Neutral citation [2012] CAT 6 Case Number: 1188/1/1/11

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

20 March 2012

Before:

LORD CARLILE OF BERRIEW CBE Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) TESCO STORES LIMITED
(2) TESCO HOLDINGS LIMITED
(3) TESCO PLC

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 8 March 2012

JUDGMENT (Disclosure)

APPEARANCES

Miss Dinah Rose Q.C. and Mr. Daniel Piccinin (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Appellants.

Mr. Stephen Morris Q.C., Miss Kassie Smith and Miss Josephine Davies (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

Introduction

1. On 1 March 2012 the Respondent ("the OFT") applied for an order for disclosure of certain documents and the provision of information, which it considered to be relevant to the liability issues in this appeal. In brief, those issues are whether the Appellants ("Tesco") participated in two separate concerted practices, one in 2002 and the other in 2003, in relation to the supply of cheddar cheese and British territorial cheeses in the UK. Both concerted practices involved a so-called 'A-B-C information exchange' in relation to future retail prices of cheese products via certain processors/suppliers. Those unlawful practices were the subject of fines imposed by the OFT in its decision of 26 July 2011 called "Dairy retail price initiatives" ("the Decision"). The name of the Decision derives from the alleged purpose of the concerted practices to increase retail prices for cheese in 2002 and 2003, and milk in 2003.

2. In particular the OFT originally sought an order from the Tribunal that:

   (a) Tesco disclose to the OFT all documents which exist (or existed) that are responsive to a notice issued in February 2005 under section 26 of the Competition Act 1998 ("the Act") and which have not been provided to the OFT, including any documents that came to light as a result of searches by Tesco's external solicitors (Freshfields) in preparation for this appeal. The OFT also asked Tesco or its legal advisers to provide a sworn statement explaining the circumstances in which two documents annexed to the Notice of Appeal were identified given that they appeared to the OFT to be responsive to, but were not provided in response to, the section 26 notice.

   (b) Tesco disclose certain documents requested by the OFT, by letter of 14 February 2012, concerning a number of contentions made in the Notice of Appeal and the witness evidence annexed to the Notice.

   (c) Tesco identify the names of all the potential witnesses it contacted during the administrative procedure prior to its letter to the OFT dated 27 July 2011

(as described in paragraph 20 below) and disclose to the OFT by list all records and/or notes of and in relation to all contact with any potential witnesses and give production of documents identified by the OFT from that list within three days from that date.

3. I note that the original application was to a very large extent co-extensive with the classes of documents and information previously sought by the OFT in correspondence. Indeed that application was put forward on the basis that Tesco had allegedly failed to provide or identify the relevant documents and information. It is right to record that Tesco contended that the original application was unjustified and disproportionate. By the time of the hearing before me, however, the parties had managed to resolve the matters described in paragraphs 2(a) and 2(b) above. I need say nothing more about those matters.

4. The remaining divisive issue concerned the OFT's application for the provision of information about Tesco's contacts with potential witnesses and for disclosure of any records of discussions with those individuals ("the Application"). In response Tesco submitted that the relevant material was and remains subject to litigation privilege and, in any event, the Application was unnecessary.

5. Attached to this judgment is a glossary of terms that are used in this judgment.

Legal framework

6. The sharpness of the issue between the parties to this Application tended to conceal the degree of common ground between them. I think it is worth drawing attention to several matters which do not appear to me to be contentious.

7. There is, first of all, the administrative procedure established by the Act. As one would expect, the OFT begins by investigating and gathering facts in relation to suspected infringements of the Act and/or Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). To that end, it is given extensive powers to conduct investigations (section 25), obtain documents and information (section 26), and enter premises with or without a warrant issued by the High Court

(sections 27 to 29). If the OFT decides to proceed with the case, it must consider whether to propose to make a decision that a relevant prohibition has been infringed. If it proposes to make such a decision, the OFT issues a so-called "statement of objections" to give the persons concerned an opportunity to be heard (section 31). Having received the parties' representations and weighed up the evidence (and assuming it does not close the case file) the OFT decides whether the prohibitions imposed by the Act and/or Articles 101 or 102 TFEU have been infringed. Where the OFT makes a decision as to whether the Chapter I prohibition has been infringed, that decision is appealable to the Tribunal (section 46).

8. It is clear, secondly, that a requirement to produce or disclose documents, whether by written notice or during an inspection, does not extend to privileged communications in accordance with section 30(1) of the Act. Section 30(2) defines a privileged communication as:

> "a communication —
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> (a) between a professional legal adviser and his client, or
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> (b) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,
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> which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege."

The above communications are more commonly known as "legal advice privilege" (section 30(2)(a)) and "litigation privilege" (section 30(2)(b)). In the present case, I am concerned only with the latter.

