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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1081/4/1/07

Victoria House
Bloomsbury Place
London WC1A.2EB

Friday, 11 May 2007

Before:

MARION SIMMONS QC

(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

CO-OPERATIVE GROUP (CWS) LIMITED

Applicant

and

OFFICE OF FAIR TRADING

Respondent

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Mr. Matthew Cook (instructed by Clifford Chance) appeared for the Applicant.

Mr. Rupert Anderson QC and Mr. Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

CASE MANAGEMENT CONFERENCE

1 (The hearing commenced at 2.30 pm)

2 THE CHAIRMAN: Good afternoon. Today I think we are really only dealing with timetable, and
3 from the correspondence I have seen I think that has been agreed between both parties.

4 Can I just raise the question about the date for the hearing before we start. As you know, the
5 practice in this Tribunal is to treat merger cases as urgent. Of course, some merger cases are
6 more urgent than others and have to be dealt with with extreme urgency and expedition. That
7 does not appear to be the basis of this case. However, that is not to say that this is not urgent
8 and should not be dealt with speedily. I would like to hear submissions today about that and,
9 subject to those submissions, the Tribunal has made available the 30th May to hear this case.
10 That would mean that time for the defence would need to be abridged, probably to 18th May,
11 allowing for a response by 23rd May. Possibly, if one did that, the defence and the response
12 could also stand as the skeleton arguments. That is a matter that we can discuss.

13 Apart from those opening remarks, Mr. Cook, do you want to start?

14 MR. COOK: I think it may be for my learned friend to start, as it is going to cause him, initially at
15 least, the greatest problems.

16 MR. ANDERSON: We recognise that in a merger case it is desirable for matters to proceed
17 expeditiously. This case, as I think you recognised in your opening remarks, is slightly
18 different in the sense that the merger has been completed. There are arrangements in place in
19 the sense that the particular undertakings are in place, and the question is how appropriate this
20 particular disposal is. There is an extension to the disposal divestiture period which has been
21 agreed between the parties.

22 THE CHAIRMAN: When does the disposal divestiture period end?

23 MR. ANDERSON: Twenty-eight days after your Decision. We raised with the other side in
24 advance of this hearing whether it was their intention to request expedition, and they confirmed
25 to us that it was not their intention to request expedition. We have indicated, both to the
26 Tribunal and to them, that we would wish the full period in which to submit our defence,
27 which is the 30th. We see no compelling reason why that period should be abridged. This does
28 raise points of some principle. It is quite important that ground rules for the circumstances in
29 which undertakings in lieu of a reference are accepted. So there are important points of
30 principle.

31 There are a number of grounds upon which the Appellants have chosen to challenge the
32 decision we have taken. We will be putting in witness evidence from a deponent who is on
33 leave until the 18th May, and therefore any abridgement would cause us some difficulty. So
34 what we had proposed, and this was agreed by the other side, was that we put in our defence
35 with the supporting witness evidence, in accordance with the timetable set out in the Rules. In

1 our submission, that is perfectly appropriate given that there is nobody currently applying to
2 have that abridged.

3 THE CHAIRMAN: That is 30th May, is it?

4 MR. ANDERSON: Yes, the 30th May is the timetable to which we are entitled under the Rules, and
5 no application for abridging of that is made.

6 There would then be – and we think this would help at the hearing – an exchange of brief
7 skeleton arguments shortly thereafter. What we were proposing was a hearing in the week
8 commencing 25th June – that is to say some three weeks later than the timetable that you
9 envisaged.

10 I fully appreciate that you, madam, are involved in a case due to be heard in the following
11 week.

12 THE CHAIRMAN: I think in that week as well, I am not sure. It is the following week, is it?

13 MR. ANDERSON: If it is the case that I have in mind it is due to begin on 4th July.

14 THE CHAIRMAN: I have a case the week before.

15 MR. ANDERSON: I think my learned friend as a difficulty in the week after the case that I had in
16 mind. Perhaps I could enquire from the Tribunal as to when the Tribunal is available.

17 THE CHAIRMAN: There is the problem not only that I am not available in, effectively, those two
18 weeks, but also the other Members of the Tribunal.

19 MR. ANDERSON: We do have a difficulty in bringing our defence back much beyond the date to
20 which we are entitled under the Rules, not least because, as I say, the relevant officer who will
21 be our witness is not available until ----

22 THE CHAIRMAN: Before it was agreed that the divestment would be 28 days after the Decision,
23 what was the divestment period, or was there not one?

24 MR. ANDERSON: It has been extended on a number of occasion, largely at the request of the
25 Appellants.

26 THE CHAIRMAN: I can see that the Appellants would want to extend it. They are happy not to
27 divest. They would prefer not to be in this position. Your clients are in a position where they
28 say it ought to be divested. There is some urgency in that, is there not, because there have
29 been all these extensions?

