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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1036/1/104

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30th July, 2004

Before:
THE HONOURABLE MR. JUSTICE LINDSAY
(The Chairman)
PROFESSOR ANDREW BAIN
MR ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

ASSOCIATION OF BRITISH INSURERS

Applicants

-v.-

OFFICE OF FAIR TRADING

Respondent

Mr. Richard Fowler and Miss Valentina Sloane (instructed by Eversheds LLP) appeared for the Applicants

Mr Mark Hoskins (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondents.

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Mr. Hoskins?

2 MR. HOSKINS: I have three items on my agenda, I do not know if they tally with your agenda.

3 First, there is the question of the fact that the Office is prepared to offer an undertaking - I
4 do not know whether the Tribunal is happy with the terms of it?

5 THE CHAIRMAN: Yes.

6 MR. HOSKINS: The second item is whether any time limit should be imposed on the OFT's
7 activities, which is a suggestion that comes from AMA. The third item is the question of
8 the costs of the appeal, ABI having applied.

9 I do not know whether you want me to take all those three at once, or to split them,
10 up, or how you would like to deal with them?

11 THE CHAIRMAN: Yes, thank you, what do you want to address to us?

12 MR. HOSKINS: The first point is the Undertaking. You have seen our written submissions.

13 THE CHAIRMAN: Yes.

14 MR. HOSKINS: What we tried to do was to reflect the draft order that the Tribunal had produced
15 and in our written observations we have highlighted where we have made changes. I think
16 all of them, apart from two, reflect the fact we are giving an undertaking rather than being
17 directed. The two changes are – if one picks it up at para. 9 of our written submissions – the
18 original of the Tribunal's Order had suggested that we should investigate "whether there are
19 reasonable grounds for suspecting", in fact the wording of the Statute at s.25 is that the
20 Office has power to investigate "where it believes there are reasonable grounds", so if we
21 change the word "investigate" to "consider" to try and take account of that.

22 THE CHAIRMAN: Yes.

23 MR. HOSKINS: I hope that wording has reflected the Tribunal's intention. The second
24 substantive change is simply in paras. 10 and 11 of the written observations, it was to allow
25 us, for example, rather than to "reach decisions" to "take commitments", under s.31A of
26 the Act again, it is just to reflect the Office's powers following an investigation. Those
27 were the only substantive changes.

28 THE CHAIRMAN: In principle the idea of an undertaking is acceptable, as we indicated last
29 time. There is a point about time. At the moment para.1 begins: "The OFT will consider",
30 and the question will be whether one writes in "as soon as practicable", or "by some period
31 not exceeding six months", or whatever it happens to be. We need guidance on that because
32 we do not want to commit you to some consideration that is impractical – have you any
33 observations on time?

1 MR. HOSKINS: Sir, I do, yes. That was the second item on my agenda. The AMA has
2 suggested that the Office should be required to complete its investigation within six months.

3 THE CHAIRMAN: Its "consideration"?

4 MR. HOSKINS: Well it is phrased as an "investigation", but yes. I think the way we would put
5 it is this, given that it is now phrased as "consideration" we would suggest there should not
6 be any fixed time limit of any duration. I say that for two reasons, and again it is difficult to
7 split up consideration/investigation and that is probably my first reason as to why there
8 should not be a time limit, but at some stage if the matter goes beyond an initial
9 consideration and moves into an investigation, it may well, for example, be necessary to
10 conduct a detailed survey of CHOs and of insurers, taking account of the 10 factors that the
11 Tribunal has pointed out. Any sort of survey of that sort takes time to plan and time to carry
12 out and the office simply is not in a position at this stage to say "we are conducting a survey
13 on these grounds and this is how long it is going to take", but we can see that there may
14 well be a need to do that.

15 The second factor is if the Office does move forward at the administrative stage
16 towards the possibility of an infringement decision then it will be necessary to have a new
17 Statements of Objections, and also the possibility of oral submissions to be made. My
18 instructions are the minimum period for that to take place is in itself ----

19 THE CHAIRMAN: That is irrelevant, is it not, if we are talking here about a period for the
20 consideration?

21 MR. HOSKINS: Sir, yes, that is why I said at the start the way the AMA has put it in its
22 submissions is that it has talked about a period for investigation, but it may well be that that
23 simply goes away, and we accept it is simply consideration of whether there are reasonable
24 grounds and one does not get into that.