9. The OFT has acknowledged in its Guidelines that it cannot use its powers of investigation to require anyone to produce privileged communications: see e.g. paragraph 6.1 of *Powers of investigation* (OFT 404) and paragraph 7.1 of *A Guide to the OFT's investigation procedures in competition cases* (OFT 1263). I accept the point made by counsel for the OFT that neither of those Guidelines deals with the circumstances in which privileged communications may arise during an investigation.

10. Thirdly, by virtue of section 6(1) of the Human Rights Act 1998 (which received royal assent on the same day as the Act), the OFT is obliged to carry out its functions in a way that is compatible with "the Convention rights". Section 1 of the Human Rights Act provides that "the Convention rights" includes the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the European Convention on Human Rights and Fundamental Freedoms (Treaty Series No 73 (1953) Cmd 8969) ("ECHR"). Both parties accept (rightly in my view) the incontrovertible proposition that proceedings under the prohibitions imposed by the Act that may lead to the imposition of a penalty are "criminal" in nature for the purposes of the Convention right as set out in Article 6 ECHR (see e.g. *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, at [98] and Case 43509/08 *A. Menarini Diagnostics SRL v Italy*, judgment of the European Court of Human Rights of 27 September 2011). I shall return below to the OFT's submission that this does not decide the issue of whether litigation privilege applies during the administrative procedure.

11. It was common ground, fourthly, that the Tribunal has a wide discretion as to what directions, if any, it should give to secure the just, expeditious and economical conduct of these proceedings. In particular rule 19 of the Competition Appeal Tribunal Rules 2003 (SI 1372 of 2003) ("the Rules") provides so far as relevant:

> "19. - (1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
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> (2) The Tribunal may give directions –
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> …
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> (d) requiring persons to attend and give evidence or to produce documents;
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> (e) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it shall be oral or written;
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> …
>
> (k) for the disclosure between, or the production by, the parties of documents or classes of documents;
>
> (3) The Tribunal may, in particular, of its own initiative -

…

(c) ask the parties or third parties for information or particulars;

…

(k) for the disclosure between, or the production by, the parties of documents or classes of documents;."

12. I would also draw attention to rule 22 which provides:

> "22. - (1) The Tribunal may control the evidence by giving directions as to -
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> (a) the issues on which it requires evidence;
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> (b) the nature of the evidence which it requires to decide those issues; and
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> (c) the way in which the evidence is to be placed before the Tribunal.
>
> (2) The Tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken."

13. The Tribunal has on previous occasions had to consider issues of disclosure (e.g. *Claymore Dairies Ltd v OFT* [2004] CAT 16 and *Durkan Holdings Ltd v OFT* [2010] CAT 12). The decisions of the Tribunal establish that, unlike standard disclosure under the CPR, there is no automatic right to disclosure. The Tribunal must be satisfied that the disclosure sought is necessary, relevant and proportionate for the fair disposal of the issues of substance in the appeal. The disclosure sought must be considered by the Tribunal in the light of the circumstances of each individual case and the overriding objective in rule 19 of the Rules.

14. Where disclosure is sought by a public authority defending a decision which is being challenged on appeal, it is necessary to bear in mind that the authority is not generally entitled to depart from the reasoning or evidence relied on in its decision. The Tribunal has recognised from the beginning that there should be a presumption against allowing the OFT to submit new evidence that could properly have been made available during the administrative procedure and dealt with in the decision: see *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 3, at [79] and also [2002] CAT 1, at [133]. This presumption is justified by the need to observe the procedural safeguards that govern the administrative procedure (*Napp* [2001] CAT 3, at [78]). The presumption may be rebutted,

however, in particular where a respondent wishes to adduce new evidence to rebut a case made on appeal.

15. Thus the contentious point arises: should the Tribunal order Tesco to provide to the OFT information and documents in relation to contacts it had with witnesses and potential witnesses towards the end of the administrative procedure, from or around January to July 2011?

16. In order to consider this point, it is necessary for me to return to the circumstances of this case.

The factual background

17. This case concerns the indirect exchange of retail pricing intentions between retailers via certain dairy processors for cheddar and British territorial cheeses. In the broadest terms, the dairy industry comprised three levels of trade in 2002/2003. The supply chain begins with the production by dairy farmers of raw cows' milk. Farmers sell raw milk to processors who, as their name implies, process it into, amongst other dairy products, cheese. The leading cheese processors in the UK were Dairy Crest, Glanbia and Lactalis McLelland. The processors supplied their branded cheese and retailer own label cheese to the so-called "national multiples" (i.e. Asda, Safeway, Sainsbury's and Tesco). The national multiples were the main, but not the only, retailers of cheese in the UK at the time.

