



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998 CASE NO 1035/1/1/04

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar gives notice of the receipt of an appeal, lodged on 7 June 2004, under section 46 of the Competition Act 1998 (“the Act”) by the Racecourse Association (“the RCA”) acting on behalf of 23 entities owning racecourses (“the appellants”) in respect of a decision (CA98/2/2004)¹ taken by the Office of Fair Trading (“the OFT”) and notified to the appellants on 5 April 2004 (“the decision”).

The decision relates to certain of the rights sold by corporate groups owning 49 racecourses (together “the Courses”) to Attheraces plc (“Attheraces”) in an agreement dated 2 May 2001 (“the Rights Agreement”). The rights in question were the Non-Licensed Betting Offices (“LBO”) Bookmaking Rights. These are the rights licensed by the Courses necessary to permit Attheraces to supply programming covering British horseraces to UK bookmakers other than LBOs for distribution in combination with betting services. The decision found that the Courses collectively sold those rights and, in doing so, infringed section 2 (“the Chapter I prohibition”) of the Act, and failed to qualify for individual exemption pursuant to section 4 of the Act. In particular, the decision refers at paragraph 448 to the following provisions of the Rights Agreement as infringing the Chapter I prohibition:

- (i) the collective grant by the Courses of their Non-LBO Bookmaking Rights (i.e. Clause 3 of the Rights Agreement insofar as it relates to the Non-LBO Bookmaking Rights); and
- (ii) the payment for such grant of the Non-LBO Bookmaking Rights (i.e. Clause 12 of the Rights Agreement insofar as it relates to the Non-LBO Bookmaking Rights plus the Income Distribution Formula – Interactive Minimum Guarantees).

The decision found that the Courses that signed with Attheraces collectively sold their Non-LBO rights and that such collective sale restricted competition in two ways: first it increased the price that Attheraces paid for the Non-LBO rights, and secondly it restricted the incentives on the Courses to compete on fixtures.

The appellants appeal against the decision and submit that the OFT misapplied the Act by finding that the Rights Agreement infringed section 2 of the Act on the following grounds:

- the appellants accept that they acted collectively in negotiating with the bidders through the RCA but they deny that they engaged in any form of collective sale of their rights. As the evidence shows, each course was able to take its own decision as to what to do with its Non-LBO rights, although because of the decision of the well-known courses and the corporate groups to back the Attheraces offer, the 26 smaller courses were faced in the end with a choice of accepting, inter alia, the Attheraces deal or not selling their Non-LBO rights at all;
- the decision makes a fundamental error in market definition. It considers that there is a separate market in the supply of Non-LBO rights on the basis that the price of such rights is not affected by the price of the betting rights. The decision makes an error by ignoring the effect of other forms of betting;

¹ The text of the decision can be found at: <http://www.of.gov.uk/NR/rdonlyres/A98734AE-9CC1-4240-9E86-BD1DD47AFE6C/0/atr.pdf>

- in any event, the conclusion that the alleged collective sale had the effect of increasing prices to Attheraces and limiting non-price competition between the Courses is not supported by the evidence.

In the alternative, the appellants submit that the decision was wrong to refuse an exemption pursuant to section 4 of the Act on the following grounds. The decision:

- while accepting some of the benefits of the agreement, failed properly to recognise the full benefits of the agreement; it also muddled up the first exemption condition (benefits flowing from the agreement) with the third exemption condition (indispensability of the restriction);
- misapplied the second exemption condition by wrongly concentrating on the effect of the agreement on Attheraces;
- wrongly concluded, against the evidence, that the restrictions were not indispensable to the benefits flowing from the agreement; and
- wrongly concluded, again contrary to the evidence, that the agreement eliminated competition.

The appellants request that the Tribunal:

- (a) allows the appeal by holding that the decision misapplied section 2 of the Act;
- (b) alternatively, allow the appeal by holding that the decision misapplied section 9 of the Act;
- (c) order the OFT to pay the appellants' costs of the appeal; and
- (d) grant any other order that is necessary or appropriate.

In the event that the Tribunal allows the alternative ground of appeal, the appellants request that the Tribunal:

- (a) itself grants an exemption under section 9; or
- (b) remit the granting of an exemption decision back to the OFT with a direction that the OFT grant an exemption, or alternatively
- (c) direct the OFT to take a new exemption decision in the light of the Tribunal's judgment.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa

Registrar
16 June 2004