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IN THE COMPETITION COMMISSION

Case No 1006/2/1/01

APPEAL TRIBUNAL

New Court
Carey Street
London WC2A.2JT

1 August, 2002

Before:
SIR CHRISTOPHER BELLAMY
(The President)
MICHAEL DAVEY
DAVID SUMMERS

Sitting as a tribunal in Northern Ireland

B E T W E E N:

BETTERCARE GROUP LIMITED

Applicant

supported by

THE REGISTERED HOMES CONFEDERATION
OF NORTHERN IRELAND LIMITED

BEDFORDSHIRE CARE GROUP

Interveners

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

MR C HAYBURN (of Messrs L'Estrange & Brett) appeared for the applicant and the interveners.

MR JON TURNER (instructed by The Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Transcribed from the Shorthand Notes of
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PROCEEDINGS

10.55 am

1
2 THE PRESIDENT: The Tribunal is handing down today its judgment in the case of Bettercare
3 Group Limited v The Director General of Fair Trading.

4 We have had the benefit of a number of comments from the parties on a draft judgment
5 which we circulated earlier in the week. We have taken on board those comments where they
6 seem to us to be legitimate corrections of factual matters or typographical errors. If and to the
7 extent we have not taken on any particular correction suggested that is because we do not think
8 the suggestion is appropriate. I would just point out in that connection that the purpose of
9 giving the parties an opportunity to comment on the judgment is to enable them to pick up
10 factual errors, and to consider in a provisional way their position on any consequential
11 applications. The purpose is not to, as it were, slip into the judgment further nuances or other
12 suggestions that might improve the way the judgment has been presented. The judgment,
13 however imperfect, stands subject to correction of factual errors.

14 There is in the copy that I think has been handed to the parties, which is the official
15 copy of the judgment, one correction on page 4 which has been made so far only in manuscript.
16 There is a deletion on that page in manuscript. In the official published version of the judgment
17 that correction will be taken out.

18 The Tribunal has found in this judgment on the material available to us that North &
19 West's activities in running its statutory residential homes and engaging in the contracting out
20 of social care to independent providers are, for the purposes of the Competition Act 1998, to be
21 regarded as economic activities for the purpose of deciding whether North & West is an
22 undertaking within the meaning of section 18(1) of the Act.

23 For the reasons set out in the judgment the Tribunal

- 24 1. sets aside the decisions of the Director contained in or comprised by the
25 Director's letters of 29 November 2000, 25 July, 2001, 21 September 2001 and
26 2 November 2001 whereby the Director decided that he had no power to
27 investigate the complaint made to him by Bettercare Group Limited, and
28 subsequently refused to vary that decision.
29 2. Remits to the Director the matter of Bettercare's complaint.

30 That is the judgment of the Tribunal.

31 MR HAYBURN: Sir, if I could firstly request an order for the applicant's costs. Just on that issue
32 the outstanding issue in Part B in the judgment, namely, that North & West has not freedom to
33 set prices, was not put forward in the contested decision and therefore should not play a part in
34 the consideration of costs.

35 I would like also to apply for the intervener's costs which will not be significant but

1 both the intervenor's submissions were mentioned in the judgment and were relevant to the
2 outcome of the judgment.

3 Secondly, Sir, while we note that the complaint was still before the Director, and we
4 accept that the judgment remits the matter to the Director without any consequential directions,
5 we would, on behalf of the applicant and the intervenor, wish to urge the Director to give
6 priority to the complainant for legal and factual analysis of the outstanding issues in the manner
7 suggested by the Tribunal on the freedom to set prices.

8 We would ask the Director to appreciate that the nursing and residential care industry is
9 in a precarious position and both the applicant and intervenor are anxious that he approach the
10 matter on a fact finding, neutral basis. Thank you.

11 THE PRESIDENT: Thank you, Mr Hayburn. Let me just say at this stage before we hear Mr Turner,
12 for the benefit of Mr Turner, although we have obviously given some thought to it our
13 provisional view on costs is that it would be right for Bettercare to have its costs up to the
14 interim judgment that we gave on 26th March, 2002 when we settled the matter of whether or
15 not there is a decision in relation to that stage of the case Bettercare did have to come to the
16 Tribunal in order to establish that indeed there was a decision.

17 As regards the costs that have been incurred since that date had the Director acceded to
18 the original request to vary the decision and had he therefore proceeded to investigate the case,
19 we tend at the moment to think that quite a lot of the work that has gone into this case would
20 actually have had to have been done anyway at that stage. In addition to that, as I think you just
21 pointed out Mr Hayburn, some issues still remain open, the matter is still under investigation -
22 we do not quite know yet what the final result is. So we are provisionally inclined to the view
23 that since 26th March probably the proper order is for both sides to bear their own costs, but
24 with that indication we will hear Mr Turner and then give you a chance to come back.

25 MR TURNER: May it please the Tribunal, I will deal briefly with matters in this order:
26 consequential directions, leave to appeal and costs.