18. The infringements alleged in the Decision came to light when Arla, a dairy processor, blew the whistle to the OFT in July 2003. The OFT opened its investigation in January 2004. It issued section 26 notices to various companies and interviewed individuals employed by Arla. The Statement of Objections ("SO") was issued by the OFT in September 2007 and sent to ten parties suspected of engaging in various infringements (they were: Asda, Morrisons, Safeway (now owned by Morrisons), Sainsbury's and Tesco, Arla, Dairy Crest, Lactalis McLelland, The Cheese Company and Wiseman). Of the 10 addressees of the SO, seven subsequently entered into what have been called "early resolution agreements", whereby each admitted liability for the alleged infringements in return

for a reduction in the penalty. The tenth addressee, Tesco, contested the Chapter I infringements alleged against it.

19. After issuing the SO, the OFT interviewed individuals employed by various dairy processors and grocery retailers. On 23 July 2009 the OFT issued a Supplementary Statement of Objections ("SSO") in order to supplement and revise the SO by adducing the additional evidence that it had obtained. Following the parties' responses to the SSO, the OFT concluded that the evidence was insufficient to support a finding of infringement in respect of some of the matters that had been alleged. On 29 April 2010 Tesco informed the OFT that it would not contest the OFT's proposed findings of unlawful coordination of retail prices of cheese products in 2002 and 2003 if the OFT decided to close the case on various other allegations. In November 2010, however, Tesco decided to contest its alleged involvement in the concerted practices to increase retail prices for cheese products in 2002 and 2003. The reasons for its change of mind are not relevant to the Application.

20. Following Tesco's decision in November 2010 to contest the OFT's proposed findings of infringement, Tesco informed the OFT in January 2011 that it was considering whether to obtain further witness evidence from individuals outside Tesco, in particular current and former employees of Dairy Crest and Lactalis McLelland. The OFT wrote to Tesco in January 2011 and stated that it was a matter for the individuals in question (and their employers) whether they wished to provide evidence to Tesco, but that the deadline for Tesco to respond to the SSO had passed. Then, on 27 July 2011, the day after the Decision had been taken but ten working days before it had been notified to Tesco and the other parties, Tesco submitted two witness statements to the OFT and a corrigendum to an earlier witness statement. The cover letter from Tesco's external solicitors to the OFT accompanying the submission of this evidence stated in particular:

> "Since [Tesco's] exchange of correspondence with the OFT earlier [in 2011], we have spoken to a number of the individuals involved in the Cheese 2002/3 allegations. These individuals either expressed their unwillingness to be drawn into this process at this late stage or, somewhat unsurprisingly, have poor recollection of the facts and events at issue (which now happened over eight years ago). All of the individuals who were prepared to speak to us corroborated Tesco's case. Of these there were two individuals who had a sufficiently reliable

> and informative recollection of the events in relation to the cheese allegations at issue and who were willing to give us witness statements, namely:
>
> • Arthur Reeves, Commercial Director for Dairy Crest's cheese business in 2002/3; and
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> • Tom Ferguson, National Account Controller [for Lactalis McLelland] in 2002/3, responsible for managing the Tesco relationship."

The author of the letter explained that the new evidence corroborated the previous submissions made by Tesco, in particular that Tesco's pricing decisions were unilateral and that it had not been colluding indirectly with other retailers. It continued:

> "We consider that the OFT cannot reach a final decision in this Investigation without taking account of this new evidence. In light of the above, the new evidence enclosed provides sufficient grounds for the OFT now to drop the remaining Cheese allegations against Tesco, as it did in relation to the Milk and Butter allegations in April 2010.
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> …
>
> Tesco has asked me to make clear that if, notwithstanding the position outlined in this letter the OFT proceeds to adopt an infringement decision against it, Tesco will continue to defend its position vigorously, including, if necessary, before the courts."

21. On 29 July 2011 the OFT wrote to Tesco explaining that this submission was out of time and returned the statements unread. A further attempt by Tesco to provide witness evidence on 4 August 2011 was similarly rebuffed by the OFT on 5 August 2011. The Decision was published on 10 August 2011.

22. Tesco sent its Notice of Appeal to the Tribunal on 10 October 2011 and annexed copies of the documents on which it relied, including nine written statements from five witnesses of fact. The OFT filed and served its Defence on 30 January 2012. Counsel for Tesco drew my attention to paragraph 28 of the Defence which states:

> "In this appeal, the OFT will rely upon the strong documentary evidence. It does not intend to call witnesses to give oral evidence. At §20 to §22 of the Notice of Appeal, Tesco is critical of the OFT's approach to witnesses in this case, and in particular, its failure to interview witnesses. However this criticism is misplaced. The documentary evidence in this case is contemporaneous and it is clear and strong. No amplification of this evidence is required, by further documentary evidence or oral testimony, when considering the nature of the infringements found by the OFT."

