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IN THE COMPETITION

Case No. 1044/24/04

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 July, 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR JOHN PICKERING
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

M.E. BURGESS, J. J. BURGESS AND S. J. BURGESS
(trading as J.J. BURGESS & SONS)
and

Appellants

THE OFFICE OF FAIR TRADING
and

Respondents

W. AUSTIN & SONS(1)
HARWOOD PARK CREMATORIUM LIMITED(2)
THE CONSUMERS' ASSOCIATION(3)

Interveners

Jennifer Skilbeck (instructed by Howell & Co.) appeared for the Appellants

Kassie Smith (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Richard Watson (of Messrs. Brignalls Balderston & Warren) appeared for the first and second Interveners.

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PROCEEDINGS
FOLLOWING HANDING DOWN OF JUDGMENT

1 THE PRESIDENT: The Tribunal is handing down today its Judgment in the case of
2 Burgess v Office of Fair Trading. For the reasons given in the Judgment the OFT's Decision
3 no. CA98/06/2004 of 29 June 2004 is set aside.

4 Secondly, the Tribunal finds that Harwood Park and Austin infringed the Chapter II
5 prohibition from 18 January 2002 to 22 March 2004 by refusing access to Harwood Park
6 except through Nethercotts for cremations to be carried by the Knebworth and Welwyn Garden
7 City branches of Burgess, and from 22 March 2004 by refusing all access to Harwood Park in
8 respect of cremations to be carried out by those branches. To that extent the Appeal is
9 allowed.

10 Are there any applications?

11 MRS. SKILBECK: Sir, the Office of Fair Trading has, as I understand it, agreed to pay our costs to
12 be assessed if not agreed. I would like to submit to you, if I may, why we should get our costs
13 in full. We have a schedule of those costs if it would be helpful to hand them up to you?

14 THE PRESIDENT: Well if there is agreement in principle that the costs will be paid, it is simply
15 a question of agreeing the amount, I think, Mrs. Skilbeck, is it not? Is it agreed in principle,
16 Miss Smith?

17 MISS SMITH: Sir, yes it is. Mrs. Skilbeck has sent in a schedule of costs. I think she wants the
18 Tribunal to assess that figure today. It was faxed to us last night, I have only seen it this
19 morning. It appears likely that we will be able to agree costs but we have not had a chance to
20 consider it, so I was simply going to ask the Tribunal for the order indicated by Mrs. Skilbeck,
21 or not oppose an order that the OFT pay the costs to be assessed if not agreed.

22 THE PRESIDENT: Yes. I would not have thought we can take it very much further today,
23 Mrs. Skilbeck, if the OFT has not really had a chance to consider the figures. Do you want us
24 just to look at the document that you have?

25 MRS. SKILBECK: I would be grateful. I am afraid I have to admit to a certain amount of ignorance
26 in this. I know of course that when costs are taxed they are generally reduced and I am just
27 anxious ----

28 THE PRESIDENT: You are asking for the full amount?

29 MRS. SKILBECK: Exactly, that is the point. I do not know if it would help if we just passed them
30 up to you?

31 THE PRESIDENT: Well pass it up by all means so we can just see what is involved.

32 MRS. SKILBECK: [Document handed to the Tribunal] One possibility might be liberty to come
33 back if necessary.

1 THE PRESIDENT: Yes, what we would normally do in a case like this is to see whether the amount
2 can be agreed, or if some agreement can be reached by the OFT and the Appellant. If no
3 agreement can be reached we will simply assess the costs ourselves summarily on the basis of
4 any written submissions that we receive.

5 MRS. SKILBECK: That would be an entirely satisfactory basis.

6 THE PRESIDENT: I think that is probably the best way forward.

7 MRS. SKILBECK: Yes, thank you, sir. We have one or two other matters to raise. One is that there
8 are a couple of outstanding applications for interim measures which need to be tidied up. In
9 addition there is a consent order which I imagine needs to be set aside.

10 THE PRESIDENT: Can I just ask whether your schedule of costs here includes the interim measures
11 application?

12 MRS. SKILBECK: It does, Sir, yes.

13 THE PRESIDENT: So the interim order is discharged, I think, is that right?

14 MRS. SKILBECK: I think that must be the appropriate order and the applications that are still
15 standing to be withdrawn. We need the Tribunal's consent to withdraw those.

16 THE PRESIDENT: The right order is to discharge the interim order and the interim measures' case
17 is discontinued with the Tribunal's permission. The costs of the interim measures case will be
18 dealt with – I do not know if your agreement extends to the interim measures case, Miss Smith,
19 or whether you have given separate thought to that?

