



**IN THE COMPETITION
APPEAL TRIBUNAL**

Case Nos: 1587/1/12/23

BETWEEN:

SQUIBB GROUP LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

ORDER

UPON the notice of appeal filed by the Appellant (“**Squibb**”) on 22 May 2023 against the CMA’s Decision of 23 March 2023 in Case 50697 - “*Supply of demolition and related services*” (the “**Decision**”)

AND UPON reading the letter from Begbies Traynor (London) LLP dated 15 January 2024 in relation to Squibb’s appeal

AND UPON reading the submissions from the Respondent (the “**CMA**”) dated 26 January 2024

AND UPON the Squibb appeal having been ordered to be heard jointly with the appeal in case 1588/1/12/23 *Keltbray Limited & Keltbray Holdings Ltd v Competition and Markets Authority*

(the “**Keltbray appeal**”) and (i) the pre-trial review (the “**PTR**”) having been listed for hearing on 26 March 2024; and (ii) the main hearing of the appeals listed to commence on 25 April 2024 (the “**Trial**”)

IT IS ORDERED THAT:

1. Squibb shall notify the Tribunal by 4pm on 27 February 2024 either:
 - (a) That it seeks the permission of the Tribunal to withdraw its appeal under Rule 13 of the Competition Appeal Tribunal Rules 2015 (“**Tribunal Rules**”); or
 - (b) That it intends to pursue its appeal and will attend the PTR and Trial.
2. If Squibb seeks permission to withdraw its appeal, it may also file written submissions as to the terms on which such permission should be granted, such submissions to be filed together with the notification provided pursuant to paragraph 1(a) above. If such submissions are filed, Squibb shall confirm whether it agrees that the issue may be determined on the papers, or whether it seeks an oral hearing.
3. If Squibb intends to pursue its appeal it shall file, together with the notification provided pursuant to paragraph 1(b) above, its proposed draft directions to trial.

REASONS

1. By way of background, these proceedings relate to an appeal by Squibb against the Decision. Keltbray Limited, and Keltbray Holdings Limited (together “**Keltbray**”) also appealed against the Decision. By an order dated 26 June 2023 the CMA was granted permission to file a consolidated Defence dealing with both the Squibb and Keltbray appeals. At the case management conference on 4 October 2023, it was ordered that the Squibb and Keltbray appeals be heard together, and directions were given leading up to the Trial.
2. On 4 December 2023, Squibb was wound up by the High Court. On 14 December 2023, TupperS Law (Squibb’s solicitors) wrote to the Tribunal to inform it that Mr Beake and

Mr Shankland of Begbies Traynor (London) LLP had been appointed as liquidators, and that their engagement in relation to the appeal had been terminated, as had that of Squibb's counsel and expert witnesses. TupperS Law informed the Tribunal that they did not have instructions to apply for withdrawal of the appeal. On 5 January 2024, on the application of the CMA, the Tribunal stayed the outstanding directions to trial in relation to Squibb's appeal, and ordered that any outstanding matters relating to the Squibb appeal shall be considered at the PTR.

3. On 15 January 2024, Squibb's joint liquidators wrote to the Tribunal explaining that there are presently no funds in the liquidation to fund the continuation of the appeal, and that it would not be appropriate to take any action in relation to the appeal, as any monies used for this purpose may not benefit unsecured creditors and would potentially reduce the amount otherwise available to preferential creditors. The liquidators indicated that they would not be able to attend the PTR, and would not be able to take part in these proceedings. The liquidators went on:

“Given that the proceedings have advanced to this stage and taking account of the information provided by the Company and its advisors prior to our appointment, we feel it would be inappropriate for us to take the step to actively withdraw the Company's appeal, on the basis that, if you have sufficient information to make a decision on the appeal at this stage, then we may be seen to be taking a step which increases the quantum of the Company's total creditors. However, we are also cognisant of the fact that we cannot take part in these proceedings because of the reasons set out above as well as us not having been involved with the Company at the time for the alleged offence.

If you feel we must either proceed with the appeal or actively withdraw it, we will have no choice but to confirm that the appeal should be withdrawn.”

The liquidators indicated that they would “*welcome the Tribunal's guidance as to the steps which should be taken*”.

4. The Tribunal invited submissions from the CMA. In summary, the CMA submits (1) that Squibb's appeal cannot be fairly or effectively determined simply on the information provided by Squibb to date; and (2) that Squibb's appeal needs to be disposed of, and not simply stayed, for reasons of legal certainty. The CMA seeks an order requiring the

liquidators to make their intentions in relation to this appeal clear, and to confirm whether or not they seek permission to withdraw the appeal, or whether they intend to participate at the PTR and at Trial. I have been invited by the CMA to determine their application on the papers. I have received no objection from the liquidators to this course, perhaps unsurprisingly given the stance taken in their letter.