23. Apparently, this passage led Tesco to ask the OFT whether it had contacted any potential witnesses, and if so, which people, and the nature and content of the communications between the OFT and those individuals. The OFT confirmed, by letter of 21 February 2012, that it had not made contact with any potential witnesses in this matter since the issue of the SSO in 2009. In the same letter the OFT asked Tesco to identify all of the potential witnesses it had contacted before or since the letter of 27 July 2011 and disclose all records of contacts between Tesco, its external solicitors and any potential witnesses.

24. This is the background against which the issues raised by the Application fall to be considered. At the hearing, however, counsel for the OFT confined (rightly in my view) the OFT's request to a list of the individuals contacted prior to the Decision of 26 July 2011 and production of notes of Tesco's discussions with those individuals. In my judgment, any discussions between Tesco or its external solicitors and potential witnesses after the Decision were and remain subject to litigation privilege (unless, of course, that privilege has been waived).

The issues for the Tribunal

25. Most of the parties' submissions at the hearing were directed to the possible application and waiver of litigation privilege. As counsel for Tesco pointed out, however, the first issue is whether I should order the disclosure sought by the OFT. The issues which I have to consider and the positions of the parties in outline were as follows:

    (a) Is the disclosure sought by the OFT relevant, necessary and proportionate to determine the issues before the Tribunal? The OFT's case was that disclosure was relevant to the issues to be determined as well as necessary and proportionate for its proposed cross-examination of witnesses of fact called by Tesco. Tesco submitted that the OFT had not identified any proper basis for disclosure.

(b) In the event of an order for disclosure, was the relevant material subject to litigation privilege? The OFT submitted that the answer is plainly 'no', whereas Tesco was equally emphatic that the answer should be 'yes'.

(c) If the relevant material is subject to litigation privilege, has that privilege been waived? The OFT's position was that Tesco had indeed waived its right to resist an order for disclosure, whereas Tesco denied this.

Should the Tribunal order disclosure of the potential witness materials?

26. Counsel for the OFT submitted that the disclosure sought by the OFT should be ordered for three reasons, namely (1) the material in question is relevant to matters in issue in the appeal and may affect the credibility of the version of events given by Tesco's witnesses, (2) disclosure is necessary for the purposes of cross-examination of Tesco's witnesses, and (3) disclosure would be proportionate as the OFT's request is narrowly confined and would not impose a great burden on Tesco.

27. In response counsel for Tesco submitted that the OFT had failed to establish why this material is relevant or necessary to the issues to be determined for four reasons, namely (1) it is not sufficient for the OFT to seek such material merely to test the credit of those witnesses on whose evidence Tesco relies, (2) the OFT had every opportunity to approach directly the relevant witnesses in this case, (3) the Defence stated that there is no need for the OFT's case to be amplified by any further material, and (4) there is a presumption against allowing a respondent to adduce new evidence.

28. The OFT is seeking disclosure of notes of discussions between Tesco and/or its external solicitors and potential witnesses so that those notes might be deployed to cross-examine the witnesses called by Tesco (hereafter "the Potential Witness Material"). My judgement is that disclosure of the Potential Witness Material would not be consistent with the overriding objective in rule 19 of the Rules to deal with this appeal justly. Further, the documents sought are neither necessary nor proportionate to the issues before the Tribunal in this appeal.

29. First, I consider that using the Potential Witness Material for the purpose of cross-examination is likely to be unfair and unhelpful. The OFT intend to use the material to test the evidence of a witness called by Tesco, presumably in an attempt to identify inconsistencies or ambiguities in the account given by that witness. If the live witness maintains his or her version of events in the witness box, then it would be impossible for the Tribunal to draw any conclusion about his or her truthfulness from the fact that their version appears to contradict the recollection of another individual who has not been called as a witness. This would be unfair to the live witness. It would also be unhelpful to the Tribunal as it would not be in a position to assess the credibility of the witness, giving evidence on oath, by reference to unsworn statements made by another individual.

30. A second point, which is related to the first, is that if the OFT wants to cross-examine on the basis of the Potential Witness Material, then it would need to adduce it properly as evidence in this appeal. This gives rise to a further problem in the present context. In my view it would be disproportionate at this late stage of the proceedings – the hearing is due to commence on 26 April – to permit the OFT to adduce some or all of the Potential Witness Material in evidence when no one had previously considered it to be relevant to the investigation or the appeal. It would be unfair now to expect an appellant to have to analyse how all the unused notes of their interviews with third parties affects their case. It would be too late to start having to assess the relevance and probative value of new evidence.

31. Third, I accept the submission of counsel for Tesco that the OFT should not be entitled to disclosure in respect of material going to the credit of its witnesses of fact (e.g. *Thorpe v Chief Constable of the Greater Manchester Police* [1989] 2 All ER 827). Counsel for the OFT tried to draw a distinction between seeking disclosure of material which might be used to question the credibility of a witness's version of events and disclosure of material to challenge whether a witness is truthful. It seems to me that this is a distinction without a difference. It is not necessary for a court to find that a person was lying in the witness box in order to have reservations about his or her version of events.

