



[2003] CAT 12

Case No. 1008/2/1/02

COMPETITION APPEAL TRIBUNAL

Royal Courts of Justice
LONDON

Monday, 9th June 2003

PANEL:

The President, Sir Christopher Bellamy, QC
(Chairman)
Mr Peter Clayton
Mr Peter Grant-Hutchinson

Claymore Dairies Ltd & Express Dairies Plc
(Applicant)

-v-

The Director General of Fair Trading
(Respondent)

Robert Wiseman Dairies plc
(Intervener)

MR NICHOLAS GREEN, QC (instructed by Messrs Ashurst Morris
Crisp) appeared on behalf of the Applicant.

MR GEORGE PERETZ (instructed by the Treasury Solicitor)
appeared on behalf of the Respondent.

MR JAMES FLYNN, QC (instructed by Messrs Herbert Smith)
appeared on behalf of the Intervener.

(Transcript of the Shorthand Notes of Harry Counsell & Co,
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J U D G M E N T
(Confidentiality)

1 THE PRESIDENT: We have been dealing this afternoon in a case
2 management conference with the issues of confidentiality
3 which arise from an order made by this Tribunal on 27th
4 March 2003 in this case, in which Claymore Dairies Ltd &
5 Express Dairies Ltd seek relief against the Director
6 General of Fair Trading.

7 The brief background is that by a letter of 9th
8 August 2002 the Director-General rejected a complaint
9 made by Claymore & Express to the effect that Robert
10 Wiseman Dairies was abusing a dominant position, contrary
11 to the Chapter 2 prohibition of the Competition Act 1998.

12 At an initial stage the Director contested Claymore &
13 Express's contention that he had made a decision that was
14 appealable to this Tribunal under the 1998 Act. On 18th
15 March 2003 the Tribunal ruled that the Director had taken
16 a decision that was appealable to this Tribunal.

17 In the further order to which I have just referred
18 of 27th March 2003, the Tribunal directed the Director to
19 file a witness statement explaining in more detail the
20 reasons for the decision that he had taken on 9th August
21 2002. The Tribunal's order required the Director to
22 exhibit to that witness statement such voluntary
23 disclosure from his file as he may be advised to make,
24 explaining the reasons for his decision, notified to the
25 applicants by the letter of 9th August 2002.

26 In due course, Mr Lawrie, who is a senior official
27 at the Office of Fair Trading filed a witness statement
28 that is dated 16th May 2003. That is a statement of some
29 30 pages which sets out in some detail the investigation
30 of the Claymore-Express complaint that the OFT had
31 undertaken and the reasons for the OFT arriving at the
32 conclusion that the evidence to prove an infringement of
33 the Chapter 2 prohibition was insufficient.

34 That witness statement exhibits a large number of
35 exhibits that include various documents supplied to the
36 OFT during the investigation, including documents
37 originating from Wiseman, as well as various compilations
38 by way of graphs, maps and tables of the results that the
39 OFT arrived at in the investigation. That witness

1 statement in its full form has been supplied to the
2 Tribunal. However, as far as the applicant in this case,
3 Claymore-Express is concerned, what has been supplied to
4 them is a redacted version of the witness statement which
5 excludes various matters, including various pages of the
6 annexes for which commercial confidentiality is claimed,
7 principally by Robert Wiseman.

8 The applicants now seek in effect disclosure of the
9 matters that have been redacted from Mr Lawrie's
10 affidavit and its exhibits, and they also seek further
11 documents which they say underlie the conclusions the OFT
12 has reached. They infer the existence of those further
13 documents from the contents of Mr Lawrie's affidavit.

14 The suggestion that the applicants have made, by a
15 letter of 5th June 2003, is that the matters redacted
16 from Mr Lawrie's affidavit and further documents should
17 be disclosed to the applicants on the basis of a
18 restricted "confidentiality ring". This ring should
19 include named external advisers to Claymore-Express -
20 that is to say, counsel and various members of Ashurst
21 Morris Crisp who act for Claymore-Express - it should
22 further include representatives of Ernst & Young, not
23 from the audit department but from the corporate finance
24 consultancy side of Ernst & Young and should also include
25 Mr John Price who is the company secretary of Claymore-
26 Express and is a barrister.