25 THE CHAIRMAN: How long would you need for consideration properly so called?

26 MR. HOSKINS: Can I take instructions on that, please?

27 THE CHAIRMAN: Yes.

28 MR. HOSKINS: (After a pause) I am told that six months would certainly be adequate.

29 THE CHAIRMAN: Yes. Obviously we will have to come to the other parties but we are just
30 working on it as between the OFT and the Tribunal, and begin: "The OFT will, within six
31 months complete its consideration", or something along those lines?

32 MR. HOSKINS: That I think would do the trick.

33 THE CHAIRMAN: I suppose "The OFT will within six months from the date thereof complete
34 its consideration" – no it does not quite flow grammatically.

1 MR. HOSKINS: One thing we could do is to reflect the wording of the Act, s.25(1) says:
2 “In any of the following cases the OFT may conduct an investigation”, so the undertaking
3 could say that the OFT will ----

4 THE CHAIRMAN: Of course, what we could have is a separate clause that says: “the OFT will
5 use its best endeavours to complete such consideration as is described in (1) above within
6 six months from the date thereof”, something along those lines, rather than tinkering with
7 the grammar of (1) as it stands. So we could have “(2) The OFT will use its best endeavours
8 to complete the said consideration within six months from the date hereof”. That would
9 work, would it, Mr. Hoskins?

10 MR. HOSKINS: That would work, Sir, yes.

11 THE CHAIRMAN: Now, any other points on the undertaking as opposed to the proposed Order?

12 MR. HOSKINS: Nothing else, Sir.

13 THE CHAIRMAN: On the proposed Order, in the second paragraph that begins: “And upon
14 considering the correspondence between the parties” we thought it would be right to refer,
15 as indeed the undertaking does, to the OFT’s decision not to contest ABI’s Appeal, and had
16 in mind saying: “Upon considering correspondence between the parties including the letter
17 of the Office of Fair Trading to the Tribunal of 26th July 2004 indicating that the said Office
18 decided not to contest the Notice of Appeal”. It explains the order better.

19 MR. HOSKINS: Sir, yes.

20 THE CHAIRMAN: That is one point. Moving on. At the moment it says: “And upon the Office
21 of Fair Trading having agreed to give an undertaking”. I think the Tribunal is not relying on
22 an agreement, they are relying on an undertaking, and it should really say: “And upon the
23 Office of Fair Trading giving the undertaking in the form attached.”

24 Then to make obvious the birth of the order, after that “Upon the Office of Fair
25 Trading” and before the next part that says: “...and it is ordered that”, saying: “And upon
26 the Respondent consenting to this Order”, because again it explains how it has come about.
27 Then of course we are likely to need something as to costs.

28 MR. HOSKINS: We are, Sir.

29 THE CHAIRMAN: That no doubt will be dealt with after we have heard from Mr. Fowler.

30 MR. HOSKINS: I may be able to short circuit costs, and I made our position clear to Mr. Fowler
31 before the Tribunal came in, which is we do not oppose ABI’s order for costs save that we
32 say no costs should be awarded in respect of the costs engendered by the AMA’s
33 application to intervene. Mr. Fowler will obviously indicate whether or not that is a
34 problem.

1 THE CHAIRMAN: And presumably it would follow, I think, “detailed assessment if not agreed”.

2 MR. HOSKINS: I was going to suggest that. The way I think it would work is the costs’ Order
3 should provide that the costs are to be agreed and failing that assessed pursuant to Rule
4 55(3) of the Tribunal’s Rules following an application by either party. The reason I put it
5 like that is that under Rule 55(3) there are a number of different people who can carry out
6 the assessment. It seems that if it is necessary to decide who is to carry out the assessment it
7 is probably wise to know what sort of disputes there are, and that is why I suggest the order
8 takes that form.

9 THE CHAIRMAN: Could you mention your formula again?

10 MR. HOSKINS: Certainly. It is the costs order should provide that the costs are to be agreed and
11 failing that assessed pursuant to Rule 55(3) of the Tribunal’s Rules following an application
12 by either party. The reason I say that is that under Rule 55(3) a number of different people
13 can carry out the assessment, and that would allow, if an application were made, for the
14 Tribunal to decide who was the most appropriate person.