27 So far as concerns consequential directions, the Director considers that the appropriate
28 order is indeed to remit without making any further direction or giving the Director a further
29 steer, in particular having regard to the matters raised by the Tribunal in paragraphs 211 to 216
30 of the judgment talking about the prospective merits of the case and possible doubts. The
31 Director, who will certainly look at the matter conscientiously, must have a discretion about
32 whether and, if so, how to proceed in this matter.

33 THE PRESIDENT: Yes, the Tribunal accepts that the Director has such a discretion.

34 MR TURNER: I am grateful, Sir. The second matter is leave to appeal. This is an important
35 judgment, and a judgment that will be needed to be given full consideration both by the

1 Director and by other interested bodies within Government. Therefore, we cannot at the
2 moment seek permission. That decision must be deferred.

3 The only point upon which we would be grateful for clarification from the Tribunal is a
4 small procedural point arising from Rule 29 of the Rules, which I have briefly canvassed with
5 Mr Rayment and the Registrar. Rule 29(1) says:

6 *29.-(1) A request to the tribunal for permission to appeal from a decision of the*
7 *tribunal may be made:-*

8 *(a) orally at any hearing at which the decision is delivered by the tribunal; or*

9 *(b) in writing to the Registrar within one month of the notification of that*
10 *decision."*

11 and different language is used. The Director understands there to be no substantive meaning in
12 that difference in language and that the notification of the decision can, and certainly in this
13 case, be taken to be the date when the decision is delivered by the Tribunal and in this case
14 certainly would proceed on that basis, subject to the Tribunal's view.

15 THE PRESIDENT: I think our provisional view is that the period "within one month" runs from,
16 quote, "notification of the decision" is probably on the day when the parties receive the duly
17 signed, stamped, copy of the judgment.

18 THE REGISTRAR: It is Rule 25(3)

19 THE PRESIDENT: Thank you Mr Registrar.

20 MR TURNER: Oh excellent.

21 THE PRESIDENT: Now in this particular case, as I understand it, a copy of the judgment has been
22 given by hand to the parties.

23 MR TURNER: Yes.

24 THE PRESIDENT: And although it has not exactly been sent to the parties it is, I think, sufficiently
25 "sent" if it is handed over physically. So I think my own original view of that - and my
26 colleagues are nodding - is that the relevant date from which time runs is today.

27 MR TURNER: I am grateful, Sir, I had frankly overlooked the point drawn to my attention by the
28 Registrar.

29 THE PRESIDENT: We do, from our side, have a procedural question to put on the table in relation
30 to the appeal - you may not have had a chance to consider it, Mr Turner, but I just mention it -
31 which are the specific provisions which seem to be governing leave to appeal and since this is a
32 Northern Ireland case it is a question of leave rather than a question of permission - a matter of
33 language - as to how it operates.

34 We have in mind, as I expect you have, Order 61 of the Rules of the Supreme Court of
35 Northern Ireland, and in particular Order 61 rule 1, and rules 17 and 18. Our view, subject to

1 argument, is that there is a two stage procedure here. It is first for the prospective appellant to
2 seek leave from the Tribunal, and if we grant leave, then the appellant has a further six weeks
3 in which to requisition a statement of case, because this is an appeal by way of case stated. We
4 then settle a statement of case and then the matter proceeds. It is somewhat different to the
5 procedure in England, and the procedure in Scotland. So you might just like at some point to
6 consider whether our understanding of the procedure is correct. I think it is a bit more
7 complicated than is normally the case.

8 MR TURNER: Sir, we have not fully given consideration to that---

9 THE PRESIDENT: No, you have not had time to do that.

10 MR TURNER: --but we will do so in the light of your indication, we are grateful.

11 THE PRESIDENT: I take this opportunity just to point that out.

12 MR TURNER: Finally, Sir, on the matter of costs, the Director's submissions do accord with the
13 provisional indications given by the Tribunal in relation to costs, and by way of amplification
14 we would make two additional features plain.

15 First, unlike, say, the Insurance Standards Council case, both limbs of this case have
16 involved virgin territory, specifically in relation to the substantive issue on the question of an
17 undertaking.

18 THE PRESIDENT: Yes.

19 MR TURNER: The decision by the Director General was conscientiously made in the light of what
20 guidance the European Court of Justice has provided, and he sought to extrapolate properly
21 from those principles. We accept that the Tribunal has taken a different view, but this is not a
22 case where the Director has made some fundamental flaw or error in an area charted by
23 jurisprudence.

24 Secondly, and in relation to procedure, we feel it right to mark the point which accords
25 with the Tribunal's provisional indication that this is a case in which the Director did go to quite
26 considerable lengths for the purpose of the substantive stage of this application to assist the
27 Tribunal by pulling together a large amount of material, including the relevant legal materials
28 and to put it into a format and order which had not so far been done in the notice of application,
29 and the Director shouldered a major burden in that regard - indeed, even after the judgment
30 went to lengths to assist the Tribunal. Of course, the Director is a public officer, and in some
31 sense different from an ordinary litigant in adversarial litigation. However, in this case he did
32 go to very specific lengths to help the Tribunal to have everything available to it to make its
33 decision.