5. In relation to the first point, the CMA submits that in practice Squibb is asking the Tribunal to exercise its case management powers under Rule 19 of the Tribunal Rules to proceed to hear Squibb's appeal in its absence. Under Rule 2(2), Rule 19 must be interpreted and applied in accordance with the governing principles set out in Rule 4. Those principles include ensuring that each case is dealt with justly and at proportionate cost (Rule 4(1)). That involves ensuring that the parties are on an equal footing (Rule 4(2)(a)); saving expense (Rule 4(2)(b)); dealing with the case in ways which are proportionate to the importance of the case and complexity of the issues (Rule 4(2)(c)(ii); (iii)); ensuring that it is dealt with expeditiously and fairly (Rule 4(2)(d)); allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases (Rule 4(2)(e)); and enforcing compliance with the Tribunal Rules, and any order or direction of the Tribunal (Rule 4(2)(f)). Rule 4(4) requires the Tribunal to actively manage cases, and that includes adopting fact-finding procedures that are most effective and appropriate for the case and planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument (Rule 4(5)). The Tribunal may dispense with the need for the parties to attend any hearing (Rule 4(6)).
6. The CMA does not consider that it would be possible to have a just, fair or effective trial of the issues raised by the Squibb appeal by having a hearing based on the material currently before the Tribunal. This is for a number of reasons: first, whilst expert reports have been filed, the joint meeting of experts prior to trial that has been ordered would not take place, and nor would there be a joint report. Neither of Squibb's experts would be instructed to attend for cross-examination. Secondly, whilst factual evidence has been filed by Squibb, it does not appear that the witnesses would attend for cross-examination. Thirdly, Squibb does not intend to instruct any legal representative to prepare for and attend

the trial. It follows that the directions for skeleton arguments would not be complied with. As matters stand, no Reply has been served in response to the CMA's Defence or in response to the CMA's evidence. As such, Squibb would be inviting the Tribunal to proceed without knowing Squibb's response to the points made by the CMA, and without hearing argument from Squibb's Counsel on either the facts or the legal points. The CMA submits that these are insurmountable obstacles to a fair trial, or the just disposal of the issues.

7. The CMA has also drawn my attention to the fact that, whilst the Keltbray appeal has been listed to be heard at the same time as the Squibb appeal, the points raised in each appeal are largely different. In particular, whilst both Squibb and Keltbray challenge the penalty imposed by the Decision, Keltbray does not challenge the CMA's finding of infringement, whereas Squibb does. The CMA also submits that Squibb's appeal raises points of wider significance for the application of the Chapter I prohibition in section 2(1) of the Competition Act 1998 ("the 1998 Act"), such as whether there is a legal requirement to define relevant markets for the purposes of finding a "by object" infringement, and whether the practice of "cover pricing" should properly be regarded as such an infringement. Even as regards penalty, whilst both Squibb and Keltbray challenge the penalty imposed, the points they each make regarding how the CMA is alleged to have erred are different.
8. The CMA also submits that it should not be put to the significant and additional costs of defending against an appeal in circumstances where there are doubts as to whether the CMA will be able to recover those costs if the appeal is dismissed.
9. I agree with the CMA. It is difficult to see how the trial of this appeal could be conducted fairly, or the issues determined justly, in the absence of the appellant, Squibb. The parties will not be on an equal footing if the CMA is required, in practical terms, to anticipate and articulate Squibb's arguments for it at trial, and then meet those arguments as best it can. The Tribunal has given directions as to what is required for this trial to be heard expeditiously and fairly, and this includes the participation of both parties and, for example, meetings of both parties' experts, the provision of a joint expert report, and the filing of

factual evidence by both parties. If those steps were not required to ensure a fair trial the directions requiring them to be taken would not have been sought by the parties, or made by the Tribunal. It is unfair to the CMA if Squibb's evidence (factual and expert) cannot be tested in cross-examination. The fact that the CMA's evidence will also not be subject to cross-examination (because there will be no-one there to ask questions for Squibb) is obviously no answer. That simply underlines the unreasonable and wholly unsatisfactory nature of the exercise that Squibb's suggestion would entail. The Tribunal would be faced either with having to determine the matter on the basis of Squibb's and the CMA's unchallenged evidence without the differences between them having been properly explored and tested, or having to descend into the arena to test the CMA's evidence itself, whilst being unable to conduct a similar exercise with Squibb's own witnesses and experts. This to underlines the fundamental unfairness of Squibb's suggestion to the CMA, and the invidious position the Tribunal would find itself in should Squibb's proposal be accepted.

10. The Tribunal will not, therefore, proceed to determine Squibb's appeal on the basis of the information currently filed.
11. The question that then arises is what should happen to the appeal? The CMA has referred to section 46(4) of the 1998 Act which provides that "*Except in the case of an appeal against the imposition, or the amount of a penalty, the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates*". Squibb is appealing both the imposition and amount of the CMA's £2m penalty. The CMA submits that the effect of the appeal is to suspend the effect of the penalty imposed by the Decision. Until the appeal is resolved, the CMA re unable to enforce the decision, or resolve issues of costs. Such a state of uncertainty is plainly unsatisfactory, whether or not there is in fact any realistic prospect of payment given Squibb's financial position.
12. The liquidators have indicated that if the Tribunal is not prepared to determine the appeal on the basis of the documents filed to date, and without Squibb's future participation, then they "*will have no choice but to confirm that the appeal should be withdrawn*". The CMA has submitted that Squibb's appeal could be struck out now given that is the liquidators'

position. However, sensibly, the CMA has also proposed that I exercise the Tribunal's case management powers and formally put the liquidators to their election in relation to this appeal. I agree. I am not unsympathetic to the situation that the liquidators find themselves in. However, it is unsatisfactory for this situation to continue. A stay is not a satisfactory option given the uncertainty that that then presents in terms of the suspension of the effect of the Decision. I will make an order requiring the liquidators to make Squibb's intentions clear.

Bridget Lucas KC
Chair of the Competition Appeal Tribunal

Made: 20 February 2024
Drawn: 20 February 2024