case, the OFT submits that it would be quite wrong to draw the "normal" inference that the OFT has made a decision of non-infringement in the present case. The OFT makes the following three submissions in that regard. First, the OFT's decision not to continue its investigation was squarely taken on the basis of administrative priority. Secondly, there were further steps to be carried out in the investigation before the OFT could have been in a position to reach a view on the question of infringement. Thirdly, to the extent that the OFT reached any view on the merits, that (provisional) view tended towards infringement rather than non-infringement.
30. As to the first of those submissions, the OFT points to (i) the fact that it weighed the potential benefits of pursuing the TRAP case against the potential benefits of diverting

those resources to other major cases then open, including “hard core” cartel investigations which the OFT considered to be more compelling candidates for the use of its limited resources; (ii) the OFT’s view that the likely consumer detriment was significantly smaller than it had first thought; and (iii) the OFT’s view that account should be taken of what it believed to be the legitimate role of TRAP in preventing illegal infringement of intellectual property. The OFT submits that none of these reasons points to a decision of non-infringement, either expressly or by necessary implication. Indeed, each demonstrates a “genuine independent reason” for closing the file (*Aquavitae*, cited above, at paragraph 209).

31. As to the second point, the OFT submits that in terms of the stage the investigation had reached, this case is not comparable to *Claymore*, where the Tribunal came to the view that the OFT had investigated the matter exhaustively. Here, there were, as set out by Mr Ray in his witness statement, significant further steps that would have been necessary before the OFT would have been in a position to make any decision as to infringement.
32. As to the third point, the OFT submits that such provisional comments as were made by the OFT when closing the case tended towards infringement. The case is thus a long way from the situation in *Aquavitae*, where the evidence before the Tribunal was that Ofwat officials considered that there was no case under the Act (see paragraph 207).

Casting Book’s submissions

33. Casting Book submits, in essence, that the OFT did come to a non-infringement decision. It refers to *Aquavitae* at paragraph 206, cited above, and submits that there are no exceptional circumstances such as to dislodge the “normal” inference that the OFT has reached a non-infringement decision. Casting Book submits that the logical conclusion to be drawn from the decision letter is that the OFT concluded that there was no infringement: if the OFT had reasonable grounds to suspect an infringement and then closed the case down, it can only be because it has actually come to the opposite conclusion.

Tribunal’s analysis

34. The jurisdiction of the Tribunal to hear appeals in respect of decisions taken under the Act is set out in sections 46 and 47 of that Act:

“46 Appealable decisions

- (1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
- (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
- (3) In this section “decision” means a decision of the OFT—
 - (a) as to whether the Chapter I prohibition has been infringed,

...

47 Third party appeals

- (1) A person who does not fall within section 46 (1) or (2) may appeal to the Tribunal with respect to—
 - (a) a decision falling within paragraphs (a) to (f) of section 46(3);

...”

35. The Tribunal’s case law in relation to what constitutes an appealable decision is summarised in *Claymore*, cited above, at paragraph 122:

“In our view the main principles to be derived from *Bettercare* and *Freeserve* are:

(i) The question whether the Director has “made a decision as to whether the Chapter II prohibition is infringed” is primarily a question of fact to be decided in accordance with the particular circumstances of each case (*Bettercare*, [24]).

(ii) Whether such a decision has been taken is a question of substance, not form, to be determined objectively, taking into account all the circumstances (*Bettercare*, [62], [84] to [87], and [93]). The issue is: has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before him? (*Freeserve*, [96]).

(iii) There is a distinction between a situation where the Director has merely exercised an administrative discretion without proceeding to a decision on the question of infringement (for example, where the Director decides not to investigate a complaint pending

the conclusion of a parallel investigation by the European Commission), and a situation where the Director has, in fact, reached a decision on the question of infringement (*Bettercare*, [80], [87], [88], [93]; *Freeserve*, [101] to [105]). The test, as formulated by the Tribunal in *Freeserve*, is whether the Director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition (*Freeserve*, [101] and [102]).”

36. In *Aquavitae*, the Tribunal said at paragraph 206:

“In normal circumstances, where the OFT or a concurrent regulator has expressly indicated that they will consider a complaint on its merits, the Tribunal will expect that investigation to reach an outcome. If the outcome of that investigation is to close the file, the Tribunal will normally infer that that is because there is insufficient evidence of infringement. In most cases the result will be an appealable decision, in accordance with the principles now established in *Bettercare*, *Freeserve* and *Claymore*, cited at paragraph 5 above. As *Claymore* makes clear, at paragraphs 124 to 146, the drafting of the case closure letter is unlikely to deflect the Tribunal if the substance of the matter is a finding of insufficient evidence of infringement. Moreover, the inference that the case has been closed because the relevant regulator has concluded that an infringement is not established will normally be irresistible if, at an earlier stage, the regulator has already expressed a view to the effect that he sees little merit in the case.”

