

IN THE COMPETITION APPEAL TRIBUNAL

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

[2003] CAT 10

New Court
Carey Street
London WC2A 2JT

Wednesday 21 May 2003

Before:

The President
SIR CHRISTOPHER BELLAMY
(Chairman)

THE HONOURABLE ANTONY LEWIS
MRS VINDELYN SMITH-HILLMAN

B E T W E E N:

ARGOS LIMITED (1)

and

LITTLEWOODS PLC (2)

Applicants

- and -

THE DIRECTOR GENERAL OF FAIR TRADING Respondent

Mr Mark Brealey QC and Mr Mark Hoskins appeared for Messrs
Argos Limited.

Mr Nicholas Green QC appeared for Messrs Littlewoods plc.

Mr Brian Doctor QC and Ms Kassie Smith appeared on behalf
of
The Director General of Fair Trading.

CASE MANAGEMENT CONFERENCE

R U L I N G

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1 THE CHAIRMAN: This is the first Case Management
2 Conference in an appeal lodged by Argos Limited and
3 Littlewoods plc, who are both well known multi-channel
4 retailers, against a Decision dated 19 February 2003 in
5 which the Director General of Fair Trading, now the
6 Office of Fair Trading, found that Argos, Littlewoods
7 and a company known as Hasbro (UK) Limited had
8 infringed the Chapter 1 Prohibition of the Competition
9 Act 1998 by entering into certain alleged price fixing
10 agreements or concerted practices in relation to toys
11 supplied by Hasbro and sold by Argos and Littlewoods
12 respectively. For that infringement Argos has been
13 fined £17.2 million and Littlewoods has been fined
14 £5.37 million.

15 The Director's evidence of the alleged infringing
16 agreements or concerted practices is based on certain
17 internal documents, mainly e-mails, but also on certain
18 notes of interviews with Hasbro employees.

19 Argos and Littlewoods deny that the e-mails and
20 notes of interview prove the Director's case. They say
21 that no infringing agreements or practices have been
22 made or have occurred.

23 Each company made that submission in response to
24 the Rule 14 Notice, which is issued at the stage of the
25 administrative procedure which takes place before the
26 decision is taken. Both companies tendered witness
27 statements at that stage in support of their position
28 contradicting the Director's case.

29 The Director in the Decision gives his reasons for
30 rejecting the arguments of Argos and Littlewoods but
31 continues to rely essentially on the e-mails and notes
32 of interview.

33 Argos and Littlewoods now advance the same case
34 before the Tribunal. They allege that the e-mails and
35 notes of interviews do not amount to strong and
36 compelling evidence of the infringement which the
37 Director alleges and are contradicted by witness
38 statements served by Argos and Littlewoods.

1 The Tribunal is, thus, in this particular case
2 confronted with an issue of disputed fact.

3 Argos and Littlewoods submit that the Tribunal
4 should resolve that issue of disputed fact on the
5 papers, not hearing oral evidence and giving the
6 various documents such weight as the Tribunal thinks
7 fit.

8 The Office of Fair Trading disagrees with that
9 proposition. The Office proposes to produce witness
10 statements from some, at least, of those who were
11 interviewed, at least those witnesses who are prepared
12 to give such witness statements, in order to clarify
13 the notes of interview and to tender those witnesses in
14 support of the Office's case and to permit them to be
15 cross-examined if the applicants so wish. For other
16 possible witnesses, there is a suggestion that the
17 Tribunal itself should issue witness summonses if
18 witnesses are unwilling to cooperate.

19 Both the applicants strongly object to that course
20 on the grounds that the Director should not now be
21 allowed to embroider or embellish the case made against
22 the applicants at the Rule 14 stage. They rely in
23 particular on an earlier judgment given by the Tribunal
24 in *NAPP*, that is to say, the decision of the Tribunal
25 dated 8 August 2001 in which the Tribunal rejected
26 certain attempts by the Director General of Fair
27 Trading to add new evidence, but also allowed certain
28 other new evidence to be admitted. The Tribunal said
29 in that case at paragraph 77:

30 "It is particularly important that the Director's
31 Decision should not be seen as something that can
32 be elaborated on, embroidered or adapted at will
33 once the matter reaches the Tribunal. It is a
34 final administrative act with important legal
35 consequences which in principle fixes the
36 Director's position. In our view, further
37 investigations after the Decision of primary facts
38 and an attempt to strengthen by better evidence a
39 Decision already taken should not in general be

1 countenanced."

2 The applicants rely strongly on that passage.

3 The OFT submits that if it is correct that there
4 can be no oral evidence at this stage of the
5 proceedings, it puts the Director at a great
6 disadvantage. There is no proper opportunity for
7 cross-examination at the administrative stage and the
8 Director does not have at his disposal means for
9 testing the evidence of particular witnesses by cross-
10 examination. It is only at the judicial stage that
11 such opportunity arises. According to the OFT,
12 disputes of fact which reach the Tribunal should be
13 disposed of by the traditional methods of oral evidence
14 and cross-examination, as various provisions of the
15 Tribunal's rules plainly contemplate. This is an
16 appeal on the merits, says the OFT, and if such
17 procedure is not followed it will be almost inevitable
18 that in most cases the Director will lose, because he
19 will never be in a position to entirely contradict the
20 untested evidence put forward by way of defence.

