



[2006] CAT 31

IN THE COMPETITION
APPEAL TRIBUNAL

Case: 1011/2/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

20 November 2006

Before:

Sir Christopher Bellamy (President)
Mr. Peter Clayton
Mr. Peter Grant-Hutchison

BETWEEN:

(1) CLAYMORE DAIRIES LIMITED
(2) ARLA FOODS (UK) PLC
(formerly Express Dairies PLC)

Applicants

-v-

OFFICE OF FAIR TRADING
(formerly Director General of Fair Trading)

Respondent

-supported by-

(1) ROBERT WISEMAN DAIRIES PLC
(2) ROBERT WISEMAN AND SONS LIMITED

Interveners

ORDER

(EXPENSES AND CLOSURE OF PROCEEDINGS)

1. In these proceedings the applicants, to whom we refer as Claymore/Express, appeal to the Tribunal against the decision of the then Director General of Fair Trading (now the OFT) set out in letters of 9 October 2002 and 4 December 2002 to the effect, according to the applicants, that the Chapter I prohibition imposed by section 2 of the Competition Act 1998 (“the Act”) had not been infringed by the interveners, to whom we refer as Wiseman, in relation to various allegations of price fixing and market sharing in respect of the middle ground sector of the Scottish milk market in the Central Belt of Scotland between 2000 and 2002. The OFT’s original investigation commenced in June 2000. This appeal was lodged on 6 February 2003.
2. On 12 August 2003 the Treasury Solicitor on behalf of the OFT informed the parties and the Tribunal that certain new information had been received suggesting that, in conjunction with the material already held by the OFT, certain infringements of the Chapter I prohibition may have occurred, which appeared to overlap significantly with the alleged infringements which are the subject of these proceedings. In consequence, the OFT had opened a new investigation on 25 July 2003.
3. Having heard the parties, the Tribunal decided on 2 September 2003 to stay these proceedings generally until further order: see [2003] CAT 18.
4. In parallel with these proceedings, Claymore/Express also appealed against the Director General’s decision set out in letters dated 6 August 2002 and 6 September 2002 to the effect that Wiseman had not infringed the Chapter II prohibition, imposed by section 18 of the Act, in respect of certain pricing and other activities allegedly undertaken by Wiseman in relation to the supply of milk to middle ground retailers in the Highlands of Scotland. After a number of interlocutory rulings (see [2003] CAT 3, [2003] CAT 12, [2004] CAT 16) the Tribunal gave judgment on that appeal (“the Chapter II case”) on 2 September 2005: [2005] CAT 30. Consequential matters were dealt with in the Tribunal’s judgments [2005] CAT 33 and [2006] CAT 3.
5. The Chapter II case having been substantially disposed of, on 11 November 2005 the Registrar of the Tribunal wrote to the parties requesting information as to the progress of the reinvestigation which the OFT had opened in this matter on 25 July 2003. The OFT replied on 24 November 2005. On 18 January 2006 the Tribunal sought further

information from the OFT. On 10 February 2006 the Tribunal sought the parties' views as to what action the Tribunal should take in relation to these proceedings, now stayed for some 2 ½ years.

6. In a letter to the Tribunal dated 22 February 2006 the OFT stated that the new investigation had opened up new lines of enquiry and extended the scope of the case. The OFT had exercised powers under sections 26 and 28 of the Act, interviewed new witnesses and obtained new economic evidence. The OFT had, so the letter stated, received new evidence "as late as June 2005", and had been evaluating the evidence since then, although there had been two unavoidable changes of case officer. The OFT stated that its intention was either to issue a statement of objections or to close the file by September 2006.
7. By reasoned order of 27 March 2006 the Tribunal decided to continue the stay: [2006] CAT 6. At paragraph 13 we said:

"However, the Tribunal does not consider that, in circumstances such as these, appeals pending before it can remain stayed indefinitely, not least having regard to the position of Wiseman. If the stay is to be continued, at least for the time being, in our judgment it is appropriate to establish a mechanism for reconsidering at a later date how these proceedings should ultimately be determined. In view of the OFT's indication that it expects to be in a position to conclude the drafting of a statement of objections, or to decide to close the file, by the end of September 2006, we propose to fix a case management conference, to consider the position in this case generally, on the first convenient open date after 1 October 2006. The stay will continue in force in the meantime. The Tribunal would be glad to be informed by the OFT as to its progress by 29 September 2006, or earlier if possible."
8. On 6 September 2006 the OFT informed the Tribunal that it had, that day, issued a statement of objections to Wiseman, among other firms. The OFT was of the provisional view that the various addressees of the statement of objections entered into an agreement and/or concerted practice in respect of the supply of fresh processed milk to "middle ground" customers, in breach of Chapter I of the Act, over a four year period covering 2000 to 2003.

