



COMPETITION APPEAL TRIBUNAL

**NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998
CASE NO 1073/2/1/06**

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003 No.1372) (“the Rules”), the Registrar gives notice of the receipt on 9 August 2006 and 14 March 2006 of appeals under section 47 of the Competition Act 1998 (“the Act”), by Mr Terry Brannigan (formerly a sole trader trading as Brannigan Publishing) (“the appellant”), of 119 Long Beach View, Eastbourne BN23 5NB, in respect of decisions taken by the Office of Fair Trading (“the OFT”) on 9 June 2006 and 6 February 2006 to reject a complaint of alleged infringements by Newsquest (Sussex) Limited (“Newsquest”) and Johnston Press Limited (“Johnston”) of section 2 of the Act prohibiting agreements which prevent or restrict competition (“the Chapter I prohibition”) and section 18 of the Act prohibiting an abuse of a dominant position in a market (“the Chapter II prohibition”).

According to the documents filed at the Registry, the appellant set up a newspaper publishing business and launched two free newspapers in East Sussex, the Lewes Life and the Uckfield Life, in 2003. Both papers were distributed weekly to all households in the towns of Lewes and Uckfield, respectively. Newsquest and Johnston were the two other principal publishers in the relevant geographic area. Prior to the entry of the appellant’s newspapers, two local newspapers were distributed in Lewes: the Argus, a daily paid-for title distributed by Newsquest, and the Sussex Express, a weekly paid-for title distributed by Johnston.

The appellant alleges that Newsquest in particular reacted aggressively to the launch of his new free titles and acted anti-competitively and in contravention of the Chapter II prohibition in particular (according to the appellant) by:

- (a) the cancellation of the intended print slot for the appellant’s publications (the appellant having entered into an agreement with Newsquest in January 2003 to use Newsquest print facilities);
- (b) the launch by Newsquest of a rival weekly free paper, the Uckfield Leader, to target the circulation of the Uckfield Life;
- (c) the offering of advertising space to the appellant’s customers either free or at excessively low prices in return for an agreement not to advertise with Mr Brannigan’s titles;
- (d) targeting of the appellant’s means of distribution, in particular by pressurising local newsagents not to stock the Lewes Life or the Uckfield Life; and
- (e) attacking and denigrating the appellant’s reputation.

The appellant also alleges an agreement between Newsquest and Johnston not to compete against each other in the Lewes and Brighton areas respectively.

Having been made personally bankrupt on 12 September 2003, the appellant complained of the above matters to the OFT on 24 October 2003.

By a letter dated 24 November 2003 the OFT informed the appellant that, although it believed that further enquiries by the OFT were justified in order to determine whether there were reasonable grounds for suspecting that the Chapter II prohibition had been infringed, the OFT had insufficient resources to make such enquiries at that time.

In the papers filed at the Registry the appellant indicates that he sought the advice of specialist counsel, who expressed surprise at the OFT's failure to proceed with further enquiries into Mr Brannigan's complaint as, in counsel's view, the matters complained of concerned conduct of a type that is an extremely common response from dominant firms in order to suppress competition from a new entrant to the market and which has long been recognised as anti-competitive.

The appellant forwarded counsel's advice to the OFT on 5 April 2004.

On 8 April 2004 the OFT wrote to the appellant's solicitors stating "whilst we can still see a justification for making further enquiries into ...the complaint we still do not have sufficient resources available in order to proceed with those enquiries at this stage. However we do hope to be in a position to reassess the situation shortly."

On 13 May 2004 the OFT wrote again to the appellant's solicitors stating that "unfortunately the situation remains unchanged from that expressed in our letter of 8 April 2004."

The OFT wrote to the appellant on 1 September 2004 noting that it was several months since the complaint was made. The OFT stated "Given the time that has passed and your need for certainty, we have revisited your complaint to assess whether we have sufficient resources available to take your case further now or in the foreseeable future. Such assessment demonstrated that we do not currently have such resources due to other casework and it is very unlikely that we will have sufficient resources available in the foreseeable future... Given that it would be unfair on you to keep our file on your complaint open indefinitely, we will now close our file."

Following further correspondence the OFT by its letter of 6 February 2006 declined to reopen its file.

In the papers filed at the Registry the appellant made the following submissions:

- (a) the OFT erred in taking the decision to close its file, notwithstanding the merits of the case and the national interest involved, on the basis that it has insufficient resources; and
- (b) Despite having spent two years trying to resolve the matter by way of private enforcement, the appellant's lack of funds means that public enforcement by the OFT is the only course open to the appellant.

The Tribunal held a hearing in private on 28 April 2006 to consider whether to exercise its power under rule 10 of the Rules to reject the appeal. That hearing was adjourned following an undertaking given to the Tribunal by the OFT to carry out a reassessment of the complaint. On 9 June 2006 the OFT wrote to the appellant stating that the OFT did not consider that the complaint was an administrative priority for the OFT. The OFT also stated that the grounds for suspecting an infringement of the Act were weak; that there was no clear evidence that either Newsquest or Johnston are dominant in any market or that there were agreements

which could have an appreciable effect upon competition. The OFT took the view that much of the alleged behaviour can be justified as a vigorous competitive response and was of too short a duration to pose a threat to serious competition, whether from the appellant or others.

By a letter to the Tribunal dated 8 August 2006 the appellant indicated his wish to appeal the decision of the OFT contained in its letter of 9 June 2006 on the ground that the OFT had made a final decision of non-infringement without consulting the appellant. In further submissions the appellant contended that the OFT was wrong in substance.

On 26 October 2006 the Tribunal reconvened the private hearing pursuant to Rule 10 to consider the matter further in the light of submissions made by the appellant and respondent. The Tribunal decided that it was not prepared at that point to exercise its power under Rule 10 to reject the appeal and that the proceedings should be registered and advertised in the normal way. The appellant was granted 28 days under Rule 9 to put in a revised notice of appeal consolidating his case both in relation to the way it was set out in the correspondence with the OFT during 2004 and his present objections to the decision articulated in the OFT letter of 9 June 2006. The Tribunal's judgment [2006] CAT 28 is published on the Tribunal website together with other relevant material.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa

Registrar
15 November 2006