

IN THE COMPETITION COMMISSION APPEALS TRIBUNAL

The Competition Commission
Room 309 New Court
48 Carey Street
London WC2

Monday 3 March 2003

Before:

**THE PRESIDENT
SIR CHRISTOPHER BELLAMY QC
(CHAIRMAN)**

**THE HONOURABLE ANTONY LEWIS
and
MS VINDELYN SMITH-HILLMAN**

B E T W E E N:

HASBRO UK LIMITED

Applicant

- and -

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

MR JONATHAN TATTON (instructed by Messrs Denton Wilde Sapte)
appeared on behalf of the Applicant.

MR JON TURNER (instructed by the Director General of Fair
Trading) appeared for the Respondent.

J U D G M E N T

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1 THE CHAIRMAN: The applicant in this case, Hasbro UK Ltd
2 (Hasbro), seeks the Tribunal's permission, pursuant to
3 Rule 10 of the Competition Commission Appeal Tribunal
4 Rules 2000 (the Tribunal Rules) to withdraw the appeal
5 lodged by Hasbro on 29 January 2003 against the decision
6 of the Director General of Fair Trading (the Director)
7 dated 28 November 2002 whereby the Director imposed on
8 Hasbro a penalty of £4.95 million in respect of a number
9 of price fixing agreements made by Hasbro in breach of
10 the Chapter 1 Prohibition imposed by section 2 of the
11 Competition Act 1998.

12 In its appeal Hasbro has not challenged the finding
13 of infringement, which related to the resale prices by
14 distributors of various well known children's toys and
15 games. Hasbro's appeal is as to penalty only.

16 The Director does not oppose Hasbro's application to
17 withdraw its appeal but he asks for his costs, first, in
18 respect of an unsuccessful application made by Hasbro on
19 24 January 2003 for an extension of time for appealing
20 Secondly, the Director asks for a contribution towards
21 his costs of the appeal itself. On the latter, the
22 Director asks for a contribution of one third of his
23 costs. The reason that the Director has not asked for
24 the whole of his costs is that he, the Director, believes
25 that there is a public interest in encouraging appellants
26 to discontinue their appeals. On the other hand, the
27 Director does not feel that it would be appropriate to
28 make no order at all for the costs of the appeal.

29 The circumstances of this particular case are
30 somewhat special. It appears that the Director was
31 pursuing two investigations involving Hasbro, "the
32 Distributor investigation" and "the Retail
33 investigation".

34 The Distributor investigation concerned various price
35 fixing agreements between Hasbro and its distributors,
36 who were selling on to smaller retailers. That
37 investigation led the Director to take the decision
38 appealed against of 28 November 2002, the Distributor

1 Decision.

2 The Retail investigation, on the other hand,
3 concerned certain alleged price fixing agreements between
4 Hasbro and two major retailers, Argos and Littlewoods.

5 When the Distributor Decision was taken on 28
6 November 2002, the Retail Investigation was still open.
7 Apparently that investigation had been held up, we are
8 told, by threats of judicial review of some aspects of
9 the procedure followed in that case. At all events, the
10 Retail Investigation had still not been concluded by the
11 time Hasbro's time for appealing the Distributor Decision
12 was due to expire on 29 January 2003.

13 On 23 January 2003 Hasbro applied, under Rule 6(2) of
14 the Tribunal Rules, for an extension of time for lodging
15 their appeal against the Distributor Decision on the
16 ground that "the circumstances were exceptional" within
17 the meaning of that Rule. The grounds for that
18 application were, first, that Hasbro could not put
19 forward its whole case as to the seriousness of the
20 infringement in the Distributor Decision without knowing
21 how the Director proposed to assess the seriousness of
22 the infringement in the forthcoming Retail Decision. In
23 particular Hasbro could not know whether there might be
24 an undue overlap between the penalties involved in the
25 two decisions, or whether there would be some question of
26 double jeopardy, or whether particular arguments might
27 emerge from the Retail Decision which might be relevant
28 to the Distributor Decision. In any event, Hasbro
29 submitted that it was in difficulty in taking the
30 commercial decision as to whether or not to appeal the
31 Distributor Decision without knowing the outcome of the
32 Retail investigation and the contents of the Retail
33 Decision.

34 The Director submitted that the two investigations
35 were quite separate and that it was up to Hasbro to
36 decide what to do.