30 MR. ANDERSON: There are arrangements in place to ensure that any problems associated with the
31 current position are not a concern of ours, at least over this sort of timetable. Clearly, if
32 matters dragged on unduly then there may be a concern. That is why we would like the case to
33 be heard expeditiously, but not so expeditiously as to hinder our ability to present our case
34 properly.

1 THE CHAIRMAN: Can I ask you – and you may not want to answer this, I do not know – what this
2 deponent is going to depose to? What is the gist of the evidence?

3 MR. ANDERSON: He is going to depose to both the facts in terms of the actual relationship and
4 what has happened in terms of negotiating the undertakings, but also to answer essentially the
5 factual and policy aspects of the case that is put against us – in other words, explaining why we
6 have taken the view we have taken, and laying the policy background as to why it is important
7 that this matter is properly addressed.

8 THE CHAIRMAN: He is the only person that can do that?

9 MR. ANDERSON: So I understand. He is the relevant decision maker within the Office.

10 THE CHAIRMAN: If we made it the week before 25th June – I do not know whether we can do that,
11 but I am just debating now – would that be possible?

12 MR. ANDERSON: Our estimate is that the hearing should only last a day, possibly running into a
13 second day. We are not looking for a whole week of the Tribunal's time, we are looking for a
14 day. It may well be possible to have the hearing, subject of course to the Tribunal's
15 availability, in that previous week and push the skeleton arguments back a little. We thought it
16 was sensible to have an exchange of skeleton arguments simply to focus the hearing, because
17 there will not at that stage have been any opportunity for either party to address the response to
18 the case that is being put.

19 THE CHAIRMAN: That would be putting it back to the week of 18th June?

20 MR. ANDERSON: The latter part of the week of the 18th, certainly.

21 THE CHAIRMAN: Why the latter part?

22 MR. ANDERSON: If it is earlier than that then I, personally, am in difficulties. I am in difficulties
23 up until the 18th, but later in that week would be possible.

24 THE CHAIRMAN: Could you do it on Wednesday, 20th June?

25 MR. ANDERSON: Yes. Is the Tribunal available then?

26 THE CHAIRMAN: I do not know. I have no idea. We will have to make enquiries in a moment.

27 MR. ANDERSON: It would certainly be undesirable to push it off into the second half of July, I can
28 see that.

29 Our current timetable was allowing 14 days for the Co-Op to respond to our defence with their
30 skeleton argument. It may be possible to truncate that.

31 THE CHAIRMAN: We might be able to truncate a few days off your defence if the gentleman is
32 coming back on 18th May.

33 MR. ANDERSON: Yes, I am sure we could take it back to the 25th, something like that.

34 THE CHAIRMAN: Shall we see what Mr. Cook says?

35 MR. ANDERSON: Certainly.

1 MR. COOK: Starting off, madam, you asked for the date that the divestment period had previously
2 ended. That was yesterday.

3 THE CHAIRMAN: How many times has it been extended?

4 MR. COOK: This is now the third extension.

5 THE CHAIRMAN: It is very unsatisfactory. It is very satisfactory for your clients, but very
6 unsatisfactory generally.

7 MR. COOK: It is not satisfactory from my client's point of view, because nothing we are saying is
8 intended to say that we should not divest these businesses. They are going to be sold at some
9 point to someone. All we are disagreeing about is that we would like the greatest possible
10 range of people we can sell them to so that we can maximise our return on it. In many ways it
11 is an unsatisfactory position because they are in limbo. It is better that the business is run by
12 someone who is going to own it in the longer term. We are not trying to delay it on that basis.
13 I should say straight away that we are happy to accommodate the timetable the Tribunal comes
14 up with, subject to it not being pushed to a date we have difficulties with in terms of
15 availability.

16 I am slightly concerned about what was being suggested, that we are going to have a witness
17 statement from the individual decision maker which was in some way going to explain all the
18 reasons why this decision was taken. A decision has been made and that is the decision which
19 we are currently challenging. If the OFT accepts that the decision is not good enough in its
20 own terms it should accept that, it should withdraw the decision and we can get on with a
21 proper decision being made, which is really what we are saying in the first place. On the other
22 hand, if it is saying that the decision is good enough on its own terms it should stand on its own
23 terms it should stand on its own terms or fall on its own terms. Obviously, without knowing
24 specifically what is going to be said, I cannot take it any further than that, but I am more
25 placing a marker at this point that if the OFT wishes to rewrite its decision there is a great deal
26 of case law from the Tribunal about the very limited circumstances in which it can do that, and
27 we will be relying on that as appropriate.

