

New Court,
48 Carey Street,
London WC2A 2JT.

16th October, 2001

Before:
SIR CHRISTOPHER BELLAMY QC
(The President)
PROFESSOR ANDREW BAIN OBE FRSE
MISS PATRICIA QUIGLEY

BETWEEN:

ABERDEEN JOURNALS LIMITED

Applicant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

and

ABERDEEN & DISTRICT INDEPENDENT LIMITED

Intervener

Mr Nicholas Green QC (instructed by Messrs Herbert Smith) appeared for the Applicant.

Mr Mark Hoskins (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondent.

Mr Fergus Randolph (instructed by Messrs Shoosmiths) appeared for the Intervener

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JUDGMENT
(Corrected transcript as approved)

1. In this appeal Aberdeen Journals Limited (“Aberdeen Journals”) appeals against a decision of the Director General of Fair Trading (“The Director”) dated 16th July 2001 in which the Director found that Aberdeen Journals had infringed the Chapter II prohibition of the Competition Act 1998 and imposed a penalty of £1,328,040. The essential nature of the Director’s finding was that Aberdeen Journals had been engaged in predatory pricing against a free newspaper in Aberdeen known as the Aberdeen & District Independent, by means of its pricing policy on another free newspaper in Aberdeen, also owned by Aberdeen Journals, the Herald & Post.

2. The question that now arises is a preliminary point in the appeal which is to determine where the location of the proceedings is to be for the purposes of Rule 16 of the Rules of this Tribunal. Rule 16 provides:

"16. - (1) The tribunal shall, as soon as practicable, taking account of the observations of the parties in the application and defence, determine whether the proceedings are proceedings before a tribunal in England and Wales, in Scotland or in Northern Ireland and shall instruct the Registrar to notify the parties of its determination.

(2) In making this determination, the tribunal shall have regard to all matters which appear to it to be relevant and in particular, the part of the United Kingdom where:-

 - (a) the applicant is habitually resident or has his principal place of business;
 - (b) the majority of the parties are habitually resident or have their principal places of business;
 - (c) any agreement, decision or concerted practice to which the disputed decision relates was made or implemented or intended to be implemented;
 - (d) any conduct to which the disputed decision relates took place.

(3) The tribunal may hold any meeting, case conference, pre-hearing review or hearing or give any directions in such place as it thinks fit having regard to the just, expeditious and economical conduct of the proceedings."

3. The need for Rule 16 appears to arise principally as a result of the provisions of section 49 of the Competition Act, 1998. Section 49(2)(a) provides that an appeal under that section, that is to say an appeal from the decision of this tribunal, may be made only:

"(a) to the appropriate court"

According to section 49(4) "the appropriate court" means:

"(a) in relation to proceedings before a tribunal in England and Wales, the

Court of Appeal;

"(b) in relation to proceedings before a tribunal in Scotland, the Court of Session."

There is a similar provision in relation to proceedings before a tribunal in Northern Ireland.

4. The question then arises as to how one determines whether particular proceedings are proceedings before a tribunal in England and Wales, Scotland or Northern Ireland, as the case may be. Rule 16 of the Tribunal Rules appears to provide a mechanism for making that determination, so that any procedural issues that arise can be determined according to what is, as it were, the governing law of the particular jurisdiction to which the proceedings relate. So a determination under Rule 16 by its nature seems to determine which court has jurisdiction in relation to any appeal from this tribunal, and may affect certain directions or other decisions that the tribunal makes in the course of its proceedings, for example, issues affecting discovery under Rule 17(2)(k), or the summoning of witnesses under Rule 21, or the dealing with costs under Rule 26.
5. There is a further question. Once it has been determined whether the proceedings are proceedings before a tribunal in England and Wales or Scotland or Northern Ireland, as the case may be, does that necessarily determine where the hearing has to take place? Or, to put it the other way round, is the place where the hearing takes place in itself determinative of where "the proceedings" take place for the purpose of section 49?
6. It seems to us, contrary to a submission made to us by the Director, that there is a distinction under Rule 16 between what is to be regarded as the governing law of the proceedings on the one hand, and where any meeting, case conference, pre-hearing review or hearing in fact takes place under that governing law on the other hand (see Rule 16(3)). So theoretically it would be possible, or indeed in practical terms be possible, for a meeting to be taking place in London in relation to proceedings before a tribunal in Scotland, and vice versa. We do not attach any particular importance to where the particular main hearing takes place for the purpose of deciding what is the governing law of the proceedings.
7. That, however, takes us to the question that we have to answer under Rule 16 (1), which is to determine whether these proceedings are proceedings before a tribunal in England and Wales or a tribunal in Scotland and for that purpose we have to have regard to the matters that are specifically set out in Rule 16(2) and any other matters that we consider to be relevant.
8. If we take the various matters in Rule 16(2) to which we are required to have regard, we notice first that in relation to Rule 16(2)(a) the applicant "is habitually resident or has his

principal place of business" in Scotland, and in particular in Aberdeen. As regards (b), which refers to "the majority of the parties" not only the applicant but also the intervener has at least a principal place of business in Scotland, in Aberdeen. So far as the Director is concerned, it is true that the Director is based in London but in our view, given that the Director's responsibilities relate to the whole of the United Kingdom, the question where the Director's physical headquarters is a matter of subsidiary importance for the purposes of Rule 16(2)(b).

