



Neutral Citation [2003] CAT 18

IN THE COMPETITION
APPEAL TRIBUNAL

New Court,
48 Carey Street,
London WC2A 3BZ

Case No. 1008/2/1/02

Tuesday, 2nd September 2003

Before:

The President, Sir Christopher Bellamy
(Chairman)
Mr Peter Clayton
Mr Peter Grant-Hutchinson

CLAYMORE DAIRIES LTD
and
EXPRESS DAIRIES PLC

Applicants

v.

THE OFFICE OF FAIR TRADING

Respondent

supported by

ROBERT WISEMAN DAIRIES PLC
and
ROBERT WISEMAN & SONS LTD

Interveners

Mr Nicholas Green QC (instructed by Ashurst Morris Crisp) appeared for the Applicants

Mr George Peretz (instructed by the Director of Legal Services, OFT) appeared for the Respondent.

Mr James Flynn QC (instructed by Herbert Smith) appeared for the Interveners.

OBSERVATIONS OF THE TRIBUNAL UPON STAYING THE APPEAL

NOTE

By letters of 9 October 2002 and 4 December 2002 Claymore Dairies Limited and Express Dairies Plc (“the appellants”) were notified that the Office of Fair Trading (“OFT”)(formerly known as the Director General of Fair Trading) had decided to close his investigation into their complaint into an alleged infringement of the Chapter I prohibition of the Competition Act 1998 (“the Act”). On 3 February 2003 the appellants lodged an appeal to the Competition Appeal Tribunal (“the Tribunal”) against the decisions contained in that correspondence contending that the OFT’s decision to close its investigation was an appealable decision within the meaning of section 46(3) of the Act. By letter of 12 August 2003 the OFT informed the appellants and the interveners that they proposed to reopen their investigation into a possible infringement of the Chapter I prohibition. On 2 September 2003 in the light of those developments, by consent, the Tribunal stayed the proceedings until further Order. It is in this context that the Tribunal made the extempore observations which appear below on the OFT’s letter of 9 October 2002 which was, so far as relevant, in the following terms:

“... Despite carrying out ... on site investigations and our continued efforts ... the information obtained to date does not lead us to think that we could proceed to make a finding as to whether or not the Chapter I prohibition has been infringed. In particular, although the evidence and witness statements provided by Express Dairies and Claymore Dairies staff were useful, the lack of relevant corroborative documentary evidence or direct testimony from participants in the cartel leads us to think that we would be unable to put forward evidence to the requisite legal standard for a Chapter I infringement and therefore the case does not warrant the commitment of further resources at this stage ...”

OBSERVATIONS OF THE TRIBUNAL

THE PRESIDENT:

1. Before we finally dispose of the Chapter I case, there is one other aspect that we would like to mention about it.

2. The matter is this. It is not directly relevant to the case, but it arises indirectly in that in the decision that was contested, which is a letter of 9th October 2002, the Director (as he then was) makes various comments about the state of the evidence and why he was not at that stage able to proceed further with the case. That seems to us to raise some rather general issues about what the OFT's approach to evidence in Chapter I cases should be, bearing in mind three factors.

3. The first factor is that, by their nature, Chapter I cases will often concern cartels that are in some way hidden or secret; there may be little or no documentary evidence; what evidence there may be may be quite fragmentary; the evidence may be wholly circumstantial or it may depend entirely on an informant. That is often a feature of a Chapter I case.
4. The second factor is that the OFT, under the system, combines, as we know, the role of prosecutor and the role of decision-maker. At a certain stage it is primarily a prosecutor and then, at the end of the administrative procedure, it is, as it were later on, a decision-maker, so there is that dual role.
5. The third factor is that there are no procedures established, at least at present as far as we know, for the cross-examination of witnesses before the OFT in the context of deciding whether there is an infringement of the Chapter I prohibition or not.
6. It therefore seemed to us that this case, had it proceeded, would have raised the question of how the *Napp* standard of proof is to be approached by the OFT at the administrative decision making stage, in circumstances such as those that I have just outlined. By the *Napp* standard of proof we refer to the Tribunal's judgment in *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading* [2002] CAT 1, [2002] Comp AR 13, at paragraphs 104-112. In that passage the Tribunal indicated that the standard of proof to be applied was essentially the civil standard rather than the criminal standard but that the evidence relied on by the OFT within the civil standard should be "strong and convincing evidence" (paragraph 108).
7. In paragraph 109 the Tribunal said: "... the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be."
8. In Chapter I cases, however, in the light of the factors we have already identified, we think it important to underline that the *Napp* standard should not be interpreted in a way that leads to the absence of prosecution of Chapter I infringements that