27 The various objections to that course of action can
28 be summarised as follows. First of all, Wisemans, the
29 intervener in this case, objects that the application is
30 premature. What should now happen, in effect, is that
31 Claymore-Express should plead its case in more detail
32 now, on the basis of the information that has been
33 disclosed to it, and that once that pleading is available
34 they should then make a further application for
35 disclosure of documents, and the Tribunal should at that
36 stage, in the light of the amended pleading, determine on
37 a document by document basis whether the need has been
38 demonstrated for the business confidentiality of the
39 documents to be overridden. The intervener, Wiseman,
40 further submits that there is no basis for any wider

1 disclosure at this stage. Objection is also taken to the
2 inclusion of Mr Price in the confidentiality ring
3 proposed.

4 The OFT, for their part, is not, as we understand
5 it, opposed in principle to the idea of a confidentiality
6 ring, but their position is that they have no objection
7 to disclosure if Wiseman has no objection either. Since
8 Wiseman does object, on the basis that I have just
9 indicated, the position of the OFT is one where at least
10 formally speaking they are not in a position to accede at
11 this stage to the suggestion of the confidentiality ring,
12 at least as we understand it.

13 Objection is also taken by the OFT to the disclosure
14 of documents that relate to third parties, that is to say
15 in particular to other suppliers known as Arla and ACC,
16 although in the case of Arla there is now an edited non-
17 confidential version of a particular meeting note that
18 the OFT had with Arla. The OFT objects to the disclosure
19 of any further documents, other than those annexed to Mr
20 Lawrie's exhibit, and also objects to the inclusion of Mr
21 Price in the confidentiality ring.

22 The OFT draws our attention in general to the
23 delicacy of this issue and the need for the OFT to, as
24 far as possible, encourage the disclosure of information
25 to it and not to give rise to the perception that
26 information disclosed in confidence to the OFT may, at
27 some later stage, become disclosed through the litigation
28 process or otherwise.

29 To those arguments the applicants, Claymore-Express,
30 reply essentially that it is extremely difficult for them
31 to plead their case in the absence of the material that
32 had been redacted from Mr Lawrie's exhibit and in the
33 absence of other underlying documents.

34 Broadly speaking, our approach to this matter is as
35 follows. There is, on the one hand, a public interest in
36 the exercise of litigation of this kind taking place with
37 as full disclosure as possible. We have already held
38 that there is a Decision in this case; Claymore-Express
39 as the applicants have the right to challenge that
40 decision under section 47 of the Act and, in order to

1 give effect to that right, is it necessary for them,
2 Claymore-Express, to understand the reasons for the
3 Director's decision.

4 In this case the Director has thought fit to give
5 his reasons in Mr Lawrie's affidavits and to support
6 those reasons with underlying material. Those being the
7 reasons that he gives, in principle it seems to us that
8 Express needs to have access to what the Director says
9 the reasons are to the fullest extent possible in order
10 to exercise their right of appeal. On the other hand,
11 Wiseman too has a legitimate interest in protecting its
12 business confidentiality, so the exercise that the
13 Tribunal is embarked on is an exercise essentially of
14 balancing these two interests. We also have to bear in
15 mind the interests of any third parties who are not
16 represented here today, the interests of the Director in
17 not exposing the administrative procedures to unforeseen
18 risk, and the general interest in not burdening the
19 litigation process with disclosure that is unnecessary or
20 unduly burdensome.

21 Balancing all those various considerations, in our
22 view, first, no serious objection is taken to the
23 principle of a confidentiality ring as such. That seems
24 to us in this case to be a sensible first step, with a
25 view to enabling Express-Claymore to frame its case on
26 this appeal or, more precisely, to amend the existing
27 case that it has already filed in ignorance of the
28 reasons that are now set out in Mr Lawrie's witness
29 statement.

30 As far as the composition of the confidentiality
31 ring is concerned, the Tribunal would wish at this stage,
32 as with these matters generally, to take the case forward
33 in stages, one by one. At this stage, and without
34 prejudice to any further ruling that the Tribunal may
35 make, we think the confidentiality ring should be limited
36 to the external legal advisers and accountancy advisers
37 of Claymore-Express. In excluding Mr Price from that
38 ring we make, of course, no personal criticism of him and
39 cast no aspersions whatever. It is simply at this stage
40 a matter of principle that we would wish to limit this

1 confidentiality ring to those external advisers whom we
2 have identified. We would suggest, and if necessary make
3 an order, that as far as the Ernst & Young component of
4 the ring is concerned that we should have identified to
5 us the named individuals, and those individuals should be
6 quite separate from and have nothing to do with the day
7 to day business of Claymore-Express or the audit of that
8 company. The general object of the exercise is that the
9 information that we are concerned with should be confined
10 to the legal advisers and accountancy advisers and should
11 not be used for any other purpose other than these
12 proceedings and should not be disclosed to any other
13 party, including any business executives of Claymore-
14 Express without the express authority of the Tribunal.