21 The applicants, for their part, continue to submit
22 that the course proposed by the Office is unfair
23 because proper witness statements should have been
24 presented at the Rule 14 stage and it is too late now
25 to add to the material.

26 This is clearly an important issue which the
27 Tribunal must come to grips with. We are not, however,
28 persuaded by Mr Brealey's submission that we should
29 resolve this question now, in the abstract.

30 The existing decisions of the Tribunal, including
31 the *NAPP* case, to which we have already referred, show
32 that while in general the Director may not bolster or
33 embroider his decision at the stage of the appeal,
34 there are also circumstances in which new evidence may
35 be admitted before the Tribunal, notably to rebut new
36 allegations by the applicants. The Tribunal itself may
37 also exercise powers to obtain evidence, as the
38 substantive later decision in the *NAPP* case also shows.

39 The Tribunal is at this stage still evolving its

1 practice in the interests of fairness. The procedure
2 set out in the Act is to a certain extent a hybrid
3 procedure where there is, first, an administrative
4 stage, and then a judicial stage. There is no right to
5 test the evidence of witnesses before the Director and
6 it is only at the judicial stage of the proceedings
7 that it is possible to test by cross-examination the
8 evidence of all relevant witnesses.

9 Although the Tribunal said at paragraph 79 of its
10 judgment in the first *NAPP* case as follows -

11 "Our provisional conclusion is that there should
12 be a presumption against permitting the Director
13 to submit new evidence that could properly have
14 been made during the administrative procedure ...

15 -

16 it is right to say that that was only a "provisional
17 conclusion" and that at paragraph 80 the Tribunal goes
18 on to say that -

19 "there may well be cases where the Tribunal is
20 persuaded not to apply the presumption we have
21 indicated."

22 The Tribunal goes on:

23 "As stated in the Guide [the Guide to Appeals
24 under the Competition Act 1998] the procedures of
25 this Tribunal are designed to deal with cases
26 justly, in close harmony with the overriding
27 objective in civil litigation under Rule 1(1) of
28 the Civil Procedure Rules 1998. That includes, so
29 far as practical, ensuring that the parties are on
30 an equal footing, saving expense, dealing with the
31 case in ways that are proportionate, proceeding
32 expeditiously and allotting to the case an
33 appropriate share of the court's resources. Those
34 considerations may militate against permitting new
35 evidence by the Director, but in some
36 circumstances considerations of fairness may point
37 in the other direction. An obvious example is
38 where a party makes a new allegation or produces a
39 new expert's report which the Director seeks to

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counter."

There the Tribunal is only dealing with one particular example of where it may be appropriate to admit new evidence. The Tribunal goes on in paragraph 81:

"One factor that may well be relevant in this connection is the fairness of the appeal process itself. In accordance with the Act, the first occasion on which the Decision receives full public judicial scrutiny is in this Tribunal. An appellant will often have submitted voluminous pleadings, witness statements and documents unconstrained by the evidence presented to the Director. The Director at the administrative stage may not always be able to foresee, although of course he should endeavour to do so, from what direction or in what strength an attack may come at the appeal stage. A situation whereby the appellant could always have a free run before the Tribunal, but the Director was always confined to the material used in the administrative procedure, could lead to a significant lack of balance and fairness in the appeal process."

Against that background we would not wish this afternoon to rule out the possibility, in principle, of the Director adducing witness statements of the kind to which he has referred. Obviously it would be more difficult if what the Director was suggesting was the possibility of producing wholly new evidence, for example, of an undiscovered fact not previously relied on. But what the Director is proposing here, as we understand it, is witness statements clarifying the notes of interview that already exist.

In the circumstances with which the Tribunal is confronted, we take the view that we cannot determine what would or would not be fair in this appeal until we see the witness statements that it is proposed to adduce. Only when we have concrete statements in front of us can we make any assessment as to whether or not it would be fair or just to admit them, whether those

1 statements are confined within proper limits, whether
2 they are helpful to one or the other parties, and so
3 on. In our view it is premature to make any ruling this
4 afternoon on the point of principle that is before us.

5 What we propose, therefore, to order is that the
6 Director's defence should be served by the due date.
7 We are not minded at this stage to grant any extension
8 of time. If, together with the defence or within 14
9 days thereafter, the Director wishes to adduce further
10 witness statements as part of his case, it is for the
11 Director to make an application with the witness
12 statements annexed and to serve those witness
13 statements on the applicants. We shall then be in a
14 position to adjudicate on whether or not it is fair to
15 admit those statements, in full knowledge of the
16 background facts and indeed with a better knowledge
17 than we presently have of the detailed contents of the
18 present file.