37. In *Claymore*, cited above, the Tribunal came to the view that as a matter of substance the OFT had, in that case, reached a decision to the effect that there had been no infringement in relation to the matters under investigation. The Tribunal said:

“145...in our view [the] conclusion by the Director was to all intents and purposes a final conclusion, subject only to re-opening on the basis of “compelling” new evidence. In our view there is nothing provisional or tentative about his conclusion that no infringement could be established on the evidence. In our view, the Director has reached a firm decision that no infringement of the Chapter II prohibition is established on the evidence before him.

...

152. In this case the Director has investigated the matter exhaustively for the purpose of reaching a conclusion on whether the Chapter II prohibition has been infringed. His conclusion, as we have held, is that such an infringement

cannot be established on the evidence before him. He has not, therefore, abstained from expressing a view on the question of infringement. His considered view is that an infringement is not established on the evidence.

...

155. ... Under the Act the Director has the functions of both investigation and decision-making. Initially, the Director is engaged in a process of investigation. The object of that investigation is to come to a conclusion whether the Chapter II prohibition has been infringed. In the nature of the process, that conclusion can be reached only on the basis of the evidence available. At some stage in the investigation the Director reaches the point where he considers that he has all the evidence he needs or can usefully obtain. At that stage he assesses the evidence and makes up his mind. ...

156. ... The Director's investigation was long and detailed; it appears from the letter of 9 August 2002, that no stone was left unturned. In particular, according to that letter, very large quantities of information were obtained using statutory powers; an additional case officer was assigned to the investigation; specialist software was bought; and consultations with internal and external experts were held. ... The Director and his staff gave close consideration to the evidence and reached a view. That view was that the evidence did not amount to proof of an infringement. As we have said, there was nothing provisional or tentative about that conclusion. ...

38. The position in *Claymore* is, in our view, a long way from the present case. It emerges from the contemporaneous documentary evidence and the witness evidence, both of which are consistent with the terms of the decision letter, that whilst an investigation under section 25 of the Act had commenced, it cannot be said that anything like a detailed investigation had already taken place by the time the decision was taken to close the case. Prior to the commencement of an investigation on 27 June 2005, the OFT sought information from the appellant and made informal enquiries of the parties alleged to have infringed the Act. Once the investigation had commenced, the OFT made only limited use of its information gathering powers. Notices under section 26 were sent on 1 and 4 July 2005 to TRAP and others, requesting documents and asking background questions about the role of the recipients of the notices and about the industry generally. A supplementary notice was sent to Hamlins, on behalf of TRAP, on 2 August 2005 relating to the estimated value of retail and wholesale sales of

celebrity merchandise to UK consumers in 2004. Apart from those occasions, however, the OFT made no further use of its powers prior to closing the investigation. Mr Ray's second witness statement and the contemporaneous evidence appended to it make clear that, if anything, the initial impression created by the investigative work done by the OFT prior to closing the case was that there may be a case to answer (see e.g. Mr Ray's second witness statement at paragraphs 33 and 36 and the evidence there cited). However, it is clear from Mr Ray's second witness statement that the OFT's understanding of the situation was far from complete and that a number of important matters had not been addressed by the OFT. It is not the case, therefore, that the OFT "has all the evidence [it] needs or can usefully obtain" (*Claymore*, paragraph 155).

39. We are satisfied that the OFT closed its file on the TRAP investigation for reasons "genuine[ly] independent" of the merits of the case (*Aquavitae*, paragraph 209) and without having reached any conclusion on the merits of the case, the investigation of which was still on-going. The decision to close the case was taken with a number of factors in mind, including that (i) the investigation was at an early stage; (ii) resources in CE4, the relevant part of CE Division, were thinly stretched – indeed, by November 2005 the TRAP case team consisted of just one official, who was, himself, engaged in a number of other matters; (iii) the case team's view of the value of the products potentially affected by the alleged infringement had been revised downwards from its initial understanding to the extent that the investigation was, in the case team's view, of a lower priority than was previously understood; and (iv) it was determined that CE Division resources would be more usefully deployed on other investigations. Mr Ray's second witness statement, Mr Priddis' witness statement and the contemporaneous evidence all support this view.
40. Taking account of the decision letter, the witness evidence and the contemporaneous documentary evidence, we are satisfied that none of the OFT's reasons for closing the case related to its view of the merits of the case and that the OFT had not reached the stage of taking any decision as to whether the Chapter I prohibition has been infringed, either expressly or by necessary implication.
41. Whilst we have some sympathy with the frustration the appellant undoubtedly has, which Mr Assirati forcefully expressed in both written and oral submissions, that

frustration is not relevant to the question before us. Nor, we should add, are questions such as whether the OFT was justified in revising its view of the value of the products potentially affected by the alleged infringement, a position which Mr Assirati criticised at the hearing. The question for the Tribunal is whether the OFT took an appealable decision. We have decided that it did not. Accordingly, we unanimously dismiss this appeal.

Marion Simmons

Peter Clayton

David Summers

Charles Dhanowa
Registrar

14 December 2006