

Neutral citation: [2005] CAT 6

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1048/1/1/05

Victoria House  
Bloomsbury Place  
London WC1A.2EB

8th March 2005

Before:  
MARION SIMMONS QC  
(Chairman)  
PETER GRANT-HUTCHISON  
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED  
and

Appellant

OFFICE OF FAIR TRADING

Respondent

Mr. Matthew Cook (instructed by M&A Solicitors, Cardiff) appeared for the Appellant.

Mr. Tim Ward (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

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**R U L I N G: Application to remit the Decision**  
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1 THE CHAIRMAN:  
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3 1 The OFT was directed to file and serve a Defence in this case by 5 p.m. on 3<sup>rd</sup> March 2005. In  
4 the event, the OFT filed a “provisional defence”. On an important aspect of the case, the OFT  
5 reserved its position pending the consideration of documents disclosed to them voluntarily by  
6 the Appellant. Some of those documents were only disclosed last night and the OFT have told  
7 us today that they are not in a position to file a final Defence today.  
8

9 2 The Appellants have asked us today to remit the OFT’s Decision in order that the OFT make a  
10 new Decision on the evidence now available to them. This is strongly resisted by the OFT  
11 who request a further opportunity to file a final Defence. It is not clear to us, having heard  
12 submissions today, whether the OFT intends to rely on its Decision or whether it wishes, in  
13 effect, to take a new Decision having regard to the material which has now been voluntarily  
14 disclosed by the Appellant.  
15

16 3 The OFT have told us today that it does not know what position it will be taking and needs to  
17 discuss the matter internally, including with the Head of Enforcement, and that it could provide  
18 a Defence which set out its position in 14 days from today. The effect of this submission is, in  
19 effect, that either the OFT’s Defence will rely on the Decision taken or the OFT seeks to use  
20 the Defence to set out a new “Decision”. That new Decision might, on the one hand, contain  
21 an alternative basis or reasoning for the fine imposed, relying on the new evidence for  
22 calculation of the fine imposed in the existing Decision. On the other hand, it may rely on an  
23 entirely new factual basis and reasoning for the infringement, with a different time period for  
24 the infringement, and then set out an entirely new calculation for the fine.  
25

26 4 We consider that what the OFT is suggesting is that they be permitted to treat the Defence as  
27 the “Decision”. We do not consider that that is an appropriate course for a competition  
28 authority to take. Unfortunately, the OFT have today not been able to tell us what their final  
29 position is. Apparently documents disclosed last night by the Appellant need to be considered  
30 for this purpose. It therefore seems to us that there are two possibilities open to the OFT. The  
31 first is to rely on the existing Decision without relying on new evidence, save in rebuttal. The  
32 second is to rely on new evidence which goes to an essential part of the case which it is up to  
33 the OFT to establish, or is relied on by the OFT to support a primary finding in the Decision, or  
34 is sought to be adduced by the OFT for the purpose of upholding an essential element in the  
35 Decision.

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2 5 As has been made clear in previous Decisions of this Tribunal, including *Aberdeen Journals*  
3 and *Argos* and *Littlewoods*, the Tribunal should resist the situation in which matters of fact or  
4 the meaning to be attributed to particular documents are canvassed for the first time at the level  
5 of the Tribunal when they could (and should) have been raised in the administrative procedure  
6 and dealt with in the Decision. We appreciate that through apparent misunderstandings on the  
7 part of DQS and the OFT the relevant material was not available, or made available, at the time  
8 of the Decision and that neither party attributes blame to the other. However, the fact that the  
9 material has become available after the Decision does not alter the position outlined above as  
10 to what is appropriate for the administrative process and what is appropriate to be the subject  
11 matter of the appeal process.

12  
13 6 The difficulty for the Tribunal today is that we do not know which way the OFT will go –  
14 neither does the OFT. So today we are faced with having to make some directions which will  
15 be workable, fair and procedurally correct. We are currently minded, subject to what we hear  
16 from the parties, to make some directions in the alternative, effectively putting the OFT to its  
17 election. Either the OFT should provide an additional Statement of Objections within 14 days,  
18 or it should put in a defence within 14 days. The Decision as to which to do will, of course, be  
19 made having regard to the Tribunal's comments, which I have just outlined. If there is an  
20 additional Statement of Objections then the procedure will follow in accordance with the OFT  
21 Rules, and this present Appeal can then be stayed pending the outcome.

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23 7 If the OFT decides to defend its existing Decision the question of whether this is appropriate  
24 may be in issue and there may then need to be a CMC which we could hear on 7<sup>th</sup> April 2005.  
25 This would give the Appellants two weeks to consider their position and would provide time  
26 for written submissions. The course which we provisionally propose seems to us to be an  
27 expedient way of proceeding and to preserve the distinction between the administrative process  
28 and the appeal process.

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