9. By letter of 21 September 2006 the Registrar of the Tribunal requested the parties' observations as to what steps should be taken in this case in the light of the contents of the OFT's letter of 6 September 2006. The Registrar's letter set out the Tribunal's provisional view, which was that there seemed little purpose in hearing the appeal. The letter continued:

“On that basis, it appears that the only issues which would arise are as follows:

- (i) the mechanism for bringing the proceedings to an end; and
- (ii) the question of expenses.

Whilst there may be scope for considering whether (a) the applicants might wish to withdraw their application or (b) the application should be disposed of by consent pursuant to Rule 28 of the Competition Commission Appeal Tribunal Rules 2000, the Tribunal currently considers that the proceedings could sensibly be brought to an end by the Tribunal lifting the stay currently imposed and simply ordering that there be no further order in this case and that the Tribunal's file therefore be closed. You may be aware that a similar course was followed in *Pernod-Ricard and Campbell Distillers v OFT* [2005] CAT 9.

As to the question of expenses, the Tribunal's first impression is that in the light, *inter alia*, of the historical nature of the case and the fact that the appeal has not been determined, there should be no order as to expenses.”

10. By letters, respectively, of 25 and 28 September 2006 Wiseman and the OFT agreed with the Tribunal's approach, both as to the closure of the case and as to the question of expenses.

11. By letter of 2 October 2006 Claymore/Express made the following points: (i) the issue of a statement of objections appeared to vindicate their position in challenging the original case closure; (ii) assuming an infringement decision is produced, the only remaining issue is expenses; (iii) it was not clear why Claymore/Express would not be entitled to their expenses – the mere existence of new evidence supposedly received by the OFT does not justify the original case closure decision; (iv) the matter is not “historical”: the effects of any infringement are still being felt in the relevant market today, and the significant delay in the case is not the fault of Claymore/Express; (v) only when an infringement decision is available will it be possible to compare the evidence relied on by the OFT for any infringement decision and the material available

to it at the time of the case closure; and (vi) Claymore/Express wished to make submissions as to expenses by reference to any infringement decision which might be made. Claymore/Express therefore submitted that a continuation of the stay was the appropriate course for the Tribunal to take pending resolution of the OFT investigation.

12. By letter of 5 October 2006 Wiseman responded to certain of the points made by Claymore/Express. Wiseman submitted *inter alia* (i) the basis for bringing the appeal has been superseded by events, and the reasons for the OFT not proceeding to a statement of objections at an earlier stage are essentially academic; (ii) Claymore/Express are already in a position to see what “new” evidence is now relied on, given that they have seen an excised copy of the statement of objections; and (iii) the question of expenses should be considered by reference to what has happened in the current appeal to date: the future conduct of the OFT investigation has no relevance in that regard.
13. By letter of 6 October 2006 the OFT also responded to Claymore/Express’ observations, submitting that (i) the correctness of the contested decision is now moot, and (ii) it would be wholly disproportionate for the Tribunal to engage in trying to determine the rights and wrongs of a decision taken five or six years previously merely in order to establish a claim for expenses, particularly where the challenge is heavily fact-intensive and the amount claimed must be relatively modest.
14. Also on 6 October 2006 Claymore/Express observed that it was unable to use the statement of objections disclosed to it by the OFT for the purpose of making submissions on expenses without the OFT’s consent. Claymore/Express also requested the opportunity to make further submissions on expenses, including by reference to the statement of objections, in the event that the Tribunal were minded to lift the stay.

The Tribunal’s analysis

15. We take the view that this matter has been fully ventilated in writing and that no useful purpose is served by inviting further submissions, whether oral or written.

16. The Tribunal's jurisdiction to award expenses in this case is governed by Rule 26 of Competition Commission Appeal Tribunal Rules 2000 (SI 2000/261), although that rule is in all material respects identical to the current Rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) applicable to proceedings commenced after 20 June 2003. Rule 26, paragraphs (1) to (3), of the 2000 Rules provide:

“26. Costs

- (1) For the purposes of these rules "costs" means-
 - (a) if the proceedings are taking place before a tribunal in England and Wales, costs and expenses recoverable in proceedings before the Supreme Court of England and Wales;
 - (b) if the proceedings are taking place before a tribunal in Scotland, costs and expenses recoverable in proceedings before the Court of Session; and
 - (c) if the proceedings are taking place before a tribunal in Northern Ireland, costs and expenses recoverable in proceedings before the Supreme Court of Northern Ireland.
- (2) The tribunal may at its discretion, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay the tribunal may take account of the conduct of all parties in relation to the proceedings.
- (3) Any party against whom an order for costs is made shall, if the tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.”

17. As the Tribunal has emphasised on a number of occasions, the Tribunal enjoys a wide discretion as to expenses: see e.g. *The Racecourse Association and others v OFT* [2006] CAT 1 at [7] to [9]; *Hutchison 3G (UK) Limited v OFCOM (Consequential Directions and Costs)* [2006] CAT 8 at [41] to [42]; and *MasterCard UK Members Forum Limited and others v OFT (Costs)* [2006] CAT 15 at [46].