37 In a ruling of 24 January 2003 [2003] CAT 1 the
38 President refused Hasbro's request for an extension of

1 time on the grounds that exceptional circumstances had
2 not been demonstrated within the meaning of Rule 6(2).
3 The President also held that, if it later appeared that
4 Hasbro had new arguments as a result of anything said in
5 the Retail Decision, that could be dealt with by way of
6 amendment to the notice of appeal in the Distributor case
7 under Rule 9(3) of the Tribunal Rules.

8 Hasbro's appeal against the Distributor Decision was
9 lodged on 29 January 2003.

10 We understand that at an earlier stage Hasbro had
11 entered into certain leniency agreements with the
12 Director, pursuant to Part 2 of the Director General's
13 *Guidance as to the Appropriate Amount of a Penalty*, which
14 is OFT 423 March 2000.

15 In the first of those leniency agreements, which
16 related to the Distribution Agreement, it was agreed with
17 the Director that if Hasbro observed the conditions
18 attached to the agreement, they would receive a reduction
19 of some 45 per cent in the amount of the penalty that
20 they would otherwise have been required to pay, in that
21 they fell within the circumstances envisaged by paragraph
22 9.4 of the Director's Guidance. We are told, though we
23 have not seen the documents in question, that in relation
24 to the Retail Agreement it was agreed with the Director
25 that Hasbro would receive a reduction of 50 per cent of
26 its penalty, but that that would be increased to 100 per
27 cent if the Director was satisfied that Hasbro had not
28 acted as the instigator or played the leading role in the
29 cartel within the terms of paragraph 9.3.2 of the
30 Director's Guidance at paragraph (c).

31 At the time, apparently, the Director was maintaining
32 that Hasbro had been the instigator or played the leading
33 role in the Retail cartel and that Hasbro was thus only
34 entitled to a reduction of 50 per cent, and not 100 per
35 cent. Although Hasbro had made various submissions,
36 that, as we understand it, was the position as it
37 prevailed on 29 January 2003 when Hasbro lodged its
38 appeal. That was the last day for lodging the appeal

1 against the Distributor decision.

2 On 6 February 2003, which is just over a week later,
3 the Director wrote to Hasbro confirming that, contrary to
4 his earlier view, he was prepared to grant Hasbro 100 per
5 cent immunity in the Retail case.

6 Two weeks later, on 19 February 2003, the Director
7 published his decision in the Retail Investigation. No
8 penalty was imposed on Hasbro in that decision, as
9 foreshadowed by the Director's earlier letter of
10 6 February. The two other parties to the Retail
11 Decision, Argos and Littlewoods were, however, fined
12 substantial amounts.

13 In its appeal lodged on 29 January 2003, in ignorance
14 of the outcome of the forthcoming Retail decision and of
15 the Director's final position as to leniency in that
16 case, Hasbro advanced a number of arguments, namely, in
17 particular, that the Distributor infringement had had
18 only a minimal impact, that the penalty of £4.95 million
19 was disproportionately high, and that the Director had
20 failed to take into account a number of mitigating
21 factors.

22 On 27 February 2003 Hasbro applied to the Tribunal
23 for permission to withdraw its appeal against the
24 Distributor Decision. We are told that now Hasbro is
25 able to see the Retail Decision, it is in a position to
26 assess the matter in the round, which it was not in a
27 position to do before, and that it has now taken the
28 commercial decision not to proceed any further with this
29 appeal.

30 As far as the issue of costs is concerned, which is
31 the only live issue that the Tribunal has to deal with
32 today, we deal, first, with the application for an
33 extension of time which Hasbro made on 23 January which
34 was decided by the President on 24 January 2003. We
35 accept that that application was not a frivolous
36 application, but it was, as the Director submits, an
37 application that was unfounded and, in our view, an
38 application that was bound to fail in light of the

1 wording of Rule 6(2).

2 In our judgment it is therefore right that Hasbro
3 should pay the Director's costs of that application.

4 That takes us to the question of the costs of the
5 appeal itself.

6 There are two conflicting interests at stake here.
7 It is, as the Director submits, in the public interest
8 that appellants should be encouraged to withdraw if they
9 feel that their appeal is no longer sufficiently worth
10 pursuing. On the other hand, it is also important that
11 public authorities are not obliged to incur what turn out
12 to be wholly unnecessary expense as a result of appeals
13 being lodged that are subsequently discontinued. So a
14 balance has to be struck.