ought to be prosecuted. In our view, there is no rule of law that, in order to establish a Chapter I infringement, the OFT has to rely on written or documentary evidence. The oral evidence of a credible witness, if believed, may in itself be sufficient to prove an infringement, depending on the circumstances of a particular case. Of course, if the OFT is relying primarily on a witness rather than on documents, it will no doubt look for support in the surrounding circumstances, for example, the dates and timing of price increases. It will no doubt ask itself whether there is reason to believe that the witness may be untruthful or mistaken but, as at present advised, we do not think there is any technical rule that precludes the OFT from accepting an oral statement of a witness at face value if it thinks it right to do so.

9. Similarly, there is no rule of law that evidence must emanate from a participant to the cartel. Although evidence at one remove, as it were, may be less compelling than direct evidence of what was said or done by a person present at a particular meeting, indirect evidence and circumstantial evidence generally, may well have a powerful role to play in the factual matrix of a case.
10. In addition, as we point out at paragraphs 110 and 111 of *Napp*, the OFT may well be entitled to draw inferences or presumptions from a given set of circumstances, for example, that the undertakings were present at a meeting with a manifestly anti-competitive purpose, as part of its decision-making process.
11. In the system as established by the Act it seems to us in general that there are probably three stages. At the first stage the OFT is investigating. Then it moves to a second stage at which it has to decide whether it is to issue a Rule 14 notice. At that point, in our view, its mode is primarily a prosecutorial mode; in other words, the OFT has primarily its prosecutorial hat on. It seems to us that the question the OFT must ask itself is the question similar to that which a prosecutor would ask in other contexts, "Am I satisfied that this evidence, if uncontested, would be sufficient to establish a Chapter I infringement?" The OFT, if it can answer that question in the affirmative, will then proceed to issue a Rule 14 notice. Then comes the third stage. The OFT, as decision maker, will hear arguments and will have to weigh up the evidence. The question for the OFT then at the end of that proceeding is still the question whether it is satisfied that the infringement is sufficiently proved, giving due weight to the presumption of innocence and any reasonable doubt there may be.
12. To the extent that the OFT wishes to rely on the evidence of a witness, it is true that

there is no possibility at the administrative stage of cross-examination in the court room. That, in our view, however, does not preclude the OFT from doing its best with the witness statements that it has and placing such weight on them as it thinks fit. It is unlikely, we think, that anyone would later criticise the OFT for relying on an apparently credible witness in the administrative stage, even if, at a later stage, as a result of cross-examination before the Tribunal, the evidence appeared to be less strong than it first seemed.

13. Of course, at the end of the proceedings there is then an appeal to the Tribunal, and at that stage all the protections of the Tribunal rules apply, including the Tribunal's decision in *Napp* as to what the relevant standard of proof is. In reaching its decision, in our view, at the administrative stage the OFT is entitled to bear in mind that, on contested issues of fact, especially primary issues of whether or not an agreement or concerted practice existed, it is ultimately for the Tribunal to decide with all the means at its disposal.
14. We just take this opportunity to give that very general guidance. We make it very clear that we are not pronouncing in any way on the case before us, either from the point of view of the facts or the applicable law. We have not heard any argument on the general approach that I have just indicated because this particular matter is now being disposed of by consent. Of course, what in any particular case constitutes sufficient evidence of an infringement of the Chapter I prohibition will ultimately be a question of fact to be determined in the particular circumstances of that case.