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IN THE COMPETITION

Case No. 1067/1/1/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

10th July 2006

Before:
VIVIEN ROSE
(Chairman)
MICHAEL BLAIR QC
MICHAEL DAVY

Sitting as a Tribunal in England and Wales

BETWEEN:

ACHILLES PAPER GROUP LTD

Applicant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Philip Collier (of Proud Goldbourn, Accountants) appeared for the Applicant.

Mr Adam Aldred (of Addleshaw Goddard) instructed by Addleshaw Goddard appeared for Bemrose Booth Limited and Bemrose Booth Limited and Bemrose Group Limited (Applicant Intervenors)

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

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CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good afternoon. There are a couple of issues to be considered this afternoon
2 which have arisen since the Tribunal circulated the agenda for the CMC. In particular, we
3 were not clear from the OFT's observations whether or not the OFT is seeking today to have
4 the appeal rejected under Rule 10(1)(a), or whether that is something that is proposed to be
5 argued at the substantive hearing. Perhaps we could just clarify that right now?

6 MR. KENNELLY: Madam, I apologise if the observations were not clear. It is not our submission
7 that the Appeal be dismissed today on the basis of Rule 10. We felt it was simply important to
8 give that matter notice for the purposes of the appellants who are not legally represented; we
9 will also be seeking a direction from the Tribunal. If the Tribunal is minded to make such a
10 direction that a further hearing be fixed at which observations may be made on the entirety of
11 the appeal and following which the Tribunal could make an order dismissing the Appeal under
12 Rule 10(1)(a) at that stage.

13 THE CHAIRMAN: Are you envisaging that that hearing would be a further case management
14 conference, or that that would be the substantive hearing of the Appeal?

15 MR. KENNELLY: That would be a hearing for the purposes of Rule 10 which would, in effect, be
16 an argument about the merits of the Appeal, because the ground on which we would seek
17 dismissal under Rule 10 would be that there is no valid ground of appeal. It would not be
18 another CMC, it would be a further hearing directed specifically for the purpose of hearing
19 submissions on whether the case should be rejected under Rule 10, but it would take place in
20 our submission prior to any further disclosure or steps in the proceedings. It would be
21 determined on the basis of the pleadings, on the basis of the Notice of Appeal and the Defence,
22 which would be put in at the relevant date after six weeks by the OFT.

23 THE CHAIRMAN: I think at the moment we are not clear what is to be gained from having an
24 additional day which then might have to be followed by a substantive hearing of the appeal,
25 but perhaps you can address us on that when you are making your other submissions.
26 Going through the agenda that was sent round, the issues that we have identified that we need
27 to consider this afternoon are: first, the representation of Achilles Paper Group, and perhaps
28 that can be disposed of fairly rapidly. Mr. Winward?

29 MR. WINWARD: Hopefully Mr. Collier is going to speak on our behalf, if that is all right?

30 THE CHAIRMAN: Mr. Collier, you are an accountant?

31 MR. COLLIER: Yes.

32 THE CHAIRMAN: You are not legally qualified?

33 MR. COLLIER: No.

34 THE CHAIRMAN: Does the OFT have any comment to make on that?

1 MR. KENNELLY: We have no objection to Mr. Collier representing Achilles for the purpose of
2 these proceedings.

3 THE CHAIRMAN: Well we are happy for you to do so, Mr. Collier. The second issue that we will
4 come to then is the application for intervention from Bemrose Group and Bemrose Booth Ltd.
5 Then we would like to consider the further documents to be served in the appeal and the issue
6 of confidentiality, bearing in mind that today's hearing is an open hearing and therefore any
7 figures which are confidential and have been redacted, for example, from the Decision, should
8 not be mentioned in open court.

9 The next matter is the timetable, and we have a timetable to propose to the parties when we get
10 to that item on the agenda; and finally the issues in the appeal which we would regard as being
11 whether or not points made in the notice of application about various figures in Achilles
12 financial statements should affect our consideration of the level of the fine, particularly having
13 regard to the possible repercussions for the state of competition in the market.

