Neutral citation: [2006] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1061/1/1/06
1065/1/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

23 June 2006

Before:

Marion Simmons QC (Chairman)
Michael Blair QC
Vivien Rose

Sitting as a Tribunal in England and Wales

BETWEEN:

MAKERS UK LIMITED

Appellant

and

OFFICE OF FAIR TRADING

Respondent

and

PRATER LIMITED

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Aidan Robertson (instructed by DLA Piper Rudnick Gray Carey) appeared for Makers UK Limited

Mr Ben Rayment (instructed by Shadbolt & Co) appeared for Prater Limited.

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

Heard at Victoria House on 21 June 2006

RULING ON CONFIDENTIALITY

1. These two appeals brought under section 46(2) of the Competition Act 1998 ("the 1998 Act") arise from decision CA/98/01/2006 of the Office of Fair Trading ("the Decision"). That decision, which was issued on 22 February 2006, concerned collusive tendering for flat roof and car park surfacing contracts in England and Scotland. The OFT found that thirteen companies had been involved in infringements of the Chapter I prohibition contained in the 1998 Act in relation to their tenders for contracts for installing flat roofing. In this Ruling we adopt the abbreviations of the parties' names which are used in the Decision.

2. The appeal by Makers challenges both the finding of infringement and the level of the penalty imposed. The appeal by Prater relates only to penalty. Both Appellants focus their challenge on the element of the penalty which was imposed by the OFT in order to ensure that the amount of the penalty was sufficient to act as a deterrent to these and other companies from engaging in similar conduct in the future. The deterrence adjustment that the OFT makes when setting the fine takes place at Step 3 of the calculation described in the OFT's *guidance as to the appropriate amount of a penalty* (OFT 423, December 2004) ("*Guidance as to penalty*").

3. The Notice of Appeal lodged by Makers asserts that the OFT failed to give adequate reasons for how it applied its *Guidance as to penalty* and that the penalty arrived at was disproportionate. In particular, Makers complains that the OFT did not give any reasons why it applied an uplift of £520,000 at Step 3, alleging that this appears to be an arbitrary figure that is unrelated to Makers' turnover in any market and is not explained. Makers further asserts that its fine appears to be disproportionate and discriminatory when compared with the fine imposed for similar conduct on Coverite.

4. Prater challenges the penalty imposed by the Decision on the grounds that the fine is arbitrary and disproportionate and that inadequate reasoning has been given for the uplift at Step 3 of £275,000.

5. In the published version of the Decision, the total turnover figure for each of the addressees of the Decision is included. But in the section where the OFT explains

how it calculated the penalty imposed on each addressee, all the other figures except for the final amount of the fine have been excised. Among the figures excised is the relevant turnover of the addressees, that is to say their turnover in the market affected by the infringements for the year 2004.

6. In its Defences lodged in both appeals, the OFT explains how it arrived at the fines imposed on the appellants and on the other addressees. It does not, however, include the figures that it used and which the parties would need to see in order to consider how the OFT applied the methodology described in the Defence.

7. The first case management conference in the Makers appeal took place on 22 May 2006. At that hearing, Makers sought disclosure from the OFT of the figures used in its calculations of the penalties of the other addressees of the Decision. The OFT accepted that it was appropriate for Makers to be provided with this information but argued that since it was information confidential to the third party addressees, an Order of the Tribunal was needed before the information could be disclosed. The Tribunal considered that making such an Order was premature before having ascertained whether any of the other addressees objected to disclosure. The Order made by the Tribunal on that occasion therefore required the OFT to write to the other addressees of the Decision to request their consent to the disclosure of any information excised from the published version of the Decision relating to the calculation of the penalty for use in the proceedings before the Tribunal.

8. The OFT accordingly wrote to nine of the addressees seeking that consent. The OFT did not write to Makers or Prater since they were clearly already on notice of the proposed disclosure. The OFT considered that it was not necessary to write to two other addressees of the Decision (Pirie and Walker) since the methodology for calculating their fines was, for reasons set out in the Decision, different from that used for Makers and Prater.

9. The Registrar of the Tribunal also wrote to the addressees on 31 May 2006 stating as follows:

"At present neither the appellant nor any other addressee of the Decision has a complete picture of the methodology adopted by the OFT (except in their own particular case) since the turnover figures on which the calculations are based are excised in the published versions of the Decision, for reasons of business confidentiality.

When considering whether disclosure of relevant information excised in the decision should be made (as is requested by the appellant), the Tribunal applies the criteria set out in Schedule 4, paragraph 1 to the Enterprise Act 2002, a copy of which is enclosed. The Tribunal's view in similar previous cases, however, was that the proper conduct of the appeal required that the basis of the OFT's calculations should be fully transparent, and the Tribunal has in the circumstances of those cases ordered that this information be disclosed in the proceedings.

We understand that you have received a letter from the OFT pursuant to the Tribunal's Order of 22 May 200[6] (a copy of which is enclosed) requesting your consent to disclosure of this information.

The purpose of this letter, which I am sending to all addressees of the Decision, is to inform you that if you have any objection to the Tribunal making such an order in the present case, you are invited to send to me any written representations you may wish to make as to why the information is commercially confidential to your business by no later than **5.00pm** on **Monday 5 June 2006**; if you wish to make any oral representations either in addition to or in substitution for written representations, they will be heard by the Tribunal at a case management conference scheduled for **2.00pm** on **Tuesday 6 June 2006**.