15 In the Tribunal's view, on the question of principle,
16 where an appellant unilaterally decides to discontinue
17 under Rule 10, it will often be the case that the
18 withdrawing party should pay at least a proportion of the
19 Respondent's costs. That is the general principle.

20 However, in this particular case, it does seem to us
21 that the circumstances are somewhat atypical. For
22 whatever reason, in this particular case there were two
23 investigations going on side by side, a Distribution
24 Investigation and a Retail Investigation. For much of
25 the time those investigations were continuing in
26 parallel. It then happened that the Retail Investigation
27 fell behind the Distribution Investigation and the
28 Distributor Decision was taken, as we have said, in
29 November 2002 at a time when the Retail Investigation was
30 still open.

31 We make absolutely no criticism of the fact that
32 these two investigations became separate in point of
33 time, but it does seem to us that the fact that they did
34 become separate in point of time did place Hasbro in a
35 particular difficulty. They had to bring their appeal
36 against the Distributor Decision by 29 January 2003.
37 Although it is true that it was possible for Hasbro to
38 put forward its arguments against that decision as a

1 self-contained decision, which indeed they did, it was
2 also possible that the contents of the forthcoming Retail
3 Decision could impact on the arguments that Hasbro was
4 able to put forward in its appeal against the Distributor
5 Decision. Further arguments could have been added at a
6 later stage by way of an amendment under Rule 9(3) of the
7 Tribunal Rules, once the Retail Decision was available.
8 At the time when they were obliged to lodge their
9 decision in the Distribution case, Hasbro was not in a
10 position to see the whole picture, either as to the total
11 amount of the penalty being imposed for the infringements
12 in question, which related to a similar time period in
13 the same market and concerned the same products, or as to
14 possible arguments regarding the effect on competition of
15 the Distribution Agreements seen in the light of the
16 Director's assessment of the Retail Agreements. Nor
17 could Hasbro see the full circumstances of the Director's
18 approach as regards the Retail Agreements and the
19 Distribution Agreements, or know whether various
20 arguments put forward in the two cases would be treated
21 in the same way in the two decisions.

22 It therefore seems to us that in deciding to appeal,
23 it was reasonable for Hasbro to take the view that it
24 could not finally assess the chances of its Distribution
25 appeal succeeding until the Retail Decision was to hand.

26 Or, to put the matter the other way round, it is
27 difficult to have expected Hasbro on 29 January 2003 to
28 take the decision not to appeal without knowing what
29 further information and/or arguments might come to light
30 shortly afterwards in the Retail Decision.

31 The Retail Decision having come to hand, in our
32 judgment Hasbro has acted reasonably in withdrawing at
33 this early stage, having now been in a position to make a
34 full assessment of the situation that they are in, in the
35 light of all the available information.

36 In the particular circumstances of this case
37 therefore, and notwithstanding the general principle that
38 we indicated earlier, it seems to us that the proper

1 course is that as regards the costs of the appeal both
2 sides should pay their own costs. That is the order
3 that, in our view, meets the justice of the rather
4 unusual circumstances of this particular case.

5 Those will be the Tribunal's orders. Hasbro to pay
6 the costs of the unsuccessful application under Rule
7 6(2). Both sides to pay their own costs as regards the
8 appeal.

9
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11 MR TATTON: Hasbro is grateful to the Tribunal.

12 THE CHAIRMAN: The costs of the appeal include the costs of
13 today. Both sides pay their own costs of today.

14 MR TURNER: I was going to mention that.

15 THE CHAIRMAN: I think that is right, Mr Turner.

16 As regards the costs of the application, the most
17 convenient course I think is for the Director to serve a
18 statement of costs on Hasbro and if that can be agreed,
19 so much the better. If it cannot be agreed, then the
20 parties should submit it to the Tribunal and the Tribunal
21 will make a summary assessment.

22 I think for good order's sake, if we say that that
23 statement of costs is to be served within 14 days and it
24 is for the Director to make an application to the
25 Tribunal for his costs if agreement is not reached, shall
26 we say, within 21 days thereafter.

27 MR TURNER: Sir, I am grateful. That factor will not cause
28 us difficulty. May I add, Sir, that the Director is
29 grateful for the guidance that the Tribunal has given.

30 THE CHAIRMAN: Mr Turner, I hope the Director appreciates
31 that we have accepted your submissions on the principle,
32 but we think this case is a rather special one.

33 MR TURNER: We are grateful.

34 THE CHAIRMAN: Thank you all very much indeed.

35 (The hearing concluded)