32. Fourth, I bear in mind that the OFT is defending this appeal on the basis of what it considers to be strong documentary evidence (see paragraph 22, above). The OFT has expressly stated that no amplification of this documentary evidence is required. That is presumably why it did not make its own inquiries and seek to contact any of the potential witnesses during the investigation or prior to filing the Defence. This being the case, it is not necessary for the OFT to seek to supplement its case by reference to the material sought in the Application.

33. My conclusion is that the OFT's application for disclosure should be refused. It is therefore not strictly necessary for me to express any view on the second and third issues raised by this Application. I shall however briefly express my conclusions on those issues, in deference to the submissions that have been made.

Are the notes of discussions between Tesco and potential witnesses prior to the Decision subject to litigation privilege?

34. The parties disagreed as to whether the communications between Tesco or its legal advisers and third parties from or around January 2011 to 26 July 2011, the date of the Decision, were subject to litigation privilege. Counsel for each party helpfully took me to various passages of a leading textbook on that subject: 10th edition of Hollander, *Documentary Evidence* (2009).

35. Litigation privilege exists because it is in the public interest that litigants should seek and obtain confidential advice in respect of actual or contemplated litigation. It is well-established that litigation privilege applies to confidential communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the dominant purpose of use in the conduct, or aid in the conduct, of actual or contemplated litigation. The general principles of litigation privilege were summarised by Lord Carswell in *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2004] UKHL 48 at paragraph 102:

> "The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated

> litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

36. The rationale behind litigation privilege was stated succinctly by Lord Rodger of Earlsferry in *Three Rivers (No.6)* at paragraph 52:

> "Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations. In the words of Justice Jackson in *Hickman v Taylor* (1947) 329 US 495, 516, 'Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary'."

Thus, litigation privilege is a right to lawfully withhold that evidence from other parties. It extends to notes of interview and proofs of evidence from potential witnesses for use in actual or prospective litigation: Hollander, *Documentary Evidence*, at paragraph 14-01. Both the information given and the identity of the person supplying it are privileged unless and until that privilege is waived.

37. The meaning of "litigation" was considered by the House of Lords in the case of *In re L (a minor) (Police Investigation: Privilege)* [1997] AC 16. Their Lordships held, by a majority, that litigation privilege could not be claimed in order to protect from disclosure a report prepared for use in non-adversarial care proceedings under Part IV of the Children Act 1989. Family law care proceedings were not to be regarded as "adversarial" in nature as they were not based upon the rights of the parents; rather they focused on a determination of the future welfare of a child. An order could, therefore, lawfully be made for the disclosure of that report to the police for the purposes of a criminal investigation. The essential reasoning of the majority can be found in the speech of Lord Jauncey of Tullichettle (with whom Lord Lloyd of Berwick and Lord Steyn agreed) who said at p. 26:

> "This raises the question of whether proceedings under Part IV of the Act are essentially adversarial in nature. If they are, litigation privilege must continue to play its normal part. If they are not, different considerations apply.

> I agree with Sir Stephen Brown P. [the then President of the Family Division] that care proceedings are essentially non-adversarial. Having reached that conclusion, and also that litigation privilege is essentially a creature of adversarial proceedings, it follows that the matter is at large for this House to determine what if any role it has to play in care proceedings … His report appears to have been based entirely on the hospital care notes and there is no suggestion that he had any communication with the mother. Accordingly, all the material to which he had access was material which was already available to the other parties … In these circumstances I consider that care proceedings under Part IV of the Act are so far removed from normal actions that litigation privilege has no place in relation to reports obtained by a party thereto which could not have been prepared without the leave of the court to disclose documents already filed or to examine the child … The better view is that litigation privilege never arose in the first place rather than that the court has power to override it. It is excluded by necessary implication from the terms and overall purpose of the Act. This does not of course affect privilege arising between solicitor and client."

38. Lord Nicholls of Birkenhead gave a powerful dissent, stating that litigation privilege should be extended to any proceeding which cannot be conducted fairly without its use, including child care proceedings. His Lordship noted that the unavailability of privilege in child care proceedings might breach Article 6 of the ECHR (which had not been incorporated into English law at that time). In his dissenting speech Lord Nicholls also sounded a note of caution against basing any such analysis simply on the distinction between "adversarial" and "inquisitorial" proceedings: [1997] AC 16, 31G-32D. In his Lordship's view:

> "In this context the contrast between inquisitorial and adversarial needs handling with care, for at least two reasons. First, the contrast suggests that proceedings are either wholly adversarial or wholly inquisitorial. They partake wholly of the one character or wholly of the other. This is not always so. Proceedings may possess some adversarial features and some inquisitorial features." (at 31H-32A)

39. This brings me to what is to my mind the threshold question on this part of the Application. By the time Tesco contacted potential witnesses from or around January 2011 to the date of the Decision on 26 July 2011, should the OFT's investigation be properly classified as adversarial, as opposed to merely investigative or inquisitorial? I have deliberately framed the question in this manner to focus on the particular facts of this case and not wider questions of principle which were not raised by the Application.

