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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1008/2/1/02

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24th September, 2004

Before:
SIR CHRISTOPHER BELLAMY (President)
MR PETER CLAYTON
MR PETER GRANT-HUTCHISON

BETWEEN:

(1) CLAYMORE DAIRIES LIMITED
(2) ARLA FOODS UK PLC

Applicants

and

OFFICE OF FAIR TRADING

Respondent

and

(1) ROBERT WISEMAN DAIRIES PLC
(2) ROBERT WISEMAN AND SONS LTD

Interveners

Mr. Nicholas Green QC (instructed by Messrs. Ashurst) appeared for the Applicants.

Mr. George Peretz (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. James Quinney (of Messrs. Herbert Smith) appeared for the Interveners.

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PROCEEDINGS AFTER JUDGMENT

1 THE PRESIDENT: For the reasons given in the judgment that we are handing down today we
2 refuse Claymore's application for further recovery and inspection at this stage.

3 Unless there are consequential observations or applications we, ourselves, would
4 propose to see if we can discuss the dates for the main hearing and the future conduct of the
5 case. Is that a convenient matter, Mr. Green?

6 MR. GREEN: Yes. We have had very provisional discussions between ourselves, and we would
7 say that three days is about right. We would reserve three days. Obviously, we would all
8 be grateful if it is as soon as possible.

9 THE PRESIDENT: Can I share with you what our thinking is at the moment? We rather agree
10 that we should probably list this case for two days with a third day in reserve. For various
11 reasons the Tribunal's diary is somewhat crowded between now and Christmas, but we have
12 been thinking provisionally of the 12th and 13th January. It rather depends on the
13 availability of the Court of Session, but at least the week beginning 10th January, with a
14 preference for the 12th or 13th, which I think are the Wednesday or Thursday of that week.
15 If we worked around that provisionally that would then raise the question of what is the
16 timetable for skeleton arguments. Slightly awkwardly, Christmas intervenes in the middle
17 of it, and what we were wondering was, without making unreasonable demands on the
18 parties, whether there would be scope for, as it were, completing the skeleton argument
19 exchange before Christmas, rather than doing it all after Christmas, or having some of it
20 before Christmas and some of it after Christmas, if you see what I mean.

21 I just throw out for discussion what was going through our mind, which would be
22 whether the appellants would be in a position to lodge a skeleton argument by
23 26th November with the OFT following on 3rd December and the intervener following on
24 10th December, so that effectively everything that needed to be done and dusted was done
25 and dusted before Christmas and then we have the hearing after the Christmas break.

26 I would be glad of comments from the parties.

27 MR. PERETZ: My only comment on that is that certainly my preference tends to be for skeleton
28 arguments to be slightly closer to the hearing. One has experience of problems with a long
29 gap between skeleton arguments and the hearing in that one produces the skeleton argument
30 and then moves on to other business and effectively one has to prepare for the case afresh.

31 THE PRESIDENT: One has to remember it all over again.

32 MR. PERETZ: Yes.

33 THE PRESIDENT: We need, in many ways, to crack on with this case because it is the oldest
34 case in the Tribunal's list.

35 MR. PERETZ: Indeed. We agree that the sensible thing is to have sequential skeleton arguments.

1 THE PRESIDENT: To have it all after Christmas rather messes up everybody's Christmas.
2 MR. PERETZ: Yes. The timetable I had in mind before the Christmas issue intervened, and
3 indeed raised with my learned friends, was that the applicants would put their skeleton
4 argument in, say, two weeks before the hearing, with the respondents and the interveners
5 putting their skeleton arguments in a week before the hearing. One option would be for us
6 to put our skeleton argument in on, say, 3rd January-ish, but I suspect that would be
7 somewhat awkward on our part because there are a large number of people at the OFT who
8 will need to have input and the Christmas period makes that difficult. So I suspect that we
9 are probably talking about our skeleton argument in on a slightly tighter timetable some
10 time before Christmas, but perhaps slightly closer to Christmas than 3rd December.
11 THE PRESIDENT: Do you see it, Mr. Peretz, going applicant, OFT, intervener, or applicant,
12 OFT and intervener together?
13 MR. PERETZ: I had seen it going applicant, OFT and intervener at the same time, yes.
14 THE PRESIDENT: That is probably right, or it is at least an option, is it not, because you do not
15 really need to reply to them, you need to reply to him.
16 MR. QUINNEY: At the same, we would not want to waste people's time by ----
17 THE PRESIDENT: By repeating everything that they have said.
18 MR. QUINNEY: ---- repeating what was in the OFT's skeleton argument, so we would say it
19 would be more efficient if we had at least some period to look at the OFT's skeleton
20 argument to see what supplemental points should be made.
21 MR. GREEN: Can I give you some suggested dates?
22 THE PRESIDENT: Thank you, Mr. Green, that would be very helpful.
23 MR. GREEN: If we did 8th December, the OFT did the 15th, and then the interveners had a
24 couple of days to see what was in the OFT's and finalise their own and produce it on the
25 17th, we would have the best part of three weeks before the hearing.
26 THE PRESIDENT: Yes, applicant on the 8th, OFT on the 15th.
27 MR. GREEN: And then the end of that week for the interveners, Friday, 17th December. It
28 means there are a couple of days before the end of term and it means that everyone can
29 collect the documents and anything they need to take away to read over Christmas and ----
30 THE PRESIDENT: We can all have a happy Christmas!
31 MR. GREEN: Exactly.
32 THE PRESIDENT: That sounds reasonable.
33 MR. QUINNEY: I wonder whether, for the interveners, we could have the benefit of the week-
34 end to go to the 18th to put our skeleton argument in?