9. As to Rule 16(2)(d), which concerns the conduct to which the disputed decision relates, the conduct concerned here primarily took place in the Aberdeen area and primarily affected advertisers, and newspaper readers and consumers in that area. It is true, as Mr Green points out, that paragraph 130 of the Decision refers to the fact that the Northcliffe Group, which is the group that ultimately controls Aberdeen Journals, was intimately involved in Aberdeen Journals' conduct with regard to the Herald & Post. But it seems to us very difficult to say that the place where the conduct to which the disputed decision relates, within the meaning of Rule 16(2)(d), was other than in Aberdeen. In our view the reference in the Decision to the role of the management of Northcliffe is a subsidiary part of the Decision for determining where the jurisdiction should be.
10. Those matters all point towards the inevitable conclusion that we have to determine that the proceedings are proceedings before a tribunal in Scotland. The submissions that are made relate primarily to what in our view is the separate question of where the main hearing should, in fact, take place. It is said that in this case all the parties have instructed London solicitors and counsel and that it would be more economical and expeditious to have the proceedings in London. As far as the Director is concerned he says it would be better from the point of view of communication with his base in London if the hearing were in London, and that we should not add unnecessarily to the costs of the proceedings.
11. As regards those arguments it seems to us that they bear primarily on the question of where the hearing should take place, rather than on the question of whether these should be proceedings regarded as proceedings "before a tribunal in Scotland", irrespective of where the hearing takes place. Similarly, we do not regard the fact that there is no obvious point of Scots' law as distinct from English law in these proceedings, at least so far as we can determine at this stage, as of any particular relevance. In general, Rule 16 clearly contemplates that this tribunal will operate under the three legal jurisdictions of the United Kingdom as the case may be and will hold its hearings where it thinks fit, not necessarily in London. So the question of which jurisdiction we are in must, in our view, be answered inevitably with the response that these are Scottish proceedings, or "proceedings before a tribunal in Scotland".

12. As regards the separate question of where the main hearing of this case should be, that is essentially dealt with under Rule 16(3). It is probably correct that where we have decided that proceedings are before a tribunal other than a tribunal in England and Wales, then, other things being equal, that is a powerful factor towards physically holding the hearing in that jurisdiction and we certainly bear that point in mind. The objection to going to Scotland for the hearing is essentially based on the extra cost which would be involved. That would be the cost of travel to Scotland and the cost of travelling time, and there might be some slight extra cost in terms of parties communicating with their other offices. But we do not regard those considerations as in themselves decisive. We notice in this particular case from the applicant's point of view, the applicant's solicitors appear to be based in Brussels, which would suggest that certain travelling costs are likely to be incurred anyway.
13. What seems to us to be important on the question of where this hearing is actually heard is first the general consideration that in our view the centre of gravity of the Competition Act 1998 should not be seen to be in London in all cases. Although in some respects London is the centre of the legal community as far as competition law is concerned, this Act applies throughout the United Kingdom, and there will be many instances where particular regional or local issues arise. In principle we think it is right to, as it were, "bring justice to the people", and to hold the hearings where appropriate in a place where the public concerned is likely to have some interest in the proceedings. In this particular case the public concerned is the public in the Aberdeen area and it is unlikely that any member of that public would be sufficiently interested to attend any hearing in London. On the other hand, if we were to hold a hearing in Aberdeen, as we are minded to do, it seems to us that that would be "just" within the meaning of Rule 16(3). We do not regard the slight extra expense of taking that course as outweighing the general considerations which I have already mentioned. In all respects it seems to us that this is predominantly a Scottish case and if this is not a Scottish case it is hard to see whether there will ever be many Scottish cases. Although competition law is not under the Scotland Act a devolved matter, it is nonetheless something that is as of much interest to Scotland as it is to other parts of the United Kingdom. On the principle of bringing law as close, as it were, to the ground as possible, we think it right in this case to exercise our discretion and to hold the hearing in Scotland. As at present advised we propose to hold the hearing in Aberdeen for the reasons that I have given.
14. Technically speaking, the decision on the location of the proceedings has to await the observations in the defence under Rule 16(1), but we have already had the benefit of the Director's observations. Formally speaking, this ruling is subject to any further observations that may be relevant that are contained in the defence.