20 MISS SMITH: Sir, I have to admit we have not – but I am told that we can agree to that.

21 THE PRESIDENT: Rapid thought has been given to the matter!

22 MISS SMITH: Very quick thought has been given to it, Sir.

23 THE PRESIDENT: In a very statesman-like way. So both the interim measures case and the main
24 case, it is simply a question of the Tribunal assessing the costs if necessary if agreement cannot
25 be reached.

26 MRS. SKILBECK: There is one more matter which I did raise with Miss Smith last night and
27 I regret I forgot to ask her about it this morning, and that is what happens to the OFT website,
28 because the Decisions are sitting on the website and I would quite like to make submissions, if
29 it is relevant, as to why they should be removed from it.

30 THE PRESIDENT: Right, I have no idea what the OFT can do about that.

31 MISS SMITH: I am grateful to Mrs. Skilbeck, I have taken instructions on that and the position,
32 which is I understand the position that has been taken in the past in cases such as *IBA* and
33 *Unichem*, is the Decision is on the OFT website, the OFT proposes today, once Judgment has
34 been handed down, to put a notice on the website at the top of the Decision saying that it has

1 been set aside and has been substituted by the Tribunal's Decision. Once the Tribunal's
2 Decision appears on its website a hyperlink will be put on the OFT website to the Tribunal's
3 Decision.

4 THE PRESIDENT: To cross-link, yes.

5 MISS SMITH: That is the position that has been taken on other Judgments.

6 THE PRESIDENT: That will be fine. I hope that is all right, Mrs. Skilbeck?

7 MRS. SKILBECK: Yes, Sir, so long as there is no risk that it will mislead the public. The OFT
8 register is, of course, for business people – it is not like the Tribunal's own website which his
9 primarily read by lawyers. It does contain information about the Burgess's business which
10 they have fought hard to try and have removed at an earlier stage.

11 THE PRESIDENT: Well I think you will have to take this up with the OFT if you are not satisfied
12 with how they do it, and we will see how things go.

13 MRS. SKILBECK: Yes.

14 THE PRESIDENT: I should say we have been grateful for the various comments we have received
15 from the parties about confidential information in the Judgment. We have accepted some
16 points and not accepted others, having regard to Schedule 4, Part 1, para. 1 of the Enterprise
17 Act 2002 and in particular how far we think certain matters have to be included in the
18 Judgment for the purposes of explaining the reasons for the Decision under sub-paragraph 3 of
19 that provision, so that is the way we have dealt with that.

20 There are no other applications from Burgess?

21 MRS. SKILBECK: Not from us today.

22 THE PRESIDENT: Thank you very much for your help. Harwood Park?

23 MR. WATSON: Nothing to add, Sir.

24 THE PRESIDENT: In relation to your costs the costs simply lie where they fall, do they not? No
25 one has sought an order against you! [Laughter]

26 MR. WATSON: No, I feel I that I am keeping my head down, Sir, in one sense, and I hesitate to try
27 and justify an application in respect of the OFT.

28 THE PRESIDENT: Well it crossed our mind to wonder what your clients thought about the
29 situation. To some extent you have come in behind the public authority and supported them,
30 and the public authority has lost. I think it is rather up to you ...

31 MR. WATSON: Sir, I am grateful to you for that comment. I do not want to take my learned friend
32 by surprise by raising the possibility of costs at this stage. I have not really, I must confess,
33 taken instructions on the basis of costs given the very short time available to speak to my
34 clients this morning, to give an indication of the outcome, and the reasoning behind it. Perhaps

1 I could tentatively invite the Tribunal to consider whether or not the burden of the costs fall
2 upon them as interveners I think it would be fair to say at the invitation of the Tribunal, and
3 hopefully it has been of some assistance to the Tribunal – on my reading of the Judgment that
4 is the case. Certain conclusions would have been more difficult for the Tribunal had Austin
5 not been represented.

6 THE PRESIDENT: No, it has been a helpful and necessary intervention.

7 MR. WATSON: Clearly they have incurred costs on that basis, they have relied heavily upon the
8 indications that had been given by the OFT from the outset and, of course, the initiative to
9 contact them at the very early stage and perhaps I can therefore tentatively make an application
10 that some contribution be awarded from the OFT. I apologise to Miss Smith for having not
11 even raised it with her beforehand.

12 THE PRESIDENT: Do not worry, Mr. Watson. When you say the indications given by the OFT
13 from the outset, what do you have in mind?

