[2005] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1014/1/1/03 - 1015/1/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29th April 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
THE HONOURABLE ANTONY LEWIS
MS VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

ARGOS LIMITED
&
LITTLEWOODS LIMITED — Appellants

and

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

Mr. Mark Brealey QC and Mr. Mark Hoskins (instructed by Burges Salmon LLP) appeared for Argos Limited

Miss Marie Demetriou (instructed by DLA LLP) appeared for Littlewoods Limited.

Mr. Brian Doctor QC and Miss Kassie Smith (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

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RULING (PERMISSION TO APPEAL)

THE PRESIDENT:

1 Argos and Littlewoods seek permission to appeal under s.49(1)(c) of the Act on a "point of law" arising from the Tribunal's judgments in this case, the Liability Judgment of 14th December 2004 ([2004] CAT 24) and the Penalty Judgment which we have delivered today, 29th April 2005 ([2005] CAT 13).

2 Argos puts forward three submissions. First, that the trilateral concerted practice found by the Tribunal at [778] of the Liability Judgment was not based on a sufficient consensus to amount to a concerted practice between the three participants – Argos, Hasbro and Littlewoods – contrary to the Tribunal's findings. The essential argument is that there was insufficient consensus as between Argos and Littlewoods for both of them to be party to that trilateral concerted practice, taking into account decisions by the European Courts in the cases of *Suiker Unie* and *Bayer*.

3 The second submission is that the bilateral agreements found between Argos and Hasbro, which are set out in [658] of the Tribunal's Judgment, were wrongly characterised by the Tribunal as an agreement or concerted practice to fix prices, but amounted only to a price information exchange to which different considerations would apply.

4 The third submission, which arises from the Penalty Judgment, was that the OFT was obliged by its own guidance to conduct a full market analysis before fixing any penalty in this case, and imposing such a penalty on Argos. Littlewoods supports those three submissions from its perspective.

5 Littlewoods, but not Argos, as we understand it, puts forward a fourth submission to the effect that in the Penalty Judgment the Tribunal wrongly found that there was no discrimination against Littlewoods arising from the fact that full leniency was accorded to Hasbro in this case by the OFT, in breach (so Littlewoods submits) of the relevant OFT guidance. Littlewoods submits in particular that Hasbro was not in a relevantly different position from Argos and Littlewoods and that, contrary to the Tribunal's findings, there was no objective justification

for the fact that Hasbro had no penalty whereas Argos and Littlewoods (or Littlewoods in this particular case) had a penalty imposed upon them.

6 As to Argos's first and second points we would emphasise that this particular matter involved an extensive examination by the Tribunal of the facts of this case, the hearing of witnesses, cross-examination and the examination of documentary evidence. We see the heart of this case as primarily a question of fact, namely, were agreements or concerted practices engaged in by the Appellants contrary to the Chapter I prohibition? In our view those are, above all, questions of fact.

7 At [778] and following of the Judgment we found that there was a trilateral concerted practice between Hasbro, Argos and Littlewoods on the basis of the evidence which is set out in [780] to [790]. We concluded at [790] on the evidence that:

> "… Argos and Littlewoods are properly to be regarded as party to a tripartite concerted practice with Hasbro and, indirectly, each other to the effect that each party would to a material extent price at or near Hasbro's RRPs on Action Man and Core Games and, for the A/W 2000 and S/S 2001 catalogues, certain other products. The object or effect of that concerted practice was to prevent, restrict or distort competition, within the meaning of the Chapter I prohibition. That concerted practice similarly lasted from 1 March 2000 to 15 May 2001."

8 The first submission that Hasbro advances in our view raises essentially questions of fact, and we do not see that any point of law arises from the first submission. In so far as any point of law could conceivably be constructed we take the view that there would be no reasonable prospect of success in that regard.

9 As to Argos's second point, at [658] and following in the Liability Judgment ([727] and following in the case of Littlewoods) the Tribunal found on the evidence that both Argos and Littlewoods respectively had entered into bilateral agreements or concerted practices as to prices with Hasbro. Those conclusions are based on a chronological survey of the evidence which starts at [419] of the Tribunal's Judgment and runs through to [657] thus taking up approximately 100 pages of survey of the evidence.

10 The essential argument put forward by Argos is that on the evidence there was no more than a price information exchange. In our judgment that submission collides with the Tribunal's finding, notably at [700] of the Judgment, that:

> " …a verbal agreement with Hasbro that Argos would price at or near Hasbro's RRPs on Action Man and Core Games was in effect after 1 March 2000 for at least the S/S 2000, A/W 2000 and S/S 2001 catalogues, and for the other common products identified above for the A/W 2000 and S/S 2001 catalogues. That agreement existed before 1 March 2000 but became unlawful after that date, for the remainder of the life of the S/S 2000 catalogue and then for subsequent catalogues. We are prepared to assume that the agreement terminated on 15 May 2001, the date of the OFT's visit."

That was the agreement that the Tribunal found on the evidence, and there is a similar finding at [726] of the Tribunal's Judgment. Similar findings were made in respect of Littlewoods at [728] to [777]. Again, we see this part of the case as raising essentially questions of fact and we have not been able to detect any arguable point of law in that part of the case. Certainly in our view there is no point of law that arises there that has any reasonable prospect of success.

11 The two remaining points relied on relate to the Penalty Judgment. The first argument put forward by Argos and Littlewoods is that the OFT should have conducted a full market analysis before imposing any penalty in this case. We have dealt with that argument at [168] to [211] of the Penalty Judgment, and we rejected the argument for the reasons there set out. We would emphasise that we have adopted a pragmatic approach to this issue with the result that the penalties imposed on the Appellants have been slightly reduced. We see on this part of the case no point of law arising that has any reasonable prospect of success.

12 Finally, as regards Littlewoods' submission that the OFT misapplied the *Guidance* in granting leniency to Hasbro while at the same time imposing penalties on Argos and Littlewoods (in particular Littlewoods) in a way, so Littlewoods submits, that gave rise to discrimination and breach of the principle of equal treatment, that submission it seems to us is largely a question of fact, but it may be that there are at the edges some legal points that arise. However, we dealt with Littlewoods' argument at [83] to [163] of the Penalty Judgment and we rejected all the points that were raised.

13 The conclusion that, in the circumstances of this case, Argos and Littlewoods should get off, as it were, "scot-free" as a result of an alleged misapplication by the OFT of the *Guidance* not only offends our sense of justice but is also unfounded either in fact, or in law, for the reasons that we have set out in the Judgment.

14 Again, to the extent that there could be constructed any point of law on that aspect of the case we do not think any such point would have any reasonable prospect of success. In those circumstances we refuse permission to appeal to the Court of Appeal.