



The Competition Commission Appeal Tribunals

NOTICE OF APPLICATION UNDER SECTION 47 OF THE COMPETITION ACT 1998 CASE NO 1008/2/1/02.

Pursuant to Rule 13 of the Competition Commission Appeal Tribunal Rules 2000 ("the Rules"), the Registrar of the Appeal Tribunals gives notice of the receipt of an application, dated 6 November 2002, under section 47 of the Competition Act 1998 ("the Act") by (1) Claymore Dairies Limited of Site 1(A)&(B), Balmakeith Industrial Estate, Forres Road, Nairn IV12 5JX; and (2) Express Dairies Limited of Express House, Meridian East, Meridian Business Park, Leicester, LE19 1TR ("the applicants") in respect of a decision taken by the Director General of Fair Trading ("the Director") and notified to the applicants on 9 September 2002, ("the Contested Decision").

Claymore is owned as to 75 per cent by Express and 25 per cent by North Milk Cooperative (a cooperative of local farmers). Its sole activities involve the processing of raw milk into liquid milk at its dairy at Nairn, Scotland, and the sale of processed liquid milk to customers in Scotland. Express is engaged principally in the processing of raw milk into liquid milk and cream at a number of sites in England and the sale of those products through retailers, doorstep delivery rounds and other outlets.

The Contested Decision *inter alia* rejected the applicants' request to the Director to withdraw or vary his decision notified to the applicants on 9 August 2002 ("the Relevant Decision"), taken following an investigation between 26 October 2000 and 9 August 2002. The Relevant Decision according to the applicants found that Wiseman had not infringed the Chapter II prohibition of the Act and that the Director was entitled to close his file on the applicants' complaint that Wiseman has abused its dominant position in the market for the supply of fresh processed milk to middle ground retailers in Scotland.

The applicants seek the following relief:

1. that the decision be set aside;
2. that the Tribunal find that Wiseman has infringed the Chapter II prohibition (section 18 of the Act);
3. in the alternative to 2 above to remit the matter to the Director for proper consideration and investigation;
4. that certain interim directions be ordered against the Director, being (in summary) the disclosure of all relevant documents, evidence and correspondence (including economic models and the results generated by them) which form the basis of the Decision and which formed part of the Director's investigation;
5. that the Director be ordered to pay the applicants' costs.

In summary the principal grounds on which the applicants rely are that the Director:

1. has taken an appealable decision within the meaning of section 46 of the Act (namely a decision of non-infringement by Wiseman of the Chapter II prohibition of the Act) and has refused to withdraw or vary that decision under section 47 of the Act;
2. has failed to produce a decision which is properly or adequately reasoned in that:
 - (a) there are material discrepancies between the reasoning in the decision and the position which, in reality, the Director had adopted;
 - (b) the Director's reasoning is deficient in material respects; and
 - (c) there are inherent inconsistencies in the Director's reasoning on the face of the decision and with regard to the circumstances of the case.
3. erred in respect of his findings contained in the decision as to predation, targeting/discriminatory prices, exclusive contracts and abusive conduct resulting from price fixing and customer sharing in that he:
 - (a) misapplied the Chapter II prohibition of the Act and failed to attribute proper weight to the evidence;
 - (b) failed to provide any adequate reasons for his specific findings; and
 - (c) adopted a flawed methodological and legal approach.

Any person who considers that he has sufficient interest in the Contested Decision may make a request for permission to intervene in the proceedings, in accordance with Rule 14 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Commission Appeal Tribunals, New Court, 48 Carey Street, London WC2A 2JT, so that it is received within **one month** of the publication of this notice.

Further details concerning the procedures of the Competition Commission Appeal Tribunals can be found on its website at www.competition-commission.org.uk. Alternatively the Tribunal Registry can be contacted by post at the above address or by telephone (020 7271 0395) or fax (020 7271 0281). Please quote the case number mentioned above in all communications.

Charles Dhanowa
Registrar

15 November 2002