

[2003] CAT 24

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1014 and 1015/1/1/03

New Court,
Carey Street,
London WC2A 3BZ.

9 October, 2003

Before:
SIR CHRISTOPHER BELLAMY
(The President)
THE HONOURABLE ANTONY LEWIS
MRS VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ARGOS LIMITED
&
(2) LITTLEWOODS LIMITED

Applicants

and

THE OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

Mr Mark Brealey QC and Mr Mark Hoskins (instructed by Burges Salmon) appeared for Argos.

Mr Nicholas Green QC and Miss Marie Demetriou (instructed by DLA) appeared for Littlewoods.

Mr Brian Doctor QC (instructed by Director of Legal Services, Office of Fair Trading) appeared for the Respondent.

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RULING

Re: Setting aside Decision
of 19th February, 2003

1. THE PRESIDENT: On 30th July the Tribunal remitted to the OFT a Decision by the Director, dated 19th February, 2003 which imposed penalties on the appellants, Argos and Littlewoods, of £17.28 million and £5.37 million respectively. The purpose of that remittal was to permit certain new material sought to be relied on by the Director to be put to the parties in accordance with Rule 14 of the Director's Rules. The Tribunal also gave directions for the timetable to be followed. A supplemental Rule 14 Notice has now been served by the OFT on 12th September, 2003, in accordance with the Tribunal's Order.
2. In the ordinary course the next step would be for the appellants to put in their responses to the Rule 14 Notice, for an oral hearing to be held and for an amended Decision to be adopted in due course by the OFT.
3. The matter has, however, been restored today to the Tribunal on the application of the parties to consider various issues that have arisen in the course of the above procedure.
4. The first issue, which we are dealing with straight away, is whether in the circumstances the Director's original Decision of 19th February, 2003 should be formally set aside as of now. Argos in particular argues that the supplemental Rule 14 Notice served by the OFT presages in effect a new Decision. It goes wider than the Tribunal's original order and is not, according to Argos, a general remittal. According to Argos it introduces certain new documents. It is not a lawful procedure, it involves substantial re-writing of the previous Decision and contains certain new allegations of substance. Not to set aside the old Decision jeopardises, says Argos, the integrity of the Rule 14 procedure, and raises also the question of from what date interest on any penalty could run.
5. It is said that the practical consequence of an order setting aside the existing Decision at this stage would, among other things, affect the following points: first, the existing procedure adopted by the OFT goes beyond the terms of the Tribunal's original order. Secondly, the integrity of the Rule 14 procedure requires the Decision to be set aside. Thirdly, it is not fair to Argos to spend time and money appealing a Decision and then to see its arguments dealt with in a proposed new Decision. Fourthly, it affects the date from which interest may in the end run.
6. Those submissions are, in general terms, supported by Littlewoods, but as far as the OFT is concerned the OFT tells us that they are, in effect, neutral on the question of whether the Decision should be set aside, and leave it to the Tribunal to decide what Order it should make.

7. The OFT, however, strongly denies that anything in the new procedures being pursued, or the extension of the old procedure that is now being pursued, is unfair to the parties and that they have acted in accordance with the underlying principles behind the Tribunal's Order.
8. The Tribunal is conscious that at this stage we are simply engaged in case management. The Tribunal does not, at this stage, think it appropriate to enter into the details of the underlying OFT procedure that is proceeding at this point and which may be the subject of a further appeal. In particular, it is not in our view appropriate for the Tribunal to enter now into the question of whether the new supplemental Rule 14 Notice does or does not in some fundamental way change the original Decision. The Tribunal notices that the essential overall allegation of the Director remains the same, namely, that there have been various agreements and concerted practices relating to price fixing, all be it that one infringement that was previously described as an "agreement" is now described as a "concerted practice".
9. However, the overall framework remains the same and it does not seem to be suggested that there is any modification as regards the penalty, but of course that is a matter that remains to be seen.
10. In our view it is not appropriate for the Tribunal to seek to micro-manage the administrative procedure, or to attempt in any way to prejudge points that will inevitably be raised on the appeal.
11. As far as the various practical points made by Argos are concerned, it seems to us that all those points can, in effect, be dealt with in the context of the substantive appeal if and when it comes back to the Tribunal. If it is alleged that the OFT is in some way acting unfairly or unlawfully, or not in accordance with the procedural rules that, of course, is a matter that can be raised when the issue finally reaches the Tribunal. The same is true of points that are raised to interest, and points raised by Argos about the alleged unfairness of having to spend extra time and money defending itself in the new procedure.
12. There will, no doubt, come a point at which the existing Decision is, as it were, subsumed into an amended Decision, if an amended Decision is indeed taken. We do not, of course, yet know what the terms of any amended Decision might be or how far in the event the final amended Decision may differ from the existing Decision. The Tribunal is of the view that the time is not yet appropriate for formally setting aside the existing Decision, and we do not see any strong grounds for doing so at this stage. In due course, if there is a further Decision, the matter will, as far as we can anticipate, have resolved itself by that stage.

13. So on the application of Argos to set aside the existing Decision, the Tribunal simply makes no order at this stage.