14 MR. WATSON: I am talking in general terms. The difficulty I think is that without a clear and full
15 investigation of the matter the OFT was simply not in a position to make a definitive statement,
16 and there is no suggestion they do make a definitive statement. What I am suggesting is that
17 Harwood did their best to establish a position by going to the correct body whose responsibility
18 it was to rule on such matters and, if it thought appropriate, to carry out an investigation.
19 Obviously, subsequently an investigation was carried out. Indeed, they took counsel's advice
20 in the course of that, effectively doing their best to make sure that they were standing on what
21 they thought was solid ground and not contravening the law. In those circumstances it is
22 difficult to see what more they could have done because they are clearly not going to invite the
23 OFT to carry out an investigation effectively against themselves, and there was no suggestion
24 that until Burgess's made effectively the complaint that that was contemplated and then
25 undertaken.

26 In those circumstances I would seek to suggest that they should not be criticised for
27 the stance that they have taken, even though of course there is implicit criticism in the Decision
28 and perhaps, apart from anything else, in the length of time that the situation was allowed to
29 continue, and clearly they will have to take that on board and consider it very carefully when
30 they see the full Judgment; that I think puts it in context. Nevertheless, in the context of the
31 present application before the Tribunal we have, of course, incurred very significant costs in
32 order to be represented and it would perhaps be reasonable for the Tribunal to consider
33 a contribution towards those costs at this stage.

1 THE PRESIDENT: Yes, thank you very much. Miss Smith, I think we had two matters we wanted
2 to raise with you on the costs issue. First, I think we should say that it is a very proper
3 approach to costs as regards the Appellants. Two issues of some general interest arise as
4 regards the cost of the Interveners in this case, who are interveners of two very different kinds.
5 We have, first of all, the Consumers' Association, who are not present today and have made no
6 application for costs and no issue therefore arises, there is simply no order for costs as regards
7 the Consumers' Association. We did, however, find it useful in this case to have the
8 Consumers' Association present and they gave a dimension that we felt helpful. What is
9 worrying us, and is a matter we would like to raise, is there may be cases where a somewhat
10 asymmetric situation arises, particularly where we have small companies who may for one
11 reason or another not have very full access to legal advice, or be particularly well able to
12 present their case – it has not been the situation in this case because the parties have been
13 represented, but it does not always happen that that is possible or occurs.

14 In such a situation with the public authority on the one side, and an ill-equipped
15 smaller company on the other we can see a role for interveners such as the Consumers'
16 Association – and there may be others – to come before the Tribunal and put a point of view in
17 the general interest. If the rule is that they always have to do that at their own expense one
18 might question whether they are going to be prepared to do it? On the other hand, there is
19 something to be said for a cost neutral approach towards such Interveners on the basis that they
20 should know that, absent exceptional circumstances, it is most unlikely that the Tribunal is
21 going to make an order for costs against them, in which case the equilibrium is achieved if
22 there are neither costs orders for or against. On the other hand, might there be cases where
23 some asymmetry ought to be allowed to creep in in the general interest of the system. That
24 was the point that had occurred to us. It is a point I simply make, as it were, because there is
25 nobody here to argue it, so we are not going to decide it, but I think it is probably fair and
26 appropriate to indicate that that is a point that has crossed our mind, so everybody knows what
27 our position is – not that we have decided it, it is just a question mark at the back of one's
28 mind.

29 The second question is the position of the other intervener, Harwood Park and
30 W. Austin & Sons, and here again we have a situation of a small company relatively speaking
31 that does not necessarily have tremendous familiarity with this area of the law and will to some
32 extent rely on the position taken by the public authority when it comes to legal proceedings. In
33 this case it was, I think, helpful to the Tribunal for Harwood Park to intervene; to be present,
34 indeed probably essential, but the costs that they have incurred are largely on the basis, or the

1 assumption that the public authority was right and that they can reasonably support the public
2 authority. If the public authority turns out to be wrong is it entirely right that Harwood Park
3 should be left to pay their own costs? Or should there be some recognition on the part of the
4 public authority that, to some extent, Harwood Park's costs have been occasioned by the
5 position that the public authority took. That is another point that has occurred to us, hence my
6 gentle interrogation of Harwood Park this morning.

7 Those are the two points that we have in mind upon which any observations from
8 your side would be helpful.

9 MISS SMITH: Sir, on those two points, with regard to the Consumers' Association, as you say,
10 there is no application before the court today.

