



Neutral citation [2008] CAT 20

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1104/6/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

31 July 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PROFESSOR JOHN PICKERING
MR. GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

TESCO PLC

Applicant

-v-

THE COMPETITION COMMISSION

Respondent

- and -

WAITROSE LIMITED

MARKS AND SPENCER PLC

ASDA STORES LIMITED

THE ASSOCIATION OF CONVENIENCE STORES

Potential Interveners

**RULING ON THE ACS APPLICATION FOR EXTENSION OF TIME TO
INTERVENE**

APPEARANCES

Mr. Mark Hoskins and Mr. Julian Gregory (instructed by Freshfields) appeared on behalf of the Applicant.

Mr. Daniel Beard and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Tim Ward (instructed by Slaughter & May) appeared on behalf of the potential Intervener, Asda Stores Limited.

Miss Kassie Smith (instructed by Lovells LLP) appeared on behalf of the potential Intervener, Waitrose Limited.

Mr. Robert Donoghue and Miss Niamh Grogan (instructed by S.J. Berwin LLP) appeared on behalf of the potential Intervener, Marks & Spencer Limited.

Miss Elisa Holmes (instructed by Edwin Coe LLP) appeared on behalf of the potential Intervener, Association of Convenience Stores.

THE PRESIDENT:

1. We are dealing today with case management issues that arise in relation to an application under section 179 of the Enterprise Act 2002, lodged with the Tribunal on 30 June 2008 in which Tesco challenge a report by the Competition Commission published on 30 April 2008 which found, among other things, that there was an “adverse effect on competition” (“AEC”) in certain local markets for the supply of groceries by larger grocery stores. The Commission recommended to the Government that it should amend the planning legislation contributing to this AEC and introduce a “competition test” for all applications for planning permission for a development of certain grocery retail stores. The background to the matter is fully set out in the Commission’s report.
2. The Tribunal has before it four applications for permission to intervene. In relation to three of them – those lodged by Waitrose, Marks and Spencer, and Asda – the applications are not disputed, and we have already indicated that we grant permission to intervene. The fourth application is one filed by the Association of Convenience Stores (“ACS”), represented by Miss Elisa Holmes.
3. The ACS application was lodged on 24 July 2008 even though the final day for making such requests for permission to intervene was 23 July. That date can be deduced from the notice that was put on the Tribunal’s website on 2 July and was indeed calculated without difficulty by the three other applicants for intervention. So the ACS lodged its application one day late.
4. The procedural rules governing proceedings in the Tribunal are contained in the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (“the Tribunal Rules”). The Tribunal Rules are completely clear as to the need to apply for permission to intervene and the time within which such applications have to be made, and the importance of adhering strictly to those time limits (which are for the benefit of all litigants as well as the Tribunal) have been emphasised on a good many occasions by the Tribunal, not least in the cases to which we have been referred this afternoon, including the ruling in *Cityhook v Office of Fair Trading* [2006] CAT 26.

5. There has been no attempt until this afternoon to explain why the application was lodged out of time, or even to apply for an extension of time, which of course the Tribunal does have power to grant in certain circumstances pursuant to rule 19(2)(i) of the Tribunal Rules.
6. Miss Holmes has indicated to us that the reason for the failure to comply with the time limit was simply that her instructing solicitors miscalculated the time for lodging the application, which of course is really no excuse at all.
7. Miss Holmes does now apply on behalf of ACS for an extension of time to intervene. There is, it seems to us, only one point potentially which Miss Holmes can rely upon to justify her application, which is the fact that the ACS comes with a different perspective from the other interveners in the sense that the ACS, as its name indicates, represents small convenience stores, whereas all the other interveners and, indeed, the applicant Tesco, are large grocery retailers. Miss Holmes has urged this as a ground on which her client has sufficient interest to intervene and also as a ground for ACS being granted an extension of time.
8. Mr. Hoskins, who appears for Tesco, and is the only person who has articulated, orally at any rate, objections to the ACS's application to extend time to intervene, has argued that there is in fact no sufficient interest on the part of the ACS and he points to the fact that the competition test, which is the subject matter of these proceedings, purports to address the "adverse effect on competition" found to exist in the local markets for the supply of groceries by larger grocery stores, and will have no application to convenience stores of the kind represented by ACS.
9. We consider that, subject to being granted an extension of time, Miss Holmes overcomes the hurdle of establishing a sufficient interest within the meaning of rule 16(1) of the Tribunal Rules. Mr. Hoskins was constrained to accept, and we think correctly, that notwithstanding that the competition test is designed to apply to larger retail establishments, nevertheless the application or otherwise of the recommended test is capable of affecting small convenience stores. That point, allied to the fact that there is no other voice – or there would be no other voice – to express any views from the perspective of such stores if the ACS were excluded, and the acknowledgment by Mr

Beard on behalf of the Competition Commission that the ACS played quite a substantial role during the course of the investigation which gave rise to the report that is being challenged, are in our view sufficient for that purpose.

10. Moreover those factors have persuaded us, we have to say somewhat reluctantly, to grant an extension and so we give permission to the ACS to intervene on the same conditions that we have applied to the other three interveners.

The Honourable Mr Justice Barling
President of the Competition Appeal Tribunal

Made: 31 July 2008
Drawn: 6 August 2008