

IN THE COMPETITION COMMISSION APPEAL TRIBUNAL

Neutral Citation: [2003] CAT 1

New Court
48 Carey Street
London WC2A 2JT

Friday 24 January 2003

Before:

THE PRESIDENT
SIR CHRISTOPHER BELLAMY QC

B E T W E E N:

HASBRO UK LIMITED

Applicant

- and -

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

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

MR SIMON BRINDLEY (instructed by the Director General of Fair Trading) appeared for the Respondent.

J U D G M E N T

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**REQUEST BY HASBRO UK LIMITED
FOR AN EXTENSION OF TIME TO APPEAL**

1 THE PRESIDENT: This is an application made on behalf of Hasbro UK Limited ("Hasbro") for an
2 extension of time for lodging an appeal to the Tribunal against a decision made against
3 Hasbro by the Director General of Fair Trading ("the Director") on 28 November 2002. In
4 that decision the Director found that Hasbro had infringed the Chapter 1 prohibition imposed
5 by section 2 of the Competition Act 1998 by fixing resale prices with some 10 distributors.
6 The Director imposed a penalty under section 36 of the Act of £4.95 million.

7 As I understand it, Hasbro does not dispute the infringement but wishes to contest the
8 amount of the penalty. In order to do that, Hasbro has to bring an appeal before this Tribunal
9 under section 46(1) of the 1998 Act. Such an appeal is governed by the Tribunal's Rules,
10 which are set out in SI 2000, No. 261.

11 Rule 6 of the rules, under the heading "Time and manner of commencing proceedings",
12 provides in Rule 6(2) and (3) as follows:

13 "(2) An appeal to the Competition Commission under sections 46 and 47 of the Act
14 must be made by sending an application to the Registrar so that it is received
15 not later than two months after the date upon which the applicant was notified
16 of the disputed decision.

17 (3) The Tribunal may not extend the time limit provided under paragraph (2)
18 unless satisfied that the circumstances are exceptional."

19 It is common ground that the time for appealing the Director's decision expires on 29 January
20 2003. Today being Friday January 24th, in the ordinary course of events Hasbro would have
21 until 5 pm next Wednesday, 29th January, to lodge its appeal. Yesterday, Thursday 23rd
22 January 2003, Messrs Denton Wilde Sapte, on behalf of Hasbro, contacted the Registrar of
23 the Appeal Tribunal and inquired about the possibility of extending the time for appealing on
24 the ground that exceptional circumstances existed within the meaning of Rule 6(3) of the
25 Rules. Invited by the Registrar to set out their concerns in writing, a letter dated 23 January
26 2003 was received by the Tribunal yesterday. I thought it right to direct that the application
27 for an extension of time should be heard orally in the presence of the Director.

28 The background is that the Director has apparently been pursuing two investigations
29 against Hasbro, one being described as "the Distributor Investigation" and the other "the
30 Retail Investigation".

31 In the Distributor Investigation the Director has investigated certain agreements
32 between Hasbro and its distributors. In the Retail Investigation the Director has apparently
33 investigated alleged agreements between Hasbro and two large retailers selling direct to the
34 public, namely Argos and Littlewoods. According to Hasbro, these two investigations were
35 proceeding side by side. Although it is accepted that the infringements concerned are quite

1 separate and that separate Rule 14 Notices were served in each case, Hasbro relies on the fact
2 that both Rule 14 Notices were issued in the two investigations at the same time, that there
3 was a single oral hearing heard in respect of both investigations and that there are links
4 between the two cases. It was always Hasbro's anticipation, so I am told, that the Director
5 would issue two decisions in respect of both of his investigations simultaneously.

6 What then happened, apparently, was that those acting on behalf of Argos and
7 Littlewoods raised various procedural points which led to the progress of the Retail
8 investigation becoming delayed relative to the Distributor investigation.

9 On 19 November 2002 Denton Wilde Sapte wrote to the Director to protest about the
10 possibility, which had come to their attention, that the Director might issue the "Distributor"
11 decision in advance of, and separately from, the "Retail" decision. According to that letter
12 such a course would prejudice Hasbro's ability to appeal the Distributor decision. It is
13 contended in the letter of 19 November that there are "fundamental linkages between the two
14 infringements both affecting the same time period, the same markets and the same products,
15 the only difference being that one infringement is at the wholesale level and the other at the
16 retail level." The letter of 19 November 2002 argues that Hasbro could not properly assess
17 the penalty to be imposed in relation to either infringement without taking into account the
18 other infringement and/or assessing the matter in the round. Consumer detriment, in
19 particular, cannot be assessed properly without considering both the wholesale and the retail
20 infringements. In addition, Hasbro might be deprived of the chance of advancing additional
21 points if it was obliged to proceed with an appeal against the Distributor decision in advance
22 of having the Retail decision. There might well be some question of double counting in the
23 two decisions, in relation to penalties. The total penalty in the two decisions might be
24 excessive or might exceed some appropriate limit or be in breach of the Director's guidelines.
25 Hasbro should not be prejudiced in defending its position in the round because of the
26 procedural difficulties that have apparently arisen in the Retail case.