15 There may come a point later in this case where we
16 may need to consider further the composition of the
17 confidentiality ring and any specific applications that
18 may be made, but at this stage we think that the
19 confidentiality ring should be as limited as possible.

20 I will come back in a moment to the order of events,
21 which is perhaps one of the principal issues of the case
22 and deal first with other matters that arise. At this
23 stage, apart from the agreed non-confidential version of
24 the note of the meeting with Arla, we will exclude from
25 disclosure for the time being documents emanating from
26 third parties. The third parties are not here present
27 today, we have not had any submissions from the third
28 parties and it seems to us in principle right to exclude
29 those documents at this stage. If that gives rise to a
30 difficulty later on the part of Claymore-Express or
31 otherwise, then a further application on that particular
32 point should be made to the Tribunal.

33 Similarly, in our view at this stage, it is
34 premature for Claymore-Express to seek documents
35 underlying the documents that are annexed to Mr Lawrie's
36 witness statement. Many of those documents will raise
37 the question of whether they are "internal" documents and
38 thus protected from disclosure under the Director's
39 rules; in any event, as it seems to us at the moment,
40 this is not an occasion for the applicants to seek to

1 rework all the workings that the Director has made on the
2 basis of the original raw material supplied to him. The
3 primary purpose of this case is to identify whether the
4 Director has made any material error of law, whether he
5 has carried out a proper investigation, whether his
6 reasons are adequate and whether there are material
7 errors in his appreciation. It should not, at least
8 ordinarily, be necessary to go in great depth into the
9 underlying documents in order to establish whether any of
10 those points arise. Of course, we reserve for later
11 consideration any specific application we receive; at
12 this stage we are only dealing with the situation as it
13 is at the moment. As we see it at the moment, the
14 Tribunal should proceed by stages, and the stage has not
15 yet been reached where it has been shown in our judgment
16 necessary for documents other than those annexed to Mr
17 Lawrie's witness statement to be disclosed. So we
18 reserve our position on that point to await further
19 developments, if any.

20 We then come on to what has in fact turned out to be
21 the main issue that has been argued this afternoon,
22 namely whether the right course is for Claymore-Express
23 to be in some way amending their application on the
24 material that they have received, and then at a later
25 stage apply for further disclosure, or whether the right
26 course is that they should be given the underlying
27 documents in Mr Lawrie's witness statement now and given
28 that statement in its full version and should plead their
29 case on the basis of that.

30 Our view is that it would be better for that
31 disclosure to take place at this stage rather than at a
32 later stage in the case. We have looked at this matter
33 from two particular points of view which are: are the
34 matters (the documents) we have been discussing likely to
35 be relevant, and where is the balance in the public
36 interest in their disclosure? As far as relevance is
37 concerned, Mr Lawrie's witness statement is directed
38 towards giving the Director's reasons for his decision;
39 it seems to us difficult to argue that anything Mr Lawrie
40 says is irrelevant to the decision that the Director

1 reached. Similarly, the documents that are annexed to Mr
2 Lawrie's statement are the documents that the Director
3 voluntarily disclosed in elucidation or elaboration of
4 those reasons, in accordance with the Tribunal Order of
5 27th March 2003. Prima facie, at least, it is difficult
6 to say that that material is not relevant to the future
7 progress of this case.

8 As far as the public interest is concerned, there is
9 a public interest, as I said at the outset, in Claymore-
10 Express being able to pursue its appeal effectively.
11 There is also a public interest as to the protection of
12 confidential business information. In our judgment the
13 latter interest is at this stage protected by the narrow
14 confidentiality ring that we are prepared to accede to.
15 There is no question as we understand it of any of this
16 underlying material being disclosed commercially or to
17 any person who has commercial connections with either
18 party, except with the express authority of the Tribunal.