28 In terms of availability, 30th May is, I believe, a date that we could physically do, if necessary.
29 It does produce a very tight timetable, particularly if the OFT is going to produce something
30 very substantive in terms of actually rewriting its decision, which it sounds like it wishes to do.
31 When you first suggested it I thought that is very tight but potentially doable, I am less
32 sanguine now about whether that is going to put us undue pressure, and certainly a date some
33 time in the middle of June, subject to the Tribunal's availability, is something that we would
34 perhaps see as being more realistic in the circumstances.

1 Obviously, like everybody else in the room, we would view with horror the notion that it
2 should be pushed off into July. It should be some time in June, and the middle of June is
3 something that we can accommodate if necessary.

4 MR. ANDERSON: Let me just put my learned friend's mind at rest. Of course we are not going to
5 rewrite the decision. The decision is perfectly adequate as it is, and will be defended. The
6 purpose of what I was trying to explain was that we believe it would assist the Tribunal to have
7 that decision put in the overall context of the Office's policy on undertakings, and therefore it
8 would be readily obvious why the decision was taken. Of course we are not going to rewrite
9 the decision.

10 THE CHAIRMAN: I will rise for a few minutes and we will see what enquiries we can make of the
11 Members. We are not sure that we are going to find that they can do those days. We will
12 make enquiries as to June. You say that you are not available up until 18th June. Does that
13 mean that you are not available in June up until the 18th, or you are available on some dates
14 before?

15 MR. ANDERSON: I am sure I can accommodate. I just have some difficulties on the days between
16 11th June and 18th June, but at the moment I do not know precisely how much of that time
17 I will be tied up.

18 THE CHAIRMAN: You think you could accommodate a day within it?

19 MR. ANDERSON: Almost certainly.

20 THE CHAIRMAN: I will rise for a moment and we will see what enquiries we can make. Is that all
21 right, Mr. Cook?

22 MR. COOK: Yes, certainly.

23 (The hearing adjourned between 2.45 and 3.00 pm)

24 THE CHAIRMAN: There is actually great difficulty in organising the Members for dates in June.
25 However, what we are going to do is this: we will fix it for 20th June with a day in reserve, the
26 21st, and we will have to see whether we can reconstitute the Tribunal and find some Members
27 who can do those days.

28 MR. ANDERSON: We are very grateful to the Tribunal for that, we really are. Thank you.

29 THE CHAIRMAN: If we cannot then we will have to come back, but at the moment we hope that
30 we will be able to do that. So it is 20th and 21st June, hopefully only 20th June, but we will
31 keep the 21st as a reserve day.

32 MR. ANDERSON: I think that is probably sensible, but both my learned friend and I think a day
33 should be sufficient.

34 THE CHAIRMAN: I would have thought a day would be sufficient, especially since we now have
35 sufficient time to hone the arguments.

1 MR. ANDERSON: Hone the arguments in the skeleton arguments, yes, absolutely.

2 THE CHAIRMAN: You were suggesting that you could possibly do the defence by 25th May.

3 MR. ANDERSON: Having discussed it with those behind me we are sure we can meet 25th May.

4 THE CHAIRMAN: What I was thinking, but subject to what you say, is that probably you want
5 sequential skeleton arguments, because there is no point in putting in a response or a reply and
6 then a skeleton argument, you may as well do it in one document.

7 MR. COOK: Absolutely, as long as it is recognised that it will in part be a reply as well, and we are
8 not therefore tied by anything ----

9 THE CHAIRMAN: We are used to doing that in this Tribunal and that means that we do not have
10 too many documents flying about, and also not too much repetition.
11 I had worked this out on the basis that you had a week, but possibly you would like a little bit
12 more. If we gave you ten days that ----

13 MR. COOK: It would be something like 6th June.

14 THE CHAIRMAN: If we gave you to 6th June, then the OFT has got to the 13th. I was wondering if
15 we gave you until the 4th and we gave the OFT until the 13th ----

16 MR. ANDERSON: We are relatively easy. We would not see our skeleton argument in reply as
17 being a particularly long document because we will recently have put in the defence. So as
18 between the 4th and the 6th, we do not feel strongly. We would put in our skeleton argument on
19 the 13th to give the Tribunal adequate time to consider it.

20 THE CHAIRMAN: Time to consider it and to get it round. It does not make any difference to you if
21 it is the 4th or 6th for the skeleton argument – it makes no difference?