14 The first item to come to is the application for intervention by Bemrose Group and Bemrose
15 Booth. We have read your letter of 4th July and your skeleton that arrived this morning. We
16 understand that the OFT does not object to you being joined as a party; we have not yet heard
17 from Achilles as to whether or not they object. At present the Tribunal remains to be
18 convinced that your involvement would be helpful. The appeal, as appears from the summary
19 on the website, is restricted to the very narrow points on Achilles' annual financial statements
20 and does not go into the substantive merits of the case, nor does it consider the factual disputes
21 between Bemrose and Achilles which the OFT did not find it necessary to resolve, and we are
22 not attracted particularly by your alternative proposal of leaving any application to intervene
23 over until you have had an opportunity to consider the transcript of the main hearing.

24 To put it in terms of your subparagraphs in para.3.2 of your skeleton, if we were to adjourn
25 your application to intervene we would envisage not adjourning it beyond the day of the
26 substantive hearing of this matter. At the moment we think it is unlikely that there will be
27 anything in this case which affects Bemrose, but please address us on that.

28 MR. ALDRED: Thank you, madam. Bemrose Booth and Bemrose Group have made this
29 application in the hope and expectation that intervention would not become necessary, and will
30 not become necessary. Clearly my clients have the potential for having an interest in this
31 matter; both their commercial interest and their reputation could be affected by things that are
32 said in this Tribunal.

33 If the appeal remains on a footing where it is just simply an appeal on penalty and there is no
34 risk of matters turning to the substantive issues, then we would agree with the Tribunal that it
35 would not be necessary for us to intervene. What we would like simply is to have the

1 possibility to hold over an application for intervention in the necessity that it becomes needed
2 because matters are discussed in this Tribunal which require correction. So we would be
3 happy with an order where we simply had the possibility of an adjournment, or were given an
4 extension of time to make an application to intervene in the event that it becomes necessary
5 and we are given an opportunity just to monitor in the lightest possible way. My clients have
6 no desire or wish to get involved, to incur costs unnecessarily but there are wider interests at
7 stake as far as my client is concerned, and we certainly want to preserve those as best we can.
8 Unless I can help you further with anything in my written skeleton?

9 THE CHAIRMAN: Mr. Collier, have you anything to say on behalf of Achilles in relation to this
10 application to intervene?

11 MR. COLLIER: First of all, please forgive the lack of any protocol here – none of us know terribly
12 much about the appeal process. We can understand that Bemrose Booth may wish to be
13 interested in the appeal, but we believe the nature of the appeal is such that it should not impact
14 on them at all, especially due to the confidentiality issues to be discussed.

15 THE CHAIRMAN: Thank you.

16 MR. KENNELLY: Madam, we were neutral as to Bemrose's intervention and we did not want to
17 create a dispute where it would not assist the Tribunal, but since now we know Bemrose's
18 concern, which is to make sure that its own interests are protected in the submissions that
19 Achilles may make, of course the OFT in the public interest also must protect Bemrose's
20 interests and be live to that issue itself. So if that is Bemrose's concern the OFT would, of
21 course, be exercising that role also, and does not require the assistance of Bemrose in that
22 respect. It is in the OFT's interest also to make sure the appeal is limited to the issues which
23 should not relate in any way to facts or matters involving Bemrose, or evidence linking
24 anything to Bemrose, and if it assists Bemrose to know the OFT is also aware of that and
25 agrees with that concern.

26 MR. ALDRED: Madam, I would just like to mention on that point that of course there are certain
27 matters of fact which the OFT did not find it necessary to adjudicate on for the purposes of the
28 Decision. So they ought not necessarily to trouble you or the other members of the Tribunal in
29 this regard, but I would simply like to reiterate the point that the Tribunal has it on board that
30 there are wider commercial and reputational issues at stake and whilst we are not seeking an
31 order now to intervene we would like to hold that open as a possibility in the event that it
32 becomes necessary.