19 At the moment the material is to be disclosed to legal
20 advisers and accountancy advisers only for the express
21 purpose and the only purpose of prosecuting these
22 proceedings.

23 As to practicalities, we find it difficult to see
24 that however we proceed the issue of confidentiality can
25 be avoided. If we were to require Claymore-Express at
26 this stage to particularise their case more closely they
27 could no doubt make an effort to do so, but they would
28 still be faced with many blank pages in what the Director
29 has disclosed and we would almost certainly be faced, a
30 few weeks down the line, with a similar application to
31 the one we have been hearing today. Since Claymore-
32 Express does not know at this stage what is in the
33 documents that have been withheld it is inherently
34 difficult for them to particularise, except in general
35 terms, why it may need them.

36 We think from a practical point of view at the end
37 of the day costs will be saved and the case will proceed
38 more efficiently if disclosure is made on the limited
39 basis that we have suggested at this stage, being
40 limited, as I say, to documents annexed to Mr Lawrie's

1 affidavit which do not affect third parties.

2 Within the documents that fall within that
3 description, it does moreover seem to us that there is
4 still room for further protection for Wiseman if it is
5 absolutely insisted upon. For example, in relation to a
6 number of the exhibits of maps, graphs and tables, most
7 of the information is in aggregated form but there are
8 from time to time tables which include customer names.
9 It might be for consideration whether, if those customer
10 names were excluded, the underlying information would
11 none the less be useful from Express-Claymore's point of
12 view. On the other hand, we bear in mind that quite a
13 lot of the information that we have now relates to 2001
14 and is therefore at least two years old, if not older,
15 and we somewhat doubt whether this information is really
16 commercially sensitive at this stage, at least if it is
17 disclosed on the extremely limited basis that we have
18 indicated.

19 So we will leave open for the time being the
20 possibility that within these documents there are
21 individual items that Wiseman, in particular, may wish to
22 draw to our attention but, subject to that point, we
23 think that the documents annexed to Mr Lawrie's affidavit
24 fall to be disclosed to the confidentiality ring at this
25 stage. Exactly how that is done, the mechanics of any
26 order the Tribunal draws up, is a matter of technicality
27 which we will hear further argument on. That is the
28 approach that we propose to adopt to the issue of
29 confidentiality.

30 MR GREEN: We are grateful for that. Can i just say that so
31 far as excluding customer names is concerned, we would
32 have some concerns about that, not least because part of
33 the analysis that the accountants may wish to undertake
34 is to be able to identify the location and size of a
35 particular customer so that they can decide whether or
36 not Express-Claymore would have been targeting that
37 customer as a potential customer, and they may need to
38 know that in order to be able to carry out meaningful
39 analysis.

40 THE PRESIDENT: But they may or they may not.

1 MR GREEN: They may or they may not, yes.

2 THE PRESIDENT: So how do we leave that? I think we ought to
3 have a draft Order.

4 MR GREEN: Can we suggest that between the lawyers we put
5 our heads together and draft it?

6 THE PRESIDENT: I suggest you draft an Order for our
7 approval.

8 MR GREEN: We will send it to the Registrar. Mr Parr has
9 just asked me to clarify that which I think is clear,
10 that your order for disclosure includes the redacted
11 parts of the witness statement itself.

12 THE PRESIDENT: It does, save and in so far as it refers to
13 information from third parties.

14 MR GREEN: Yes.

15 THE PRESIDENT: Someone would have to check that.

16 MR GREEN: Someone would have to check that. There is one
17 other thing I would like to mention and it is really just
18 to make sure that it is not a problem. Whenever one gets
19 a ring like this, one always ends up asking one's client
20 for the factual information which one needs in order to
21 be able to understand the documents. As we understand
22 it, there can be no objection to that provided that
23 either expressly or by inference none of the information
24 in the witness statement or the exhibits are disclosed to
25 the client. It is simply a matter then of taking general
26 instructions about factual matters.

27 THE PRESIDENT: Yes. As we see it, in this sort of case the
28 documents in question remain in the custody of those in
29 the ring, they do not leave the offices of the relevant
30 lawyers or chambers. No copies are communicated to
31 anyone else, there may well be numbered copies made
32 available and there may be arrangements for returning
33 documents uncopied that turn out not to be material in
34 any issue in the case, and so forth.