22 MR. ANDERSON: Not really, no.

23 THE CHAIRMAN: There you are, they are being very generous to you.

24 MR. COOK: It would make a difference to us, madam, so the 6th, please.

25 THE CHAIRMAN: Very well, the 6th.

26 MR. ANDERSON: That is a Wednesday, and then we will put ours in on the following Wednesday.

27 THE CHAIRMAN: The 13th.

28 MR. ANDERSON: And we will be heard the Wednesday after that.

29 THE CHAIRMAN: The 20th, yes.

30 MR. ANDERSON: That is ideal.

31 THE CHAIRMAN: So that is the defence the 25th; the Appellant's skeleton argument the 6th June,
32 which will include effectively what would normally go into a reply; the OFT skeleton
33 argument the 13th June; and the hearing the 20th June. That gives an opportunity for the
34 Appellant to consider whatever this evidence is that is going to be put in.

1 MR. ANDERSON: Of course, yes. Presumably, if they feel they need to put in anything in reply to
2 our evidence they would put it on 6th June with everything else?

3 THE CHAIRMAN: Yes. They will have time to think about that, because if they get it by 25th May
4 there should be sufficient time to do that.

5 MR. COOK: Absolutely, madam.

6 THE CHAIRMAN: Are you anticipating that this evidence, this witness statement, is going to have
7 exhibits or is it just a witness statement?

8 MR. ANDERSON: It is too early for me to say. It may well be that I have been exciting too much
9 expectation on my learned friend as to how significant this evidence will be. I do not know
10 whether there will be exhibits or not. I do not envisage this being a great tome of evidence
11 with lever arch files of exhibits – not at all, no. It is something that I am sure my learned
12 friend and those behind him will be able to accommodate quite quickly.

13 THE CHAIRMAN: Good. We do not need to give directions in relation to bundles of documents,
14 etc.

15 MR. ANDERSON: I would not have thought so, no.

16 THE CHAIRMAN: There are going to be very few and it will be very easy to manage that.

17 MR. ANDERSON: We will endeavour to agree an agreed bundle of documents and an agreed
18 bundle of authorities.

19 THE CHAIRMAN: Yes, it always makes it go quicker if we can have an agreed bundle. Then we
20 have one bundle to work from and everybody is working from the same bundle. The same
21 thing with the authorities. Normally the authorities are very nicely produced.

22 MR. ANDERSON: We will agree a bundle of authorities, yes.

23 THE CHAIRMAN: There is nothing else, is there, in relation to that?

24 MR. ANDERSON: I do not think so. We have agreed to the redactions that they have sought in
25 relation to their Notice of Appeal. I do not believe there is anything else.

26 THE CHAIRMAN: I have one matter. It is in relation to the substance and it is what has been going
27 through my mind and therefore I thought I ought to raise it so that it can be considered and
28 I can either be told that it should not be going through my mind or it becomes a point that
29 might be one that ought to be addressed. It is in relation to the duties and responsibilities of
30 directors when they sit on boards of companies, particularly competing companies. What I am
31 wondering is whether a director who acquires information on Board A has a duty to disclose it
32 to Board B. That depends on his duties to Board A and to Board B. Do you see the point?
33 This case has another complication because the relevant person is, I think, only technically a
34 director of one of the two companies. That is right, is it not?

35 MR. COOK: That is correct.

1 THE CHAIRMAN: He has a senior management role in the other company. That raises the
2 question of what his duties are. It also, I think, might raise the question of whether, in the
3 organisation of the various management boards and directors, etc, of these companies, he
4 might be a shadow director and therefore owe the same duties.

5 MR. COOK: These are obviously points that we will want to come back to anyway.

6 THE CHAIRMAN: I do not expect you to address them today.

7 MR. COOK: Could I just flag two very quick points and obviously these will be developed in due
8 course. The answer to the first point is that it is a very artificial thing where you talk about
9 directors wearing different hats. Effectively, it is like the Holy Trinity, it is three people in one
10 body. So what you acquire while wearing one hat is not something you have access to while
11 wearing another hat is what I will suggest is the position ----

12 THE CHAIRMAN: I do not think it is as simple as that.

13 MR. COOK: In terms of shadow directors, you are talking about owing duties. Senior executives
14 owe duties to their companies anyway and owe fiduciary duties, so whether they are officially
15 a director or not, the same sort of fiduciary duties are owed anyway.

16 THE CHAIRMAN: The reason I raised it in that way was so that the answer did not come back,
17 "Oh, but he is not a director". I accept what you are saying.

18 MR. ANDERSON: That is very helpful, and those are, I am sure, points that will be debated. They
19 will certainly be considered.

20 THE CHAIRMAN: They will be considered and, if relevant, debated.

21 MR. ANDERSON: Yes.

22 THE CHAIRMAN: Thank you very much. Is there anything else? I will see you on 20th June,
23 hopefully, with two other Members.

24 (The hearing concluded at 3.10 pm)