19 We do not accept the submission made on behalf of
20 Argos that this represents "the oldest trick in the
21 book" on the grounds that, even if the Tribunal rejects
22 the witness statements, it will have read them. We
23 followed a similar course in *NAPP*, where a number of
24 witness statements were in fact excluded from the file
25 and no further attention was paid to them. We take the
26 view that this Tribunal is equipped to put out of its
27 mind matters that have been excluded from the file, if
28 necessary returning the witness statements to the
29 parties concerned. If there were continuing doubts on
30 that point, it would always be open to the applicants
31 to make an application that their appeal should be
32 heard by a different Tribunal.

33 That is our ruling on the matter we have been
34 discussing hitherto.

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37 MR DOCTOR: There is one further point, which is the
38 question of disclosure. I am happy to say that we are
39 not going to proceed. There are three categories. In

1 fact we have acquired two of them.

2 THE CHAIRMAN: So we do not need to rule on that?

3 MR DOCTOR: There is no need for a ruling on that.

4 THE CHAIRMAN: Thank you.

5 That, I think, takes us more or less through the
6 agenda. We have two more points. We have 11 and 12,
7 which are confidentiality and timetable.

8 As far as confidentiality is concerned, for my
9 part and my colleagues' part, I do not think it is
10 useful to go into confidentiality in detail this
11 afternoon, but we would observe in a preliminary way
12 that some of the claims to confidentiality at the
13 moment seem to us to be rather wide. The Tribunal may
14 need some persuading that confidentiality can attach
15 either to a ground of appeal or to a document which is
16 relied on as part of the evidence in the case. But I
17 suggest that when we have the position of all parties
18 on confidentiality that is a matter we can come back to
19 in due course. We may not need to resolve it at the
20 moment.

21 As far as the timetable of the case is concerned,
22 we have just said that we would expect the defence to
23 be filed by 3 June in accordance with the normal rules.

24 We have in terms of the Tribunal's diary pencilled in
25 the possibility of a further Case Management Conference
26 on the provisional date of 2 July, where it may be that
27 we need to come to grips with the question of witness
28 statements if matters have not been resolved by that
29 date, and other outstanding matters. It may be only at
30 that stage that we can see properly the shape of this
31 case.

32 As far as the progress of the case after that date
33 is concerned, at present, without being definite, it
34 looks to the Tribunal as if dates, roughly speaking, in
35 the period of the second and third week of September
36 are likely to be the relevant window for the purposes
37 of the hearing. That is to say, it seems to us
38 unlikely that this case will be sufficiently mature for
39 a hearing before the end of July. For various reasons

1 the Tribunal is not anxious to fix major hearings
2 during August, which takes us effectively to September.
3 That is our provisional thinking at the moment on the
4 timetable.

5 In the light of that, I do not know whether there
6 are any other points or issues that the parties would
7 like to raise?

8 MR GREEN: Can I make one observation about timetabling?

9 THE CHAIRMAN: Yes.

10 MR GREEN: September may be an appropriate time. If we are
11 going to have a trial with a large number of witnesses,
12 the logistics of trying to ensure that the witnesses
13 turn up and are not inconvenienced by holidays and so
14 on, is going to be something of a nightmare, so we may
15 need a degree of flexibility in scheduling in
16 appropriate windows to get the maximum number of
17 witnesses to be able to attend.

18 THE CHAIRMAN: Yes. Although Mr Doctor submitted that
19 cross-examination of witnesses was the only way of
20 doing it, with the hallowed and sacred principle of
21 common law procedure, the Tribunal is not in general
22 particularly keen on prolonged cross-examination
23 sessions that last for days and days and days. It may
24 very well be that when we get down to it, there are
25 only a few points in relation to a few documents that
26 need to be examined more closely. We shall see. It
27 may very well be, even if we get that far, that if
28 there is to be any cross-examination, it does not by
29 any means involve all the witnesses. It may just
30 involve one or two, or some or a part of a witness's
31 statement, or something. It seems to us probably, at
32 the moment at least, that the answer to this case lies
33 somewhere in the middle. I hope it is to the lower end
34 of length in terms of hearing days rather than towards
35 the higher end.

36 MR GREEN: I think that is sensible. There are
37 potentially up to 30 individuals who have given witness
38 statements. We imagine that only a portion of those
39 would need to be called and of those statements there

1 will be a number of issues which, certainly from the
2 applicants' side, we may wish to explore, but I suspect
3 that they will be in a relatively confined compass.

4 THE CHAIRMAN: There is a certain amount of background that
5 probably won't need to be explored orally. But the
6 factual allegations of whether particular arrangements
7 or agreements or practices were made are within a
8 relatively small compass and do not involve dozens of
9 people but only involve some.

10 MR GREEN: Yes.

11 THE CHAIRMAN: Let us leave it there and proceed on that
12 basis and return, if necessary, to the fray in early
13 July.

14 Is there anything else that anybody else wants to
15 raise?

16 Thank you all very much.

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18 (The hearing concluded)

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