33 THE CHAIRMAN: The key point about the period between now and the substantive hearing seems
34 to us to be your point 3.2.1 in your skeleton, namely the parties making available their notice
35 of appeal, defence and written skeletons, excluding any confidential information to your

1 clients. As far as we can see the redaction of confidential information would be quite a
2 substantial task for the parties and at present we are not sure that that is really a necessary step
3 for us to take, or an appropriate step for us to take, given that everyone seems to be agreed that
4 the likelihood of matters arising which affect your clients is pretty slim. Of course, you are at
5 liberty to attend the trial, the hearings are public hearings, subject to the need to go into a
6 private hearing if confidential information is to be discussed, but is there anything further you
7 would like to say particularly about whether you need to see the pleadings and the skeletons
8 given that the transcripts also appear on the Competition Appeal Tribunal's website?

9 MR. ALDRED: Madam, my expectation would be that if any matters which are likely to affect my
10 clients were to be raised, they are more likely to be raised in open court than by way of written
11 submission by either parties, given the narrow basis upon which the appeal is currently framed,
12 and if that remains the case we would be comfortable with just simply having access to the
13 transcripts or being present when the hearing takes place.

14 (The Tribunal confer)

15 THE CHAIRMAN: The Tribunal will adjourn your application to intervene. We are not minded to
16 make an order that the parties make their pleadings or their skeletons available to you, but we
17 would make it clear that we do not envisage that adjournment going beyond the date of the
18 hearing. So if your clients wish to protect their position they will need to send someone along
19 to the substantive hearing because we would not like to open up the possibility of a further
20 iteration being necessary after the main hearing has taken place.

21 MR. ALDRED: I understand that.

22 THE CHAIRMAN: The next issue that we wanted to consider is item 4 of the agenda, which is the
23 documents that are necessary for the Tribunal to determine the appeal. At present the current
24 date for filing the defence is 18th July. However, as we indicated in the agenda there is the
25 issue as to whether or not the appellant needs to serve a witness statement in support of the
26 facts set out in its notice of appeal. Such a witness statement would not necessarily go beyond
27 saying anything that is currently set out in the notice of appeal but it simply contains the
28 affirmation of the truth of the contents of the statement, and then at the substantive hearing (if
29 necessary) that statement can stand as the evidence-in-chief of the witness – I would imagine
30 in this case Mr. Winward himself.

31 If a witness statement is to be provided by Achilles, then there may be a question of whether
32 the service of the defence needs to be postponed in order to enable the OFT to look at that
33 before filing the defence. At the moment we would envisage that there would be a
34 simultaneous exchange of skeleton arguments prior to the hearing rather than any reply. By
35 that I mean at some point before the date of the final hearing of this case both sides set out

1 what the points are that they want to make at the hearing and those documents are exchanged
2 so that both sides have prior notice of what the other is going to say at the hearing.

3 Perhaps I can pause there and invite the parties to make any comments they would like on
4 those proposals?

5 MR. COLLIER: We do not feel there is a need for any further witness statements. There may be
6 some further documents required. There was a comment made in the OFT's observations that
7 pointed to the absence of further documentation in support of some of the information in the
8 financial statements, so we would probably want to provide that as further written evidence.

9 MR. KENNELLY: Madam, it may assist the Tribunal if I tell the Tribunal why the OFT proposed
10 the Rule 10 route, because it links into the proposed arrangement in relation to skeletons and a
11 further witness statement and, of course, as the Tribunal has seen our submission is that the
12 appeal is very likely to fail and our concern was that we avoid a long drawn out process with
13 reply, several witness statements, and extraneous or irrelevant matters delaying the final
14 resolution of the appeal. That is why we proposed a further hearing which would just deal
15 with the Rule 10 issue.

