



Neutral citation [2006] CAT 6

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case: 1011/2/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

27 March 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

Respondent

-supported by-

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

Intervenors

ORDER

(CONTINUATION OF STAY)

1. In these proceedings the applicants, who we refer to 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, who we refer to as Wiseman, in relation to various allegations of price fixing and market sharing alleged to have occurred in 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 is either to issue a statement of objections or to close the file by September 2006. That timetable is based on the OFT's assessment of the time needed to draft any statement of objections, finalise evidential matters (including the need to obtain further evidence that the drafting may reveal) and conduct an internal peer review by senior management within the OFT.
7. The OFT considers that it would be inappropriate, in those circumstances, to restore this case for hearing. Absent the applicants' consent, the OFT would not wish to press the Tribunal either to dismiss this case or remove it from the register, since either course might involve an inquiry into the merits which would be difficult, if not impossible, at this stage. The OFT considers that the best course is therefore to leave this matter stayed, with liberty to apply.
8. Claymore/Express agree with the OFT that the best course would be to leave matters where they are.
9. Wiseman considers that there may be sense in discontinuing the current proceedings and awaiting the new OFT decision, since any such new decision will inevitably be on a different basis from the decision currently subject to challenge. Wiseman notes that the OFT's investigation commenced about six years ago. According to Wiseman, the allegations apparently made to the OFT have never been put to Wiseman, and the delay

which has occurred compromises Wiseman's right to a fair hearing and prejudices Wiseman's ability to defend itself.

10. In our view, although the OFT has, quite rightly, not informed the Tribunal of the details of its investigation, it is difficult to describe the present position as satisfactory. The present case concerns a basic consumer product, supplied in the most populated region of Scotland, by companies of importance to the Scottish economy. The matter originally commenced nearly six years ago, and the reinvestigation which commenced in July 2003 has now been proceeding for over 2 ½ years. Substantial delays appear have occurred since 2003, apparently partly due to changes of case officer. Although the OFT states that new evidence was received "as recently" as June 2005, that in itself is some nine months ago, and it appears that, in the meantime, there has been little concrete progress. The OFT further indicates that it still requires another seven months, from February 2006 to September 2006, to prepare a statement of objections or decide to close the file.
11. As we are sure the OFT would agree, unjustified administrative delay seriously weakens the effectiveness of the Act. Delay also adds to the costs, leads to periods of uncertainty, and from the point of view of the parties investigated, gives rise to the risk of possible prejudice in preparing a defence. Unjustified administrative delay is equally inimical to the interests of consumers, whom the legislation is designed to protect, and also to the effective pursuit of civil remedies. The management of the OFT's file in a timely and effective way is thus of major importance in achieving the objectives of the legislation which the OFT is responsible for enforcing.
12. In the present case, while we see the force of Wiseman's suggestion, as intervener, that these proceedings should now be discontinued, that is not the position taken by the applicant Claymore/Express or the OFT as the respondent. Both those parties suggest that the present stay should be continued. We agree with that suggestion, for the reasons given by the OFT. We also accept the OFT's submission that it would be inappropriate, at this juncture, to restore this matter for hearing.
13. 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.

Christopher Bellamy

Peter Clayton

Peter Grant-Hutchison

Charles Dhanowa
Registrar

27 March 2006