I also enclose a copy of a letter sent today by [Makers'] legal representatives, DLA Piper Rudnick Gray Cary UK LLP, in which it is stated that the appellant would be content for such information to be disclosed only to its legal representatives and not to the appellant itself. Whilst that may be a practical way of resolving confidentiality concerns, at least at this stage, the Tribunal may not wish to proceed on that basis, particular it if may be necessary to refer to the information in a judgment for the purpose of explaining the reasons for its decision".

10. The case management conference scheduled to take place on 6 June 2006 was postponed until 21 June 2006 and the addressees were given a revised deadline for making their representations.

11. In its reply to the OFT, Coverite Limited (now in administration) consented to the disclosure of the figures without restriction. The other addressees either objected to disclosure or did not make it clear in their response whether they were

consenting to the disclosure of the hitherto excised information. None of the addressees indicated that they wished to make oral representations.

12. The postponed second case management conference in the Makers appeal and the first case management conference in the Prater appeal took place on 21 June 2006. In its written submissions served in advance of the hearing, Prater stated

> "Prater would also request that it be provided with any confidential turnover figures or other information which are made available to Makers in connection with its appeal. Like Makers, Prater is prepared to accept receipt of such information on a "lawyers only" basis. The information is considered necessary as the OFT is likely to have reference to it in defending its methodology in setting penalties in the decision…"

13. In its submissions, Makers asked the Tribunal to order disclosure of all the penalty calculations set out in the Decision. At the hearing Makers and Prater indicated that they were prepared to agree to disclosure of the confidential information being limited, for the time being, to a "confidentiality ring" made up of the parties' external advisers. Both Makers and Prater agree to their own figures being disclosed without restriction.

14. The Tribunal considers that the information which forms part of the calculation of the penalty for each of the addressees and which has been excised from the published version of the Decision is relevant evidence in both of these appeals as to the level of the fines imposed. However, having regard to the responses received from the addressees (other than Coverite), the Tribunal must balance those responses against the public interest in the administration of justice.

15. The situation regarding confidentiality, as it affects the Tribunal, is essentially governed by paragraph 1(2) and (3) of Schedule 4 to the Enterprise Act 2002. That provides as follows:

> "1(2) In preparing [the final decision or judgment] the Tribunal shall have regard to the need for excluding so far as practicable-
>
> (a) information the disclosure of which would in its opinion be contrary to the public interest;

(b) commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates;
(c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests.

(3) But the Tribunal shall also have regard to the extent to which any disclosure mentioned in sub-paragraph (2) is necessary for the purpose of explaining the reasons for the decision."

16. As the Tribunal made clear in *Umbro Holdings Ltd v Office of Fair Trading* [2003] CAT 26, although the statutory provision deals only with what is to be included in the Tribunal's judgment, the same principles apply to the protection, during the appeal proceedings, of information that is likely to be regarded as confidential. This is subject, of course, to the overriding requirement of ensuring that the appeal proceedings are fair.

17. The addressees have not explained why disclosure of the figures might significantly harm their legitimate business interests other than by stating in broad terms that the turnover figure for the particular company activity might enable competitors to gain a deeper insight into their strategy and business plan. We note that such information becomes less sensitive with the passage of time and that Makers, Prater and Coverite have not objected to unrestricted disclosure.

18. At the present stage of these proceedings it is inappropriate for us to determine whether these figures should be excluded from the Tribunal's final judgment. However, since we consider that the evidence is relevant to the issues before us in this appeal we have decided that disclosure of the excised information should take place for the time being on a limited basis as described below. This approach will allow the parties to present their submissions and at the same time avoid prejudicing any such future determination. We consider that such an approach ensures that the proceedings are fair to the parties while avoiding any risk of prejudice to the addressees.

19. The OFT has indicated that it will prepare a schedule setting out for each of the addressees the calculation by which it reached the final penalty figure. This calculation will necessarily involve both the total turnover figure, which is already

in the public domain and is relevant to Step 3, and the relevant turnover figure which is not in the public domain and which is used in Step 1.

20. In order that the excised third party information other than that relating to Coverite is kept confidential, the Tribunal has decided that the OFT should be ordered to draw up two schedules; Schedule A will set out the calculations of penalties showing the total turnover and final penalty figures already disclosed in the published version of the documents. It will also include the other figures relating to Makers, Prater and Coverite who have not sought to retain the confidentiality of this information. Further, Schedule A will include the figures relating to the fines on Pirie and Walker in so far as those figures are in the public domain.

21. Schedule B will set out the calculations in full including the confidential information relating to the other addressees (except for Pirie and Walker). Information which appears in Schedule B and not in Schedule A will be "Protected Information" and will be disclosed only to external advisers to Makers and Prater. Those external advisers will be named in Part A of a Schedule to the Order and the undertakings they give not to disclose the Protected Information beyond the ring will be set out in Part B of that Schedule.

22. The continued confidentiality of the information may have to be reconsidered at a later stage. The relevant addressees will have the opportunity to make further representations to the Tribunal before any decision as to wider disclosure is made.

23. The Order of the Tribunal will be drawn up on the above basis.

Marion Simmons Michael Blair Vivien Rose

Charles Dhanowa 23 June 2006
Registrar