



Neutral citation [2009] CAT 13

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1104/6/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

3 April 2009

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-

COMPETITION COMMISSION

Respondent

- and -

WAITROSE LIMID

MARKS AND SPENCER PLC

ASDA STORES LIMITED

THE ASSOCIATION OF CONVENIENCE STORES

Interveners

APPEARANCES:

Mr. Nicholas Green Q.C. and Mr. Mark Hoskins Q.C. (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Tesco Plc.

Mr. Peter Roth Q.C. and Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared on behalf of the Competition Commission.

Heard at Victoria House on 3 April 2009

RULING ON REQUEST FOR PERMISSION TO APPEAL

THE PRESIDENT:

1. Mr. Green QC on behalf of Tesco seeks permission to appeal the Tribunal's judgment on relief handed down earlier today ([2009] CAT 9). Tesco's original application for review was brought before the Tribunal under subsection 179(1) of the Enterprise Act 2002 ("the Act"). Appeals against decisions of the Tribunal in relation to such applications can be brought under subsections 179(6) to (8) of the Act, which provide for appeals, in this case to the Court of Appeal, that being the appropriate court when the Tribunal is sitting in England & Wales. Any such appeal must raise a point of law.
2. In considering whether to grant permission, the Tribunal, when sitting in England and Wales, as here, applies the test in Civil Procedure Rule 52.3(6):

"Permission may only be granted if the Tribunal considers that the ground of appeal has a real prospect of success or that there is some other compelling reason why the appeal should be heard."
3. Tesco seeks permission to appeal on a point of statutory construction which we dealt with in today's judgment, namely, whether the time limit set out in subsection 137(1) of the Act applies to a "new decision" reached by the Commission on referral of a matter back to the Commission for reconsideration under subsection 179(5)(b).
4. Mr. Green makes a number of points in support of Tesco's request for permission. First of all, he submits that arguably the Tribunal was wrong as to its construction of those provisions and the time limit does apply to a referral back in the present case and prevents a new decision by the Commission. In this regard he says that the Tribunal did not fully appreciate the importance of the possible role of the Office of Fair Trading in filling the lacuna which, on Tesco's argument, would obviously arise if the Commission could not reconsider this matter itself.
5. Secondly, he says that a similar point to this had arisen in *Interbrew SA & Anor v Competition Commission & Anor* [2001] EWHC Admin 367 under the previous merger regime contained in the Fair Trading Act 1973, albeit that the court there did not need to decide it as the matter was disposed of by agreement between the parties.

6. Thirdly, he submits that the point is very important as it affects not only this case but others as well. He says there would be real value in a definitive decision of the Court of Appeal on this issue, and that such a decision might well come on quite quickly, possibly even before the summer vacation, whereas if we refuse permission and the Court of Appeal grants it there may be an even longer delay.
7. Mr. Roth QC, who appears on behalf of the Commission, opposes the application. He submits that an appeal would have no real prospect of success and that there is no other compelling reason for an appeal going ahead.
8. We agree with Mr. Roth. Although the point in question is one of statutory construction and therefore a point of law, we regard the argument raised by Tesco as a hopeless one for the reasons set out at length in our judgment. Nor has Mr. Green convinced us that there is any other compelling reason for the matter to go on appeal. The point would be important if it had any merit, but a meritless argument should not necessarily go on appeal on that basis.
9. For these reasons the Tribunal unanimously refuses Tesco's request for permission to appeal. Tesco, if so advised, may renew its application for permission to the Court of Appeal within 14 days pursuant to CPR 52.3(3), and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of the transcript of this ruling should be placed before the Court of Appeal.

The President

Graham Mather

John Pickering

Charles Dhanowa
Registrar

Date: 3 April 2009