27 The Director in his reply to Hasbro of 22 November 2002 contended that the two cases
28 were separate infringements that had been conducted together for administrative convenience.
29 He, the Director, did not know when the Retail case would be resolved and that since the
30 Distributor case was ready he felt he should proceed to a decision on the Distributor case, the
31 cases being entirely separate infringements based on separate sets of facts, according to the
32 Director.

33 It was apparently anticipated by those acting on behalf of Hasbro that the decision in
34 the Retail case might be published or available in early January 2003. It appeared later,
35 however, that the Retail decision would not be available before February. In those

1 circumstances those acting on behalf of Hasbro, Denton Wilde Sapte, wrote, as I have said, to
2 the Registrar of the Tribunal on 23 January 2003 formally to seek an extension of time for
3 lodging the appeal on the ground that "the circumstances are exceptional" within the meaning
4 of Rule 6(3) of the Tribunal's Rules.

5 The arguments put forward are essentially that Hasbro will be disadvantaged in filing
6 its appeal against the Distributor decision if it has to do so at a time when the Retail decision
7 is not to hand. In the letter of 23 January it is submitted that Hasbro has "found it impossible
8 to frame arguments on how Hasbro believes the seriousness of its infringement should be
9 assessed without understanding how the Director has assessed the seriousness of Hasbro's
10 Retail infringement". It is further submitted that Hasbro cannot know, in the absence of the
11 Retail decision, "whether it has any arguments, for example, that it has in effect been fined
12 twice in respect of any possible overlapping effects of the two infringements, whether there
13 should be any proportionality between the respective penalties, or whether the fines taken
14 together in the round can be considered fair and just in respect of the overall impact of the
15 two infringements" or, finally, "whether it would be wrong for the two penalties together to
16 exceed a single overall cap". In addition Hasbro contends that "its commercial decision as to
17 whether to appeal the Distributor decision on quantum at all cannot be made in isolation from
18 whatever penalty the Director imposes in the forthcoming Retail decision".

19 Mr Tatton, on behalf of Hasbro, has elaborated those points before me this afternoon.
20 In essence he submits that Hasbro wishes to put its best foot forward in presenting the appeal
21 and that it cannot put a full case before the Tribunal at the outset unless it has both the Retail
22 decision and the Distribution decision available to it. Hasbro does not want to put in anything
23 less than the full case. It has also been submitted that Hasbro finds difficulty in taking a final
24 commercial decision on whether to appeal at all without knowing what might be in the second
25 decision. The overall suggestion is that the time should be extended until some point after
26 which the second decision becomes available.

27 Mr Brindley, for the Director, tells me that in the Director's view the two cases, the
28 Distributor case and the Retail case, are regarded by the Director as separate cases.
29 Investigations started at different times, there are two Rule 14 Notices and that the
30 representations have been heard together only for reasons of good administration.

31 The situation apparently is that it is more likely than not that there will be a second
32 Decision in the course of February on the Retail case but I am told that there is no guarantee
33 that there will be a fine in the second case.

34 It is submitted on behalf of the Director that there is no difficulty in Hasbro dealing
35 with the existing decision on its merits, that the cases are quite separate and that there are

1 possibilities within the Tribunal Rules for dealing with the situation that has arisen, not least
2 the Tribunal's discretion as to costs, to be found in Rule 26 of the Rules, if it later turns out
3 that Hasbro has been put to unnecessary expense and that the Director is open to criticism in
4 that regard.

5 Taking those various considerations into account, I am of the view that this application
6 falls to be rejected, for a number of reasons.

7 First, the Tribunal is not permitted to extend the time limit for lodging an appeal
8 "unless satisfied that the circumstances are exceptional". See Rule 6(3). It is probably
9 impossible to produce any indicative, let alone comprehensive, definition of what is meant by
10 "the circumstances are exceptional" in Rule 6(3). Each case must turn on its own facts.

11 I draw attention, however, to paragraph 4.14 of the Tribunal's "Guide to appeals under
12 the Competition Act 1998", which provides as follows under the heading "Restricted power
13 to extend time for appealing":

14 "Under Rule 6(3) the Tribunal may not extend the two month time limit for appealing
15 'unless satisfied that the circumstances are exceptional'. The possibilities of obtaining
16 an extension of the time limit for appealing are thus **extremely limited**. (The
17 comparable rules in the Rules of Procedure for the Court of First Instance, which is to
18 be found in Article 42 of the Statute EC of the Court of Justice, requires the party
19 concerned to prove the existence of unforeseen circumstances or of *force majeure*."

20 In my judgment, the general intention behind the Tribunal's rules is that the initial time
21 limit for lodging an appeal is intended to be strict. Cases that do not involve *force majeure* in
22 the strict sense will, in my judgment, only rarely give rise to "exceptional circumstances".

23 As far as the Tribunal is concerned, respect for the deadline in commencing
24 proceedings is, in many ways, the keystone of the whole procedure. In my judgment,
25 therefore, derogations can be granted only exceptionally under Rule 6(3). That principle,
26 important as it is under the Competition Act, is likely to be even more important when the
27 Tribunal assumes its various new jurisdictions under the Enterprise Act later this year.