40. Counsel for the OFT submitted that the administrative procedure under the Act is investigative and non-adversarial in nature; litigation privilege is by necessary implication excluded. In that regard he relied on a statement in *Phipson on*

Evidence that competition investigations are not adversarial; on the fact that there is no equivalent of litigation privilege in the context of investigations by the European Commission; on an analogy between the care proceedings in *In re L* and administrative procedure under the Act; on the inquisitorial nature of what the OFT was doing in this case; and on the fact that the Act itself distinguishes between "legal proceedings" (in section 30) and "investigation" (in section 26). The OFT accepted that investigations must be fair and comply with the requirements of Article 6 of the ECHR; however those requirements did not transform investigations into "adversarial proceedings".

41. The passing observation in the 17th edition of *Phipson on Evidence*, which is not supported by authority, is with respect of no assistance in the present case. (I note that Charles Hollander Q.C. is the distinguished author of the relevant chapter in *Phipson on Evidence* and that the same observation appears in the 10th edition of Hollander, *Documentary Evidence*.) The reference to "competition investigations" as one of the examples of non-adversarial proceedings might be referring to market studies carried out by the OFT or, perhaps, market investigations under the Enterprise Act 2002. In my judgment, it should not be taken to characterise *all* competition law investigations as being inquisitorial in nature, irrespective of the nature of the proceeding in question and the particular circumstances of the case. I shall consider the particular features of the present case below.

42. The European Union case law on legal professional privilege is aptly summarised in paragraph 50 of the Commission's *Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU* (OJ 2011 C308/6). This does not take matters further for two reasons. First, it is concerned with legal advice privilege, not litigation privilege. Second, the Courts of the European Union do not appear to have considered whether or not litigation privilege exists in the context of an investigation by the European Commission.

43. So far as *In re L* is concerned, the majority of the House of Lords were concerned with the existence of litigation privilege in care proceedings. I do not accept the submission of counsel for the OFT that investigations under the Act are analogous to care proceedings under the Children Act 1989. At a high level of generality they

are, of course, both concerned with protecting different aspects of the public interest. It does not follow, however, that they should always be regarded as public interest inquiries which are (in the words of Hollander, *Documentary Evidence*, at paragraph 14-08) merely engaged in fact-gathering. In *LM v London Borough of Lewisham* [2009] UKUT 204 the Upper Tribunal noted in paragraph 29 that *In re L* did not hold that there is never any litigation privilege in care proceedings; their Lordships in *In re L* were careful to confine themselves to the facts of that case. Similarly, labelling as "inquisitorial" all investigations at all points under the Act, as the OFT sought to do, fails to take into account the nature of proceedings under the Act in a particular case. Proceedings may not be wholly adversarial or wholly inquisitorial. In *LM v London Borough of Lewisham* the Upper Tribunal referred to judicial review proceedings as being sufficiently adversarial in nature to attract litigation privilege. This is so even though judicial review proceedings do not, in theory, involve a *lis inter partes* and are issued in the name of the Crown to request the High Court to exercise its supervisory jurisdiction.

44. In his dissenting speech in *In re L* Lord Nicholls stated that "the expression adversarial carries with it a connotation of confrontation and conflict": [1997] AC 16, at 31G. In my judgment the proceedings in this case were confrontational by the time Tesco began collecting the Potential Witness Material in early 2011. By then, the OFT had issued an SO and an SSO, both of which proposed to find that Tesco had infringed the Chapter I prohibition; the investigation was not simply an inquiry to get to the bottom of the facts. Tesco stood accused of wrongdoing. As noted above, Tesco was contesting the OFT's proposed decision that the Chapter I prohibition had been infringed. By this point the character of the administrative procedure was no less confrontational than ordinary civil proceedings involving the same alleged infringements.

45. Further, the OFT was about to decide Tesco's liability under the Act. The outcome of the procedure in this case was by no means certain, but there was a serious risk that Tesco could be found liable for infringing the Act and be fined up to a maximum of 10 per cent of worldwide turnover of the infringing undertaking and be potentially liable in damages. As already noted, it was common ground that the procedure whereby a fine is imposed for a breach of the Chapter I prohibition falls

under the 'criminal head' of Article 6 of the ECHR. I accept the submission of counsel for the OFT that the fact that Tesco's Article 6 rights were engaged does not automatically mean that litigation privilege applies. But it is a factor which is relevant to characterising the nature of the investigation.