1 THE PRESIDENT: If you get yours in on the 20th I think that is quite reasonable. Yes, five
2 o'clock on the 20th.

3 MR. QUINNEY: I am grateful.

4 MR. PERETZ: May I make three observations?

5 THE PRESIDENT: Of course, Mr. Peretz.

6 MR. PERETZ: The first relates to the skeleton arguments. We would put a marker down that we
7 think it would be helpful, particularly for the applicants' skeleton argument, to try and focus
8 what is an extremely lengthy pleaded case on their part into as short and tight a set of
9 propositions as possible. We think that would help everybody.

10 The second couple of points arise out of the judgment. We do not apply for costs
11 at this stage, but I just want to put a marker down that a lot of time and effort has been spent
12 on this application which the Tribunal has, in the end, entirely dismissed, and at some point
13 we may well want to raise a point about costs in respect of that, whatever the eventual result
14 of this case may be.

15 THE PRESIDENT: We just reserve the costs at this stage.

16 MR. PERETZ: The third point arises out of para.131 of the judgment, which is the payment made
17 by Wiseman to Aberness, the loyalty payment. We read para.131 essentially as
18 paraphrasing Claymore's case, but just in case anyone might feel inclined to read it slightly
19 differently we just want to put down the marker that of course the OFT's case about this
20 supply agreement is that there is insufficient evidence that it was exclusive. That is the
21 OFT's position. I do not think I need to say more at this stage.

22 THE PRESIDENT: Yes, I think that is as we have understood your position, and his case is that
23 (a) it was de facto inclusive; and (b) the fact that they paid a lot of money for it has
24 implications for the competitive analysis that you should apply to it.

25 MR. PERETZ: Yes, thank you.

26 MR. GREEN: I simply want to make one counter-marker, which is that we were considering
27 applying for costs on the basis that the OFT's concession was made at an extraordinarily
28 late date, but we know you are going to reserve it so we will make that point later as well.

29 THE PRESIDENT: Thank you, Mr. Green.

30 MR. QUINNEY: On para.132, which relates to the issue of the one-off payment to Aberness,
31 I am afraid we have not been able to obtain instructions from our client regarding whether
32 we definitely do agree with the two propositions, and confirming the working presumption
33 that the amount was indeed material.

34 THE PRESIDENT: Given that this was now quite a long time ago, it would, I think, help the

1 Tribunal to some extent to have a bit of clarity on the details of this if your clients felt able
2 to explain it to us.

3 MR. QUINNEY: Yes, we will write to the Tribunal with copies to the parties.

4 THE PRESIDENT: Thank you.

5 MR. GREEN: That may raise an issue of disclosure again. If the two presumptions and
6 assumptions which now appear to be common ground between ourselves and the OFT
7 suddenly fall into dispute then we may have to consider applying for ----

8 THE PRESIDENT: That is what we are working on at the moment. If those are contested then
9 we may, as you say, have to revisit this specific point, but it is a rather isolated point and it
10 may be possible at this distance in time to sort it out in some sensible way.

11 MR. PERETZ: Our only observation is that, as you will know, sir, the word "substantial" is
12 notoriously one which sometimes gives rise to differences in interpretation. We were, in a
13 sense, waiting to see how this played out.

14 THE PRESIDENT: We cannot wait very much longer to see how things play out.

15 MR. PERETZ: We will watch with interest what Wisemans say.

16 THE PRESIDENT: Let us hope that Wiseman are able to come up with some solution that clears
17 up that particular point.

18 Mr. Green, I think there is something in Mr. Peretz's observations that the case is
19 very widely presented, which is entirely the privilege of the applicant. Many cases do, in
20 fact, as we all know, boil down to two or three main points, and if those two or three main
21 points do not succeed then the other points probably will not entirely carry the day. If, on
22 reflection, you do feel able to boil it down into three or four main prongs of attack, I think
23 that is probably helpful for everyone.

24 MR. GREEN: I think we suggested at an earlier CMC that we would indeed do that. I cannot,
25 however, promise to make Mr. Peretz's life easy!

26 THE PRESIDENT: No, of course not, you will make it as difficult as possible!

27 Very well. I believe we are formally asked to make orders amending the
28 confidentiality ring, which I gather are not opposed.

29 Are there any other matters that we need to deal with today? No. Thank you very
30 much indeed.