28 I am not satisfied on the material that I have before me that exceptional circumstances
29 exist in this case or, to use the strict words of the Rule, that "the circumstances are
30 exceptional". Of course, at this stage of the case I am unable to express any view as to
31 whether there are in fact links between the Distributor decision already taken and the Retail
32 decision that is apparently expected, or how important those links are. However, assuming in
33 Hasbro's favour that there are such links - assuming, I stress, without deciding - it seems to
34 me that the fact that the Director has taken one decision, imposing a penalty, and apparently
35 intends to take another in respect of an infringement that is a different "albeit related"

1 infringement, does not, at least at first sight, amount to "exceptional circumstances" within the
2 meaning of Rule 6(3).

3 It appears to be acceded on behalf of Hasbro that at least a protective appeal could be
4 lodged before time expires next Wednesday. I am, on the material that I have, unpersuaded
5 that Hasbro is disabled from putting forward its arguments as to the amount of the penalty in
6 the Distributor case, which is the sizeable sum of £5 million, and on the material I have I am
7 unable to find that Hasbro faces an insuperable difficulty, or even a major difficulty, in
8 framing its appeal or its arguments as to the seriousness of the offence which has already been
9 found to be proved in the existing Distributor Decision. It seems to me that there is scope for
10 addressing arguments on the existing Distributor Decision, even in the absence of the Retail
11 decision. If one argument is that the Director should not have arrived at his penalty in the
12 Distributor case without waiting for the Retail case or should have decided both cases
13 together, that is an argument that Hasbro is entitled to put forward on the appeal.

14 If the argument - and, as I understand it, this is the principal argument - is that Hasbro
15 cannot put forward its appeal completely in the absence of the Retail decision, it seems to me
16 that there are, at first sight, two answers to that difficulty.

17 In the first place, if there is in due course a second decision which Hasbro wishes to
18 appeal, any new matters raised by the second decision can be advanced in an appeal against
19 that second decision. Alternatively, an application can be made to amend or amplify the
20 appeal already lodged against the first decision.

21 In that connection, although this Tribunal is in general terms reluctant to permit
22 amendments to applications made under Rule 9, Rule 9(3) expressly provides that the
23 Tribunal is enabled to give permission to amend where (a) a new ground is "based on matters
24 of law or fact which have come to light since the application was made", or (b) "it was not
25 practicable to include that ground in the application".

26 At first sight it would seem to me that both those circumstances would apply in this
27 case, which means that any initial difficulty that Hasbro might have in lodging its appeal can
28 be corrected or dealt with in the course of the appeal.

29 There is, in addition, no difficulty under the Tribunal's rules in the cases eventually
30 being dealt with together. See Rule 15(1).

31 In general the material before me does not persuade me that the prejudice that Hasbro
32 advances is sufficient to bring Hasbro within the rubric of "exceptional circumstances" in
33 Rule 6(3). Even if it is arguable that the circumstances are exceptional within the meaning of
34 that rule, I am not satisfied as a matter of discretion that this is a case in which I should extend
35 time. In that connection it is uncertain when a further decision might be taken as regards the

1 retail case and, if so, whether any penalty would be imposed.

2 Following that further decision there is then, of course, further time for appealing. The
3 situation that the Tribunal is in, therefore, is that it is impossible to tell whether, or if, there
4 will ever be an appeal in the second case. One can foresee circumstances in which, if I were
5 to extend the time on some basis or other, that might create more problems than it solves – in
6 particular, by giving rise to uncertainty as to what deadlines would apply to which appeals
7 and when.

8 In those circumstances, and as a matter of case management and the exercise of
9 discretion, it seems to me that the underlying principle of the Rules should be adhered to, ie
10 that the original deadline required by the Rules should be respected, rather than opening up a
11 period of uncertainty. Once the appeal is lodged, the question of "where we go from here"
12 can be sorted out in the light of further developments in the case management of the appeal.
13 If it turns out in the event that the Director has acted in a manner that is open to criticism, that
14 is a matter that the Tribunal can take into account in relation to orders for costs under Rule
15 26.

16 I do accept that the resulting situation is not wholly satisfactory. This is not the first
17 time that the bifurcation of proceedings before the Director has given rise to difficulty at the
18 appeal stage. See for example the *Napp* case where the directions became separated by some
19 weeks from the substantive decision. However, I am unable to be satisfied that the situation
20 from Hasbro's point of view is so unsatisfactory as to give rise to the possible application of
21 Rule 6(3). Nor am I satisfied that this would be a proper course for the exercise of discretion
22 to extend time for the reasons that I have given.

23 In those circumstances I refuse this application for an extension of time for appealing.

24 MR TATTON: Sir, thank you.

25 MR BRINDLEY: Can I make one final comment, Sir?

26 THE PRESIDENT: Of course, Mr Brindley.

27 MR BRINDLEY: It just occurred to me as you were talking, Sir, that in relation to any possible
28 application there might be in relation to the costs of this hearing, that should simply be left to
29 the end of the whole of the proceedings.

30 THE PRESIDENT: I will simply reserve the costs of today.

31 (The hearing concluded)