



[2003] CAT 26

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1019/1/1/03

New Court,
48 Carey Street,
London WC2A 2JT.

27 October 2003

Before:
SIR CHRISTOPHER BELLAMY
(The President)
BARRY COLGATE
RICHARD PROSSER OBE

BETWEEN:

UMBRO HOLDINGS LIMITED
and
THE OFFICE OF FAIR TRADING

Appellant

Respondent

Miss Kelyn Bacon (instructed by Umbro Holdings Legal Department) appeared for Umbro Holdings Limited.

Mr Jon Turner and Miss Anneli Howard (instructed by the Director of Legal Services, the Office of Fair Trading) appeared for the Respondent.

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JUDGMENT
**(REQUEST FOR CONFIDENTIAL TREATMENT OF CERTAIN ISSUES RAISED IN
THE APPEAL)**

1. THE PRESIDENT: On 1st August 2003 the Office of Fair Trading ("OFT") took a decision under section 2 of the Competition Act 1998 in relation to the price fixing of replica football kits and imposed penalties on a number of undertakings. That decision is some 243 pages long.
2. Four of the undertakings concerned have appealed to the Tribunal under section 46 of the Act by appeals lodged on or around 1 October, 2003. The appellants are as follows: JJB Sports PLC - a leading sports retailer - who were fined £8.373 million; Allsports Limited - also a leading sports retailer - who were fined £1.35 million, Manchester United PLC, who were fined £1.652 million and Umbro Holdings Limited - a manufacturer of sports shirts and similar products - who were fined £6.641 million.
3. JJB and Allsports in their appeals contest both the facts relied on by the OFT and the penalty imposed. Manchester United and Umbro contest the penalty only. At present the appeals are technically proceeding separately although it is likely to be sensible in due course for the common parts of the appeals to be heard together. There has, at this stage, been no formal order for the exchange of Notices of Appeal, not least because possible issues relating to confidentiality are not yet resolved.
4. The conduct of the appeals was the subject of a first discussion at a case management conference on 23 October 2003. This judgment, however, concerns a particular matter that has been raised by the appellant, Umbro. On 16 October 2003 Umbro wrote to the Tribunal requesting that the CMC in its appeal should be held separately from the others on the grounds that a particular matter raised in Umbro's appeal was confidential to Umbro and should not be disclosed to the appellants.
5. The Tribunal decided to hold the CMC of 23 October in the presence of all the parties so far as matters common to everybody were concerned. However, at the conclusion of the CMC the Tribunal had a separate hearing in camera with Umbro to enable Umbro to advance the submissions that it wished to make. The Tribunal therefore heard submissions from Umbro and from the respondent OFT, in the absence of the other parties, in relation to the confidential matters that Umbro wished to raise. We intimated at the end of the argument that we were against Umbro on the submissions made.
6. Since the matters are of general importance we are giving judgment in open court. Umbro has intimated in response to the Tribunal's inquiry that it does not propose to seek permission to appeal to the Court of Appeal.
7. In its Notice of Appeal, dated 29 September 2003 Umbro appeals on penalty only. Indeed, Umbro challenges only one finding in the decision, namely, a determination in paragraph 596 of the appeal that:

"No significant admissions or co-operation were given until Umbro submitted its written representations to the Rule 14 Notice."

8. Umbro says that it ought to have been given credit for having co-operated with the OFT well before the stage of its written representations in reply to the Rule 14 notice.
9. It appears from Umbro's notice of appeal that the OFT has given a reduction of 40 per cent of the penalty for Umbro's co-operation with the OFT. Umbro says, however, that the reduction accorded to it should have been greater.
10. I interpose at this point in parenthesis to say that the figure of 40 per cent, I have just mentioned is masked in the published version of the decision and so was unknown to the other parties. It is, however, mentioned in the notice of appeal. No request was made in the notice of appeal for confidential treatment by the Tribunal of that figure. The figure was disclosed in the summary of the appeal published on the Tribunal's website on 8 October 2003, the Tribunal having no reason to think that that figure was confidential. The fact of that publication has, in the meantime, provoked an application by Manchester United for permission to amend its notice of appeal to claim that it too should be afforded a reduction of 40 per cent for co-operation.
11. To return to the story, Umbro's argument for a further reduction, beyond the 40 per cent already accorded, is based upon the fact that between essentially late 2001 and February 2002 Umbro co-operated with the OFT in providing information and witness statements in the context of an application for leniency which Umbro made at that time. That application was rejected by the OFT but Umbro seeks to rely on it in its appeal.
12. The matter is alluded to in the version of the decision given to Umbro at paragraph 15. That paragraph is again masked from the other parties to this case because the OFT regarded the matters contained therein as confidential. That paragraph however, as regards Umbro, reads as follows:

"An application for leniency was also received from Umbro. The OFT informed Umbro on 29 January 2002 that it did not satisfy the condition in paragraph 3.4(c) of the OFT's guidance and therefore could not benefit from total immunity under paragraph 3.7. The application in respect of the England direct agreement was rejected on 12 February 2002 because the information supplied by Umbro did not materially advance the OFT's case. The application in all other respects was rejected on 28 February 2002 because the OFT was not satisfied that Umbro had provided all the information about the alleged infringement of the Act or that Umbro was maintaining continuous and complete co-operation with the OFT."
13. Umbro now submits to the Tribunal that the fact that it had asked for leniency and co-operated with the OFT is a confidential matter as between Umbro and the OFT. Further, says Umbro, that confidentiality should now be protected by the

Tribunal during the appeal process. Umbro says that if it were to become known that it had claimed leniency it would, or might, suffer considerable commercial damage in the market place. It says that the evidence given by Umbro about the matters in question has already been commercially damaging as regards its relations with its customers, and notably JJB and Allsports. It has made efforts to restore these good relations and would not wish to see that undone now. Other adverse commercial consequences are referred to.

14. At this point there arises a further issue, not strictly limited to the issue of confidentiality as regards the fact of the application for leniency. In the course of making that application for leniency Umbro produced certain draft witness statements which were followed on 4 February 2002 by various signed witness statements submitted to the OFT. I think that we have understood that those statements were resubmitted on 5 April 2002. We are told that once Umbro's application for leniency had been rejected, those witness statements were not looked at further by the OFT and were not relied on in the contested decision. Nonetheless disclosure of all documents on the OFT's file, including by necessary implication witness statements of the kind I have just mentioned, is sought by JJB and Allsports. There is in addition the question of the correspondence passing between the OFT and Umbro relating to the rejection of the application for leniency. That correspondence in itself also raises the question of whether there is anything in the content of that correspondence that could be relevant to the defence of those parties appealing on the facts in this case.
15. We should explain by way of background that in a document OFT 423, *The Director General of Fair Trading's guidance as to the appropriate amount of a penalty*, the Director sets out a procedure for according lenient treatment for undertakings coming forward with information. In paragraph 3.2 of that document, the Director (now the OFT) states as follows:

"The Director considers that it is in the interest of the economy of the United Kingdom to grant favourable treatment to undertakings which inform him of cartels and which then cooperate with him in the circumstances set out below. It is the secret nature of cartels which justifies such a policy. The interests of the customers and consumers in ensuring that such practices are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which are members of the cartel and which cooperate with the Director."
16. It is right to point out that at paragraph 3.12 of the same document, under the heading "Confidentiality" it is said as follows:

"An undertaking coming forward with evidence for a cartel may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The Director will therefore endeavour, where possible, to keep the identity of such undertakings confidential

throughout the course of the investigation."

17. It therefore seems to us clear from the wording of paragraph 3.12 that in making an application for leniency there is no guarantee of confidentiality. Indeed, if the application for leniency succeeds, that fact becomes public. Nothing, however, is said about what is to happen in the case of a failed application for leniency, and in that context we turn to the statutory framework with which we are concerned in this matter.
18. Under section 237 of The Enterprise Act 2002, the OFT has certain obligations of confidentiality which are imposed notably by section 237 (2). In particular, information supplied to the OFT relating to the business of an undertaking must not be disclosed unless disclosure is permitted under Part 9 of that Act. It is to be noted that by virtue of section 237 (5) nothing in Part 9 of the 2002 Act affects the Competition Appeal Tribunal, that is said in terms.
19. Under section 239(1) the OFT may disclose information with the consent of any other party. Umbro has not in this particular case given its consent. Under section 244 there are set out various considerations that the public authority must have regard to when considering possible disclosure, as follows:
 - "(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure [*the OFT*] thinks is contrary to the public interest.
 - "(3) The second consideration to which [*the OFT*] must have regard is the need to exclude from disclosure (so far as practicable)--
 - (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates....."
20. However, under section 244(4) there is a third consideration that the OFT must have regard to, namely:
 - "(4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure.
21. In this case the OFT has considered that the fact of the application for leniency should remain confidential, in support of its general policy of encouraging applications to apply for leniency.
22. The situation regarding confidentiality, as it affects the Tribunal, is essentially governed by paragraph 1, subparagraph 2 of Schedule 4 of the Enterprise Act 2002. That provision deals only with the decisions of the Tribunal, which are to be recorded in a document.