11 THE PRESIDENT: No.

12 MISS SMITH: The OFT position is that the Tribunal's case law on the position of Intervener's costs
13 up until now has been that very often it will be in the interests of justice that those costs should
14 lie where they fall. We appreciate that the position of the Consumers' Association may be
15 different on the facts of particular cases. We are also aware that there is no inflexible rule on
16 costs in front of the Tribunal. Perhaps the only rule that one could say there is as regards costs
17 in front of the Tribunal is that there is no rule.

18 THE PRESIDENT: There is no rule, no.

19 MISS SMITH: So we are aware that in particular cases applications for costs might be made on
20 behalf of the Consumers' Association or a party in a similar position and that application will
21 have to be considered on the facts of that particular case.

22 THE PRESIDENT: Yes.

23 MISS SMITH: With regard to the position of Harwood Park, this is an application that, with respect,
24 we have not had a chance to consider fully, or on which I have had a chance to take full
25 instructions.

26 THE PRESIDENT: Well we are not going to make a ruling until you have had a chance to do so.

27 MISS SMITH: I am grateful. I would simply say for the purposes of today that it is a novel
28 application – an unsuccessful Intervener who adopted the submissions of the OFT seeking
29 costs against the OFT. We would submit that it is in the interests of justice that costs fall
30 where they lie. However, if the Tribunal would like further submissions to be made on those
31 issues then we would suggest it would be in the interest of all parties that Harwood Park be
32 given an opportunity to make a proper application if they get instructions to do that in writing,
33 and that the OFT have an opportunity to respond to any points raised in writing, of course
34 bearing in mind the statements that have been made by the Tribunal today.

1 THE PRESIDENT: Yes, thank you very much.

2
3 (The Tribunal confer)

4 THE PRESIDENT: The Tribunal will rise.

5 (The hearing adjourned at 10.55 a.m. and resumed at 11.10 a.m.)

6 THE PRESIDENT: Mr. Watson, we have had a think about the position of Harwood Park, and
7 I think our conclusion is at this stage that the position is not sufficiently clear cut for it to be
8 appropriate for us to encourage you to make an application for costs on behalf of Harwood
9 Park.

10 It is perfectly true that their intervention was necessary and helpful to the Tribunal.
11 It is also perfectly true that we have said in the Judgment that we can accept that your clients
12 may well have believed all along that they were acting legally as a result of the Decision that
13 the OFT took, and maybe as a result of other advice they had I do not know. No one is
14 suggesting that Harwood Park acted in bad faith or anything like that in this case. We are also
15 extremely conscious of the fact that the matter has now been resolved and we hope that an
16 amicable relationship on the ground will be re-established.

17 The question then arises what is the position as regards Harwood Park and Austin in
18 relation to costs? The Tribunal's decision is that at the end of the day your clients have lost but
19 they have not had any order for costs against them. So from that point of view they have come
20 out, as it were, in a neutral position. Whether, even as a losing party, they should actually
21 recover some costs is, as Miss Smith points out, would perhaps be a development of this area
22 of the law, and one might consider that possibility in some cases, but I think we have come to
23 the conclusion in this particular case, in general terms, from at least the point at which the OFT
24 re-opened its investigation it must, or should have been apparent that the case was not
25 necessarily an open and shut case, and even though it is true that the OFT later reached
26 a decision in your clients' favour, certainly from the stage of the introduction of the Appeal,
27 and the interim measures' proceedings it must equally have been clear to everybody again that
28 it was not necessarily an open and shut case and that there was room for more than one point of
29 view. That being the case you clients no doubt, quite properly, in their own interest
30 participated in the proceedings but at the end of the day they lost. In those circumstances our
31 view is that the right order is that the costs simply lie where they fall and it would not be
32 appropriate now to take that aspect any further, although we are glad to have had the
33 opportunity to consider that position in the round.

1 MR. WATSON: Sir, I cannot argue with that at all, and thank you very much for explaining it in
2 that way.

3 THE PRESIDENT: Thank you, Mr. Watson, and thank you very much indeed for all the help you
4 personally have given to us in the course of these proceedings, and for the help that your
5 clients and counsel have also given us at various stages.

6 MR. WATSON: It is very kind of you to say that.

7 THE PRESIDENT: Thank you very much. Very well, Miss Smith, I think we just leave it there, if
8 we may, and unless anything else arises I think that probably concludes our consideration this
9 morning.

10 MISS SMITH: No, Sir, there are no further outstanding applications. Of course, with regard to the
11 question of appeal we will consider our position and if so advised make an application.

12 THE PRESIDENT: Thank you very much.

13 (The hearing concluded at 11.15 a.m.)