18. The contested decision was adopted on 9 October 2002 and confirmed on 4 December 2002, following an application by Claymore/Express pursuant to section 47 of the Act (as it then stood) and Rule 28 of the Competition Act 1998 (Director's Rules) Order 2000. The investigation the subject of the contested decision related, initially at least, to the period from 1 March 2000, when the Act came into force, to June 2000, when the investigation commenced.
19. The notice of application, filed on 6 February 2003, sought, in particular, the following relief: an order (a) that the decision be set aside; and (b) that either the matter be remitted for "proper consideration and investigation", or the Tribunal issue directions so as to enable it to determine the question of infringement itself.
20. As indicated above, these proceedings were stayed by Order of 2 September 2003 following the OFT's decision to reopen its investigation into the matters the subject of the proceedings. Claymore/Express submit that the stay should continue until the OFT comes to the end of its investigation; at that stage the question of expenses should be resolved.
21. We observe first that we can see no good reason for maintaining these proceedings as far as the substance is concerned. The OFT has reopened its investigation and has now issued a statement of objections. The applicant has therefore essentially obtained the main relief it sought, in so far as the matter has been re-investigated by the OFT and a statement of objections issued. If the OFT adheres to the statement of objections, Wiseman or any other of the parties will be able to appeal to the Tribunal. In the circumstances, it appears unlikely that the matters raised in the present notice of application will fall to be determined by the Tribunal in the present proceedings. There will be a fresh decision by the OFT and, if so advised, new appeals before the Tribunal.
22. However, Claymore/Express submit that these proceedings, and the accompanying stay, should be maintained for the purpose of determining any application Claymore/Express may ultimately wish to make in respect of expenses. Claymore/Express would wish to compare the evidence relied on by the OFT in any future infringement decision with the material before it when it issued the case closure letter of 9 October 2002, and make submissions as to expenses accordingly.

23. We agree with Claymore/Express that the only conceivable purpose in maintaining these proceedings would be to enable the Tribunal ultimately to rule on the question of expenses in this case, in the light of the OFT's decision following the present statement of objections. However, we do not share the view that these proceedings, and the accompanying stay, should be maintained solely for that purpose.
24. Our view is that, as the OFT has submitted, it would be disproportionate to enter into, at some uncertain future date, an examination of the underlying merits of the appeal before us, comparing the material relied on for any infringement decision with that before the OFT in 2002, solely for the purpose of considering an application for expenses. Moreover, on Claymore/Express' approach the Tribunal would not be in a position to carry out even that exercise until after the OFT had reached a decision and any subsequent appeal had been determined, which would not in all likelihood be until 2007 or later. Since the substance of Claymore/Express' challenge is now academic, the Tribunal would be extremely reluctant to engage in, effectively, a trial of the issues in these proceedings simply to consider expenses, particularly at that distance in time from the original events, which date back to 2000. That would, in our view, be a disproportionate use of the Tribunal's (and the parties') resources.
25. We note moreover that Claymore/Express' expenses, incurred in late 2002 and early 2003, are likely to be limited, given that this case did not proceed, in substance, beyond the notice of appeal. Although case management conferences were held on 27 March 2003 and 2 September 2003, those case management conferences were in fact very largely taken up with matters in the Chapter II case, which has already been the subject of an order for expenses: [2005] CAT 33.
26. In all those circumstances, the additional expenses that would be incurred in going into the merits at some future and distant date, solely to determine the issue of expenses, would not seem to us to be justifiable: see by analogy *R v Liverpool City Council ex parte Newman* [1998] JR 178. In any event, in our view the Tribunal should have regard to the desirability of finality in the proceedings before it. It is undesirable that cases remain on the register for substantial periods, in this case for nearly 4 years already, with the prospect, if the Tribunal were not to take the course it has decided upon, that the case would remain stayed for a potentially lengthy period to come.

27. In these circumstances in our view these proceedings should now be terminated, the appropriate course being to make an order in the form made in *Pernod-Ricard v OFT* [2005] CAT 9.
28. As to whether the Tribunal could, at this stage, make an order for expenses in any event, in our view it would not be appropriate for the Tribunal to consider the matters raised in the statement of objections, as Claymore/Express suggest, since the administrative procedure is still in progress. It follows that the Tribunal is not at this stage in a position to consider whether the notice of application in this case is well founded as to the merits or not. Since, for the reasons already given, the Tribunal does not consider it appropriate to maintain these proceedings on foot solely for the purpose of ruling on expenses at some future date, after the OFT has taken a decision and any further appeals have been concluded, it follows that the only practical option open to the Tribunal is to order that each party bears its own expenses. We note that Claymore/Express does not come away from these proceedings empty-handed, since the OFT has undertaken the investigation which it sought.
29. For these reasons, we have come to the conclusion that the appropriate course is to make the following order:
- (1) that there be no further order in these proceedings;
 - (2) that there be no order as to expenses.

Christopher Bellamy

Peter Clayton

Peter Grant-Hutchison

Charles Dhanowa
Registrar

20 November 2006