15 THE CHAIRMAN: I would have thought the most appropriate would be the Costs Judge.

16 MR. HOSKINS: That is one of the possibilities, Sir, yes.

17 THE CHAIRMAN: That is the most likely, appropriate person, is it not? We are not talking here
18 about a really tiny case, and really tiny costs.

19 MR. HOSKINS: I do not know how contentious it is going to be, Sir, that is why I suggest
20 perhaps leaving that over because there may just not be much in it, so it is simply a question
21 of yourself taking a view.

22 THE CHAIRMAN: Well, subject to those points I think we have heard enough from you for the
23 moment.

24 MR. HOSKINS: I think you have, Sir, yes.

25 THE CHAIRMAN: Mr. Fowler, what do you say about things?

26 MR. FOWLER: Sir, the suggested amendments to the undertaking seem entirely satisfactory and
27 the question of time is a matter really for the OFT – we would like it dealt with as soon as
28 possible – if they think they can do it in the time so much the better.

29 On the question of costs, again the formulation put forward by my friend is entirely
30 acceptable. I think I ought perhaps to draw the Tribunal’s attention to the fact that this
31 would not be a consent Order under Rule 57.

32 THE CHAIRMAN: No, that is why we framed it rather differently: “Upon the respondent
33 consenting to this order, it is ordered that ...”. I think it explains the history, so to speak, of
34 the order without actually giving formal consent.

1 MR. FOWLER: In those circumstances I do not object to what is proposed. Thank you, Sir.
2 THE CHAIRMAN: Thank you. Miss Black?
3 MISS BLACK: We have no comments on the proposal suggested by Mr. Hoskins, we are happy
4 with those suggestions. In relation to costs Mr. Hoskins somewhat pre-empted any issue of
5 costs on the part of the AMA. I recognise there are slightly unusual circumstances in that
6 although we applied to intervene we have not actually been given permission to intervene.
7 Nevertheless we have incurred costs, those costs are being incurred by the fact that the
8 OFT's decision not to contest the Decision led to us deciding to intervene at a very late
9 stage and therefore ask perhaps further consideration be given to that.
10 THE CHAIRMAN: I think you are going to have difficulty in persuading us that you ought to
11 have any costs.
12 MISS BLACK: I am not surprised by that.
13 THE CHAIRMAN: Well, Mr. Hoskins, it seems that all is *ad idem*, or whatever the English
14 would be.
15 MR. HOSKINS: We are all happy, Sir.
16 THE CHAIRMAN: It obviously behoves us, if we can, to have a cleaned up, signed copy as fast
17 as possible. Have you an electronic version of your draft as it was proposed that we could
18 just tinker with to clean it up?
19 MR. HOSKINS: We have, Sir, yes, the Office can send that through obviously without any
20 problem.
21 THE CHAIRMAN: We can say we add the reference to the OFT's letter of 26th July. We change
22 "Office of Fair Trading having agreed to give ..." to "...giving the ...". We say that
23 "Upon the Respondent consenting to this Order ..." we add a provision as to costs of the
24 kind that you read out.
25 We leave para.1 of the Undertaking as it is, but we add in para.2: "The OFT will use
26 its best endeavours to complete the said consideration within six months from the date
27 hereof".
28 At the foot it says: "Undertakings shall take effect from the date, having been signed
29 on behalf of the OFT, they are accepted and dated by the Chairman of the Tribunal".
30 I apprehend that someone will sign on behalf of the OFT and then I can sign them on behalf
31 of the Tribunal.
32 MR. HOSKINS: Sir, yes.
33 THE CHAIRMAN: Can we do that this afternoon?

1 MR. HOSKINS: Yes, we can do that this afternoon. I suggest we send an electronic version
2 through and we will send a hard copy of the undertaking – signed – through this afternoon
3 as well. Would you like us to put the amendments in?

4 THE CHAIRMAN: It is probably quicker for you to do them, given that you have the electronic
5 version already.

6 MR. HOSKINS: We will send a hard copy and an electronic version in case there are any
7 changes to be made.

8 THE CHAIRMAN: Thank you very much.

9 MR. HOSKINS: Thank you.

10