Schedule 4 paragraph 1(2) provides:
"In preparing that document the Tribunal shall have regard to the need for excluding so far as practicable---

that is to say excluding from the Tribunal's final decision or judgment---

- "(a) information the disclosure of which would in its opinion be contrary to the public interest;
- (b) commercial information the disclosure of which would or might in its opinion significantly harm the legitimate business interests of the undertaking to which it relates.
- (c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests."

But then:

- (3) But the Tribunal shall also have regard to the extent to which any disclosure mentioned in sub-paragraph (2) is necessary for the purpose of explaining the reasons for the decision."

23. Although that statutory provision deals only with what is to be included in the Tribunal's judgment, the Tribunal takes the view that, for that provision to be effective, the Tribunal should protect, during the appeal proceedings, information that it would be likely to regard as confidential for the purposes of its judgment subject, of course, to the overriding requirement of ensuring the fairness of the appeal proceedings.
24. It is to be noted in particular, in subparagraph (2), that the need to exclude certain confidential material is expressed to be: "so far as practicable". As regards disclosure that might be contrary to the public interest, the disclosure must be such which would "in its opinion", that is to say in the opinion of the Tribunal, be contrary to the public interest.
25. As regards commercial information, it is information the disclosure of which would, or might, again in the "opinion of the Tribunal", significantly harm the legitimate business interests of the undertaking to which it relates, so there must be first of all significant harm, and secondly legitimate business interests. All those matters are, however, also to be borne in mind in the light of subparagraph (3), whereby the Tribunal has to have regard to the extent to which disclosure is necessary for the purpose of explaining the reasons for its decision.
26. In this particular case, Umbro submits that its legitimate business interests would suffer if the fact of leniency were disclosed; that it would be commercially unfortunate for it if the details of its application for leniency were crawled over in the course of these appeal proceedings, and that other parties are not affected.
27. Umbro invokes, effectively two public interests which are also emphasised by the Office of Fair Trading. The first public interest is that persons should be free to seek leniency in confidence and without fear of disclosure, and that the efficiency of the leniency programme should be protected, because that will lead

- to the discovery, or more effective detection of cartels.
28. Secondly, it is submitted that the parties before the Tribunal should not be at the risk of suffering commercial sanctions in the market place as a result of a perception that they had "shopped" or "sneaked" on their customers or competitors - those are the Tribunal's words and not words in the submissions that have been made to us.
 29. Alternatively it is submitted that disclosure should be on a counsel only basis, or on some basis in which the various elements before the Tribunal are edited in a way that might protect Umbro's confidentiality as far as possible.
 30. To take that last point first, we have difficulty with the suggestion that in a case of this kind matters should be dealt with on a counsel only basis. Such a basis does put the legal advisers in an extremely difficult position, and in a case involving penalties we do not consider that it is an appropriate basis on which to proceed unless there are very strong countervailing considerations to the contrary.
 31. Similarly, our own provisional perusal of the documents in question does not suggest that it would be practicable or desirable to try to edit the documents in the way suggested.
 32. More generally, the Tribunal takes the general view that its proceedings should be conducted on a basis that is as fully open as possible, subject only to the protection of vital business secrets or for some other overriding reason. It must be remembered that the Tribunal's judgment is a public document that has to be published. The Tribunal's hearings are in public, the transcripts of its hearings are published and so on.
 33. Equally, in a case such as the present, which takes place in a setting in which parties have had penalties imposed upon them, it is, in the Tribunal's judgment, of overriding importance that the parties should be able to exercise their rights of defence without having possibly relevant material held back or inaccessible. In the event of a conflict between the rights of the defence and other claims to confidentiality there must, in our judgment, be a presumption that the rights of defence prevail.
 34. We entirely see and accept the public interest considerations which lie behind Umbro's application and which are particularly emphasised by the OFT. It is, in our judgment, desirable that those who seek leniency should be able to do so, at least in the first instance, in confidence and should not be denied that confidence, unless there are important countervailing reasons. It is equally desirable that parties who seek leniency should not be placed unnecessarily at risk of some kind of commercial retaliation in the market place. Indeed, the Tribunal and, we trust, the OFT, is likely to take a particularly severe view if