16 If the Tribunal is proposing simply not having a reply and having a witness statement which
17 confirms the Notice of Appeal but with a statement of truth so no detailed extraneous evidence
18 is given – because in our submission it need not be given, the appellant need only confirm the
19 financial material which they have set out in the Notice of Appeal and the next step being
20 exchange of skeletons before final appeal – that would have effectively achieved the same
21 result and achieved the result that the OFT seeks. That procedure should be as quick as any
22 other procedure which the Tribunal could properly direct, and so we would be minded to adopt
23 the Tribunal's suggestion provided it was limited in the way the Tribunal has indicated.

24 However, we would wish to avoid a great deal of further witness evidence being adduced on
25 matters which, of course, were not available to the OFT at the time that it made its decision,
26 those would not form a proper basis to challenge the assessment of the fine which the OFT
27 imposed.

28 THE CHAIRMAN: I do not think we are able to restrict at this hearing the evidence that the
29 appellant wants to put forward. However, it appears from what Mr. Collier says that at present
30 they do not envisage filing a great deal of additional information. Our point, Mr. Collier, was
31 not that there might be additional matters that you want to put forward, but rather that the form
32 in which your points have currently been made needs to be slightly different, or supplemented
33 by incorporating them into a witness statement so that they can then stand as evidence in the
34 case. At the moment in the notice of application you have put forward your arguments, and
35 that is signed by Mr. Winward. However, in order for that to be evidence that we can take into

1 account at the hearing that needs to be in the form of a witness statement from Mr. Winward or
2 from you in which you state as your evidence that those events and incidents that are referred
3 to in the Notice of Application actually took place. So it is a formal document rather than
4 introducing a lot more information although, as you say, if there is further information that you
5 want to include again that needs to be attached to a witness statement in order for it to be
6 accepted into evidence before the Tribunal. I hope that is a little clearer now as to what we are
7 expecting.

8 MR. COLLIER: I think so, yes.

9 MR. WINWARD: Yes.

10 MR. COLLIER: In that case I think it would probably need to be a witness statement from myself.

11 THE CHAIRMAN: That may well be the case. The kind of issue that we are envisaging here is that,
12 for example in the OFT's observations for today they say "Well it is claimed that loans were
13 made to the company by Mr. Winward and other people", but there is no evidence to support
14 that because the Notice of Application, although it states those things is not evidence of those
15 things. It needs to be in a statement by someone who can say from their own knowledge "I
16 know that this happened, and I am writing this down and I am telling you that it is the truth",
17 and then we can rely on that, and it is open to the OFT to challenge that at the hearing if they
18 want to. But I think you understand now better what it is that we have in mind, and it is up to
19 you to decide who should make that statement and what it should include.

20 The effect of that witness statement is that at the hearing of the matter that will probably stand
21 as the examination-in-chief of you or Mr. Winward (whoever is giving evidence) and then it
22 would be open to the OFT (if they wanted) to cross-examine the deponent on the content of
23 that, but it shortens proceedings to have a written statement which can stand as the evidence if
24 it is not challenged and it tends to speed things up by everybody being clear what is going to be
25 said at the main hearing.

26 The other aspect to consider is confidentiality. Given that it is only the OFT and Achilles who
27 are parties to this appeal, the concern would only arise in relation to the publication of figures,
28 particularly bearing in mind the very limited information which a small company like Achilles
29 needs to file with Companies House. But we will need to bear in mind at the hearing that
30 hearings are held in public, that anybody can come and listen, and therefore if we are going to
31 be discussing figures which are confidential to Achilles we need to be aware of that and make
32 sure that we have cleared the court so that it takes place in private before any such figures are
33 mentioned. But I do not think there is anything that we need to order today, just that that is
34 something that we need to bear in mind both today and in subsequent hearings.

1 The next item is whether there is any room for an agreed statement of facts in this case. I think
2 that was something that you mentioned in your observations. Do you have any particular
3 proposal as to how we could take that forward?