46. In these circumstances I consider that the administrative procedure under the Act was sufficiently adversarial by the time Tesco contacted third party witnesses that the Potential Witness Material it gathered was subject to litigation privilege. In reaching this conclusion I also bear in mind the following dictum of Lord Nicholls in *In re L* [1997] AC 16, at 31H-32C:

> "At bottom, the answer to the present question turns on what are the requirements of procedural fairness in the conduct of family proceedings.
>
> …
>
> Fairness is a universal requirement in the conduct of all forms of proceedings, inquisitorial as much as adversarial, although the requirements of fairness vary widely from one type of proceedings to another. The requirements of fairness depend upon matters such as the nature of the proceedings, the subject matter being considered, the rules governing the conduct of the proceedings, the parties involved, the composition of the tribunal, and the consequences of the decision."

Given the seriousness of allegations against it and the potential consequences I have described above, a fair procedure included the right to present its case and to gather evidence and, as a corollary, litigation privilege applied to its contacts with third party witnesses and the Potential Witness Material.

47. I do not think it necessary to refer to other points made in the course of the hearing, as none of them affect my conclusion. For the above reasons, I am satisfied that the Potential Witness Material is subject to litigation privilege. In the absence of waiver of privilege by Tesco, the identity and other details of Tesco's contacts with potential witnesses must be kept confidential and cannot be made the subject of evidence. I should say that I do not regard my conclusion as breaking any new ground. As counsel for Tesco observed at the hearing, it seems to me likely that both legal advice privilege and litigation privilege have routinely been claimed and probably never challenged in relation to similar or analogous investigations under the Act. Were it otherwise, the scope for witnesses being discouraged and unfairness would surely be increased.

Has there been a waiver of privilege?

48. The OFT submitted that notes of interviews and/or witness statements from Mr Thomas Ferguson and Mr James McGregor, respectively National Account Controller and Sales Director of Lactalis McLelland Ltd ("McLelland") at the material time, should be disclosed even if initially privileged for two reasons. First, Tesco waived any litigation privilege by relying on what is said in paragraph 3 of the second witness statement dated 18 May 2011 of Mr Alistair Irvine, joint owner and joint Managing Director of McLelland at the time. This was one of the documents enclosed with Freshfields letter of 27 July 2011. Second, the OFT contends that the letter of 27 July 2011 relied on communications that Tesco had with potential witnesses and there has accordingly been waiver of privilege.

49. Resisting the suggestion that privilege had been waived, counsel for Tesco pointed out that Tesco had neither deployed nor relied on any of the communications that it had with potential witnesses, other than those from whom Tesco has submitted witness statements. The mere reference to the notes of interviews with potential witnesses was not sufficient to constitute a waiver of privilege.

50. The law relating to waiver of privilege was expounded by the Employment Appeal Tribunal in *Brennan v Sunderland City Council* [2009] ICR 479. In the course of a careful judgment Elias J (as he then was) reviewed the authorities cited to him and observed as follows:

> "63 … In our view the fundamental question is whether, in the light of what has been disclosed and the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material. The court must not allow cherry picking, but the question is: when has a cherry been relevantly placed before the court?
>
> 64 Typically, as we have seen, the cases attempt to determine the question whether waiver has occurred by focusing on two related matters. The first is the nature of what has been revealed; is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed; has it simply been referred to, used, deployed or relied upon in order to advance the party's case? …
>
> 65 … Plainly the fuller the information provided about the legal advice, the greater the risk that waiver will have occurred. But we do not think that the application of

> the waiver principle can be made to depend on a labelling exercise, particularly where the categories are so imprecise. The concepts shade into each other, and do not have the precision required to justify their employment as rigid tests for defining the scope of waiver.
>
> 66 Having said that, we do accept that the authorities hold fast to the principle that legal advice privilege is an extremely important protection and that waiver is not easily established. In that context something more than the effect of the advice must be disclosed before any question of waiver can arise.
>
> 67 However, in our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities in England strongly support the view that a degree of reliance is required before waiver arises, but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available. A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question whether fairness requires full disclosure."

51. The 10th edition of Hollander, *Documentary Evidence*, reminds me at paragraph 19-09 that the approach of Elias J was followed by Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless* [2009] EWHC 1437.

52. I have concluded that waiver has not occurred and that fairness does not require the Potential Witness Material to be disclosed. Turning to the first source of alleged waiver, the Freshfields letter to the OFT dated 27 July 2011 (quoted in paragraph 20, above). The OFT submitted that Tesco did not merely state that contacts had taken place as it claimed that:

> "All of the individuals who were prepared to speak to us corroborated Tesco's case."

53. It seems to me that this cursory reference is far from sufficient for waiver to have occurred. The letter does not state what the unidentified individuals had said or in what ways their views corroborated Tesco's case. Nor does it provide a summary of the respective accounts given by the potential witnesses. Moreover, the comment that the unidentified individuals corroborated Tesco's case was not something Tesco was relying on because it was not submitting witness statements from them. It follows that Tesco itself cannot later rely on any alleged corroboration of its case

from the potential witnesses it contacted. I therefore do not consider that any privilege in the Potential Witness Material was waived.