35 MR GREEN: Those are the usual mechanics.

36 THE PRESIDENT: The usual mechanics can be left to the
37 drafting of the Order, I trust. Very well.

38 Should we discuss in outline a timetable for that
39 and form a view as to what the next stage is?

40 MR GREEN: I think it would be helpful to do that, Mr

1 Peretz mentioned a few moments ago that as far as they
2 were concerned they had no objection to us having six
3 weeks, but they would like six weeks to produce a
4 defence. I am neutral as to that, I do not have any
5 objection, but I think we will need some time, obviously,
6 to digest the material and take instructions from the
7 accountants.

8 THE PRESIDENT: Yes.

9 MR GREEN: So certainly we would need six weeks.

10 THE PRESIDENT: So the first stage is the disclosure to the
11 ring of what it has got not at the moment.

12 MR GREEN: Stage 1 is to agree the ring; Stage 2 is to
13 ensure disclosure. Notice of Application six weeks from
14 date of disclosure, and there should not be too many
15 problems with regard to that now, although they may have
16 third party issues to check so I will leave it to Mr
17 Peretz to sort that out, but that should not be too
18 difficult.

19 THE PRESIDENT: How long do we need to agree the ring and
20 consider whether there are still any internal redactions
21 and serve the stuff you have not got at the moment. Do
22 you need seven days, fourteen days?

23 MR GREEN: Shall we err on the side of caution just in case
24 the Office have difficulties with third parties.

25 THE PRESIDENT: we will say fourteen days for agreeing the
26 ring and disclosing. Then six weeks after that for an
27 amended Notice of Application, and I think probably that
28 is as far as we ought to go at this stage.

29 MR GREEN: We are in the Tribunal's hands as to what the
30 next steps are.

31 THE PRESIDENT: We could make an order about the defence, but
32 I think we would rather see the application and see where
33 we are and then carry on from there

34 MR PERETZ: We need to agree the terms of the Order within
35 that timetable.

36 THE PRESIDENT: Within that first fourteen days, yes.

37 MR GREEN: If we could simply include a liberty to apply
38 within the Order.

39 THE PRESIDENT: With all the Tribunal's orders there is a
40 general liberty to apply.

1 MR PERETZ: What I was envisaging is we would produce a
2 draft Order for the Tribunal and then disclosure would
3 follow immediately after that Order was made.

4 THE PRESIDENT: Yes.

5 MR PERETZ: As far as a defence is concerned, our only
6 concern is that on this timetable we are likely to hit
7 August which is not an easy month.

8 THE PRESIDENT: Let us leave it like it is because we will be
9 sympathetic to further applications for time to take
10 account of the vacation period and so forth.

11 We do not particularly envisage at this stage, Mr
12 Green, a very wide-ranging trawl into the underlying data
13 which one would not normally have if one had a decision,
14 ie one would take the decision as it was. But let us see
15 how we get on and it is obviously up to you to make
16 whatever applications you think fit.

17 MR GREEN: I do not think I really ought to comment.

18 THE PRESIDENT: Yes.

19 MR FLYNN: Not a matter for the Order, but just a point
20 perhaps for my learned friend to consider is that the
21 point of the confidentiality ring is that the information
22 is to be retained within the ring and not disclosed to
23 those running Express's business or advising them
24 generally on their business.

25 THE PRESIDENT: Yes.

26 MR FLYNN: Obviously, that information must not be disclosed
27 in any application as amended, so somehow or other that
28 is an issue that is going to have to be dealt with. I
29 raise it as a point, there is no point in having a
30 confidentiality ring and then the matter being published
31 in the application.

32 THE PRESIDENT: That is a bridge we will have to cross when
33 we get to it.

34 MR GREEN: It is either dealt with in that way or it is
35 produced in a redacted form for the client to see, but
36 obviously they cannot see anything which is confidential
37 simply because it is in a pleading, which would defeat
38 the purpose of the ring.

39 THE PRESIDENT: At some point, and it may affect both parties
40 or all three parties, those representing the various

1 parties have got to somehow take instructions on what
2 case it is they are to make, and a way of doing that has
3 to be devised somehow or other. Let us see how we get on
4 and, obviously, the more we can deal with it without
5 having to get into the details the better.

6 Is that sufficient for today, or are there other
7 points that people would like to raise?

8 MR GREEN: That is fine.

9 THE PRESIDENT: Thank you very much.

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