4 MR. KENNELLY: Madam, if the appellant is to produce a witness statement which may amplify
5 the financial information provided in the Notice of Appeal it may be better to wait until the
6 OFT receives that witness statement and then agree such facts as may be agreed, but we
7 indicate in our observations that we expect to be able to agree many if not all of the
8 background facts in this case since the financial statements themselves stand really as the main
9 documents for the examination of the Tribunal, but more than that the OFT cannot properly
10 say at this stage.

11 THE CHAIRMAN: Yes, once you have served any evidence that you want to serve, and also if the
12 OFT appends any witness statement to their defence then there may be an opportunity for you
13 and the OFT to get together to narrow down what issues there are that need to be determined at
14 the time of the substantive hearing. The facts, or the issues in this case are fairly narrowly
15 defined but it is always useful for the parties to turn their mind at a fairly early stage before the
16 hearing to see if there are things that they can agree and present to the Tribunal as being agreed
17 so that we only have to deal here with the remaining matters that are in contention.

18 MR. ALDRED: Madam, it occurs to me that it might be a useful opportunity with regard to the
19 preparation of the agreed statement of facts for the OFT and ourselves to confer with regard to
20 ensuring that those facts at least that have been put before the Tribunal are non-contentious so
21 far as Bemrose Booth and Bemrose Group are concerned, and I just raise it in this forum, but I
22 am sure we could probably take that off-line.

23 THE CHAIRMAN: Yes, well the OFT have heard your comment and I am sure they will bear that
24 in mind. Finally then to the timetable. This is what we propose: for Achilles to serve their
25 witness statement by 24th July. The OFT then to serve a defence by 4th August, and that to
26 include any witness statements on which the OFT wants to rely; exchange of skeleton
27 arguments by 25th August, and then the hearing to take place on 12th September. We would
28 put the case down for one day though it may not take that time, but if the parties need to take
29 instructions on that timetable they should do so.

30 MR. KENNELLY: I would be grateful for a moment in relation to the witness statement from my
31 clients? (After a pause) Having consulted my clients that appears to us to be a very sensible
32 way to proceed and should cause us no difficulties in relation to the defence and witness
33 evidence (if any) that needs to be appended to the defence by the OFT.

34 THE CHAIRMAN: Mr. Collier?

35 MR. COLLIER: Yes, those dates are fine by us, thank you.

1 THE CHAIRMAN: Good, well we will proceed on that basis. Are there any other issues that either
2 party would like to raise with us at this stage? Do I take it then that if we proceed along those
3 lines your Rule 10 application does not need to be pursued, if I can put it like that?

4 MR. KENNELLY: That is correct. The resources of the OFT are limited and it was our concern that
5 the matter be dealt with in proportionate fashion, and that is why we raise the Rule 10 issue.
6 We bear in mind of course that the appellant is not represented and it was never our desire to
7 force them into an excessively early resolution of this matter. The timetable the Tribunal has
8 proposed, and the appellant has accepted seems to us to be the swiftest way to resolve the
9 issues fairly to all the parties.

10 THE CHAIRMAN: If I can just summarise then particularly as to what is expected of the parties
11 now: by 24th July Mr. Collier and Mr. Winward you need to put into the form of a witness
12 statement the matters which are included in the notice of application and attach to that witness
13 statement the same documents (or cross-refer to those documents) that were attached to the
14 notice of application and also any additional information that you want the Tribunal to be able
15 to take into account.

16 Then on 4th August you will receive from the OFT their defence to your application with any
17 documents on which they are going to rely, and on 25th August you need to have a skeleton
18 argument which sets out in bullet points very briefly the points that you are going to want to
19 make at the hearing which will then take place on 12th September. The referendaire, Miss
20 Darbon, will speak to you after the hearing today just to check that you understand that and to
21 provide any assistance that you would need with that.

22 Other than that, thank you everybody for your assistance today.

23 (The hearing concluded at 2.35 p.m.)