54. The second alleged source of waiver of privilege was said to be Mr Irvine's second witness statement (which was annexed to the Notice of Appeal). That statement sought to correct Mr Irvine's recollection of who had attended a meeting at Tesco's offices in Cheshunt on 6 October 2003. Mr Irvine now says that Mr Ferguson of Lactalis McLelland did not attend that meeting. Mr Irvine indicates that this correction to his earlier evidence was made on the basis of interviews (conducted by Tesco) with Mr McGregor and Mr Ferguson himself, both of whom indicated that Mr Ferguson did not attend that meeting. The OFT submitted that the material in respect of which privilege has been waived are notes of interviews or witness statements Tesco has from Mr McGregor and Mr Ferguson. The OFT's case was that it was entitled to explore why Mr Irvine has changed his evidence on this point.

55. Although the OFT's case on this point is certainly arguable, I have not in the end been persuaded by it. First, the issue in respect of which disclosure has been made is whether Mr Ferguson attended the meeting on 6 October 2003. Tesco has therefore waived privilege in such parts of the interview notes with Mr Ferguson and Mr McGregor in relation to that issue. Further disclosure is necessary if it avoids unfairness or misunderstanding of what has been disclosed: see *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 158, per Mann J at [11]. This is known as the "cherry-picking" principle. I do not consider that Tesco has "picked cherries" from the notes of interviews of Mr McGregor or Mr Ferguson. There is no basis for saying that the partial disclosure of these notes of interview is misleading or that Tesco has deployed or relied upon those notes unfairly in this appeal.

56. In addition, it seems to me that the purpose of Mr Irvine's second witness statement was simply to save time at trial. Had that statement not been filed, Mr Irvine would have needed to correct his first statement as part of examination in chief at the hearing. Should the OFT wish to ask Mr Ferguson questions about who attended the meeting on 6 October 2003 it can do so. Whilst that meeting is referred to in paragraph 147 of the Notice of Appeal, it does not seem to me that Tesco has

sought to rely on the content of its interviews with Mr McGregor or Mr Ferguson in support of its arguments about what happened at that meeting. That being so there has been no waiver of privilege (beyond Tesco's interviews with Mr McGregor and Mr Ferguson about the fact that Mr Ferguson did not attend the meeting).

57. For those reasons I am not persuaded that there has been a waiver of privilege beyond the partial reliance on privileged material to indicate that Mr Ferguson did not attend a meeting between McLelland and Tesco on 6 October 2003.

Conclusion

58. For the reasons given, I order that:

    (a) Pursuant to rules 19(1) and 19(2)(k) of the Rules, the Application be refused.

    (b) Pursuant to rule 55(3) of the Rules, the OFT pay Tesco its costs of the Application, such costs if not agreed to be assessed on the standard basis by a costs officer of the Senior Courts Costs Office.

59. I should like to express my appreciation to all counsel and their respective legal teams for co-operating with the Tribunal so promptly and for their helpful written and oral submissions.

Lord Carlile of Berriew Q.C.

Charles Dhanowa
Registrar

Date: 20 March 2012

ANNEX TO JUDGMENT OF 20 MARCH 2012

GLOSSARY OF TERMS

The parties to the appeals	
The Appellants/Tesco	Tesco Stores Limited, Tesco Holdings Limited and Tesco Plc
OFT	The Respondent to the appeal, the Office of Fair Trading
Other parties to the investigation	
Arla	Arla Foods Limited and Arla Foods UK Holding Limited
Asda	Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited
Dairy Crest	Dairy Crest Limited and Dairy Crest Group Plc
Glanbia	The Cheese Company Limited, Waterford Foods International Limited, Glanbia Investments (UK) Limited and Glanbia (UK) Limited
McLelland	Lactalis McLelland Limited
Safeway	Safeway Stores Limited, Safeway Stores Group Limited and Safeway Limited
Sainsbury's	Sainsbury's Supermarkets Limited and J Sainsbury Plc
Wiseman	Robert Wiseman & Sons Limited and Robert Wiseman Dairies Plc
The Decision under challenge	
Decision	The decision in Case CE/3094-03, dated 26 July 2011, taken by the OFT
The Application to be determined	
The Application	The OFT's application for disclosure for the provision of information about Tesco's contacts with potential witnesses and for disclosure of any records of discussions with those individuals from/or around January 2011 to 26 July 2011
Legislative provisions	
TFEU	Treaty on the Functioning of the European Union
The Chapter I prohibition	The prohibition contained in section 2(1) of the Act
The Act	The Competition Act 1998 (as amended)
ECHR	The European Convention on Human Rights and Fundamental Freedoms
The Rules	The Competition Appeal Tribunal Rules 2003 (SI 2003/1372)