34 No statement of costs has been received and I have discussed with Mr Hayburn the
35 appropriate way forward in that case. We both consider that a detailed assessment of costs is

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1 therefore needed, and in the light of Rule 26(3) that it would be appropriate for the Tribunal to
2 order that costs be assessed by a taxing officer of the Supreme Court of Northern Ireland in this
3 case.

4 THE PRESIDENT: I will just remind myself of Rule 26(3). [Pause for reading] Yes. There is still
5 perhaps remotely the chance that the parties might actually agree.

6 MR TURNER: There is - "if not agreed".

7 THE PRESIDENT: Yes.

8 MR TURNER: The final point in the light of Mr Hayburn's submissions - costs of the interveners.
9 That is to some extent a matter of principle. That is opposed. Of course, those costs did arise
10 essentially only at the substantive stage in any case, and to the extent that costs were incurred.
11 But we say that such costs should not be allowed. It is not appropriate for the Director to have
12 to pay duplicate or triplicate sets of costs by analogy with the procedure in judicial review
13 unless there is some real reason why that should be the case - if there is a real and separate
14 interest identified and defended in the case, which there was not here, or if different and
15 important arguments were raised which were not raised by the principal applicant, which was
16 not the case here. Therefore, our submission is that the costs of the intervenors should not be
17 allowed.

18 Sir, unless I can assist the Tribunal further, those are our submissions.

19 THE PRESIDENT: Thank you, Mr Turner. Yes, Mr Hayburn?

20 MR HAYBURN: First, Sir, just to agree with Mr Turner's assessment of the costs---

21 THE PRESIDENT: That they should be assessed by a taxing officer of the Supreme Court, Northern
22 Ireland, yes.

23 MR HAYBURN: Yes. Sir, I do appreciate your position on the substantive hearing. I would say in
24 our view we feel that the judgment upheld much of what was contained in our arguments and
25 the correspondence, and where it elaborated on them it still upheld and stood by those
26 comments, so not all the substantive work was carried out after the substantive hearing in our
27 view.

28 Secondly, I just repeat the intervenor's point, the way the Director conducted the case,
29 in particular Mr Barry's statement, involved quite a lot of work from the RHC in particular, the
30 Bedfordshire Care Group I presume their complaint is still pending before the Director for the
31 same reasons as our is, so while their costs will not be significant their involvement was
32 material.

33 THE PRESIDENT: Yes. Thank you very much. [The Tribunal confer]

34 On the issue of costs in this case the Tribunal considers, as provisionally indicated, that
35 the applicant [Bettercare] should have its costs up to and including the delivery of the judgment

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1 that this Tribunal gave on 26th March on the interim question of whether it was in the presence
2 of a decision.

3 Up to that stage our view is that the two intervenors, The Registered Homes
4 Confederation and Bedfordshire Care Group, should both bear their own costs. The
5 involvement of both those intervenors up to that point was minimal, and more generally
6 without deciding the point at this stage we have some sympathy with the Director's observation
7 that in general it is not appropriate to give costs of intervenors against the Director unless there
8 are particular circumstances that justify the award of such costs in a particular case.

9 We leave the generality of that issue for another day but there are no such
10 circumstances in this case as regards the period up to 26th March.

11 As regards the period since 26th March when admittedly a great deal of additional cost
12 has been incurred, we accept the Director's submission that the substantive issue with which we
13 have been concerned was to some extent an issue that involved virgin territory on which there
14 was no clearly decided authority completely on the point, that the Director went to considerable
15 lengths to assist the Tribunal by putting before the Tribunal factual material that did indeed
16 assist us.

17 Thirdly, as I have already said when indicating our provisional view, we consider that a
18 great deal of the work that has in fact been done in the second stage of this appeal would have
19 had to be done anyway had the matter proceeded administratively before the Director.

20 On those grounds we think that the correct order is that from 26th March onwards both
21 parties should bear their own costs, bearing in mind, of course, in addition that the matter is still
22 pending before the Director and we do not yet know the final outcome. That applies equally to
23 the intervenors, and they too shall bear their own costs as from 26th March.

24 We are prepared to accept that it is appropriate in this case to order a detailed
25 assessment of the costs by a taxing officer of the Supreme Court of Northern Ireland, under
26 Rule 26(3) if the costs are not agreed. So there will be a detailed assessment by a taxing master
27 of the Supreme Court of Northern Ireland in default between the parties on the question of
28 costs.

29 I think unless there are any other points the parties wish to raise today that concludes
30 matters.

31 Thank you very much, and thank you again to the parties and all those who contributed
32 to putting before the Tribunal material in this case.

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