- there is evidence that some kind of commercial reprisal has been sought by any party as a result of another party seeking to co-operate with the authorities.
35. That said, as we have already mentioned, it is clear that there is no guarantee of confidentiality when an application for leniency is made, as the Director's guidance makes clear.
 36. It also appears in this case that Umbro knew that there was no guarantee of confidentiality for its leniency application. That emerges particularly from representations made by Umbro on 4 March 2003.
 37. In our judgment there are insuperable difficulties in maintaining the confidentiality which Umbro claims. Given that the only point raised in its appeal is very largely based on its earlier application for leniency, in our judgment it would be virtually impossible to write the Tribunal's decision without referring to that application. Indeed, as we understand it, Umbro accepts that the fact of that application for leniency will come out in due course anyway.
 38. In our judgment it would, however, be impossible to conduct the public hearing without revealing the fact of the application for leniency. In addition, in a case such as the present it would be extremely difficult to conduct Umbro's appeal at a hearing that was held in camera.
 39. In addition, in this particular case, the fact of the application for leniency has, or to put it at its lowest, might - because "might" in this case would be sufficient - have a horizontal effect as regards other parties to the agreement. The first and obvious such effect is in relation to the calculation of penalty. In so far as other parties may wish to argue that they have been unduly penalised by comparison with other appellants, or have been in some way discriminated against, the reasons for, and the mechanics of, the calculation of the penalty in Umbro and other cases, seem to us to be matters which should not, in principle, be protected by confidentiality. That is underlined, in particular, by Manchester United's application for permission to amend its Notice of Appeal in order to plead that it should be treated in the same way as Umbro.
 40. The fact of having sought leniency is, in our judgment, also possibly relevant, or at least at this stage cannot be excluded as irrelevant, to any argument that the other appellants may wish to put forward as to the reliance to be placed on Umbro's evidence and witness statements. It has already been suggested, as emerges from the decision, that Umbro's witnesses may have been producing self-serving statements. That is a matter that it would be difficult for the Tribunal to go into without disclosure of the matters we are considering.
 41. It is also, in our view, doubtful whether Umbro, having decided to base its appeal (which is made publicly) on its failed leniency application has any longer "a legitimate interest" within the meaning of Schedule 4 of the 2002 Act in

- maintaining confidentiality of the principal fact on which it relies in that appeal, or that, at this stage of the proceedings, such a claim for confidentiality can any longer be legitimately maintained within the meaning of that provision.
42. In our judgment, both at the stage of making the original application for leniency and in bringing the appeal, Umbro must have taken, or been aware of, taking a certain risk. It must have known that the fact of the application might come out at some stage and must be taken to have weighed that risk against other possible adverse consequences.
 43. In any event, in our view, this is a case in which the needs of fairness and transparency clearly outweigh any other interests there may be in keeping this matter confidential. We are not persuaded that, in this particular case, there would be any lasting harm to the leniency system. Persons who genuinely seek leniency are still able to come forward and, if successful, will profit thereby. Those who come forward on some failed basis simply have to run the risk that that fact may be identified in due course in the event of appellate proceedings before the Tribunal. For those reasons we come to the conclusion that we are unable to keep confidential the fact of having sought leniency upon which Umbro relies.
 44. As regards the statements submitted to the OFT in the course of that application for leniency, the OFT has already, very properly, been seeking Umbro's consent to disclose those statements, at least in their finalised versions. In our judgment the OFT has acted quite correctly at this stage in taking the view that those statements should be disclosed to the other parties. In our judgment those documents, by which we mean the original draft statements and the later finalised statements, should be disclosed to the other parties in the appeal, both in their draft and final form.
 45. Similarly, the correspondence between Umbro and the OFT throws light on the reasons why the OFT did not accept the application for that leniency. We are not able at this stage to say that matters contained in that correspondence cannot be relevant at this stage to the defence of other parties before the Tribunal, and we therefore reach the conclusion that that correspondence too must be disclosed in the interests of justice to other parties before the Tribunal.
 46. On those grounds the Tribunal will draw the appropriate orders.
 47. So that is our judgment on the issue we dealt with on Thursday in camera. For the benefit of those who were necessarily not able to be present on that occasion, I hope in this judgment we have summarised the essential content of the debate that took place on that occasion and given our judgment accordingly.