Neutral citation: [2004] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Cases: 1014 and 1015/1/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

3 March 2004

Before:

Sir Christopher Bellamy (President)
The Honourable Antony Lewis
Mrs Vindelyn Smith-Hillman

Sitting as a Tribunal in England and Wales

BETWEEN:

ARGOS LIMITED

and

LITTLEWOODS LIMITED

Appellants

-v-

THE OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

Mr Mark Brealey QC and Mr Mark Hoskins (instructed by Burges Salmon) appeared for Argos

Mr Nicholas Green QC and Ms Marie Demetriou (instructed by DLA) appeared for Littlewoods

Mr Brian Doctor QC and Ms Kassie Smith (instructed by Director of Legal Services, Office of Fair Trading) appeared for the Office of Fair Trading

Heard at Victoria House on 23 February 2004

JUDGMENT (Application for disclosure)

Introduction

1. This is an interlocutory application by Argos Limited ("Argos") and Littlewoods Limited ("Littlewoods") for the disclosure of certain documents in the course of their separate appeals against the decision of the Office of Fair Trading ("the OFT") of 21 November 2003 (No. CA98/8/2003) ("the Decision").

2. The Decision replaced an earlier decision (CA98/2/2003) adopted on 19 February 2003 by the OFT's predecessor in title, the Director General of Fair Trading[1] ("the Director"). On 30 July 2003 the Tribunal ordered that decision to be remitted to the OFT in order to permit it to carry out a supplementary procedure under rule 14 of the Competition Act 1998 (Director's Rules) Order 2000, SI 2000 no 293 ("the Director's Rules") in respect of 3 additional witness statements of Messrs Thomson, Wilson and Bottomley which the Director sought to adduce in support of his defence to the appeal against his original decision: see *Argos and Littlewoods v Office of Fair Trading* [2003] CAT 16.

3. In the Decision the OFT found that Argos, Littlewoods and Hasbro UK Limited ("Hasbro") had infringed the Chapter I prohibition of the Competition Act 1998 ("the 1998 Act"). According to the Decision the OFT started an investigation into price fixing by Hasbro in March 2001. The investigation looked first into possible price fixing and/or resale price maintenance by Hasbro and a number of its distributors. That investigation led to decision CA98/18/2002 of 28 November 2002. In that decision the Director required Hasbro to pay him a penalty of £4.95 million. That figure included a 45 per cent reduction in the penalty granted by the Director in accordance with his Guidance as to the appropriate amount of a penalty (OFT 423, March 2000, "the Director's Guidance"). As part of the process of investigating the distributors' case, information was sought from Hasbro about its dealings with retailers.

[1] Since 1 April 2003 the functions of the Director have been assumed by the OFT who is the respondent to these proceedings pursuant to the provisions of Part I of the Enterprise Act 2002. Where necessary, references in this judgment to the OFT are to be taken as referring to the Director and vice-versa.

4. According to the Decision (paragraph 11) Hasbro then applied on 14 September 2001 for total immunity from financial penalty under the Director's Guidance in respect of its dealings with retailers, or in the alternative, a reduction in the level of penalty. According to the Decision Hasbro was granted leniency subject to the Director's "usual terms", and in particular on condition that Hasbro co-operated fully with the OFT's investigation.

5. The background to Hasbro's application for leniency is not fully set out in the Decision. Hasbro explained some of that background to the Tribunal on 3 March 2003 at the public hearing of its application for permission to withdraw its appeal against the separate decision of the Director CA98/18/2002 of 28 November 2002, referred to above. From the transcript of that hearing, which may be found on the Tribunal's website (www.catribunal.org.uk), it appears that Hasbro was provisionally granted 100 per cent leniency in September 2001 in respect of the agreements with Argos and Littlewoods. However, that grant of leniency was subject to the proviso that the Director did not at a later stage of his investigation conclude that Hasbro had acted as the instigator of the infringement. Were the Director to conclude that Hasbro was the instigator then Hasbro would only receive a 50 per cent reduction of its penalty.

6. On 1 May 2002 the Director issued a notice ("the original rule 14 notice") under rule 14 of the Director's Rules proposing to find that Argos, Littlewoods and Hasbro had infringed the Chapter I prohibition of the 1998 Act by entering into price fixing arrangements in respect of certain toys and games.

7. According to what the Tribunal was told during the hearing of 3 March 2003, written and oral representations were made by Argos, Littlewoods and Hasbro to that notice. At the time the original rule 14 notice was issued it appears that the Director was minded only to grant Hasbro 50 per cent leniency on the grounds that at that stage he was not satisfied that

Hasbro had not instigated the infringement. Apparently the Director also invited Hasbro to make submissions as to why the provisional grant of 100 per cent immunity should not be revoked.

8. On 10 December 2002 the OFT disclosed the representations made by Hasbro, Argos and Littlewoods respectively to each of the other parties, but parts of those representations considered by the Director to be confidential were redacted pursuant to section 56(2) and (3) of the 1998 Act (see below). Argos and Littlewoods made further written representations on those redacted representations (Decision, paragraph 315).

9. According to what the Tribunal was told on 3 March 2003, the apparently separate representations made by Hasbro on the question of leniency did not, it seems, initially persuade the Director to alter his conclusion that Hasbro was the instigator. It appears that Hasbro then submitted further representations, and was eventually notified on about 5 or 6 February 2003 that the Director confirmed Hasbro's total immunity from penalty. Those representations were not disclosed to Argos and Littlewoods.

10. In the earlier decision (CA98/2/2003) adopted on 19 February 2003, and in the subsequent Decision which is the subject of this appeal, the OFT rejected the representations of Argos and Littlewoods and found that they had, with Hasbro, infringed the Chapter I prohibition of the 1998 Act. For the infringements found in the Decision the OFT required Argos to pay a penalty of £17.28 million while Littlewoods was required to pay a penalty of £5.37 million. Hasbro's penalty was assessed by the OFT at £15.59 million but because Hasbro was the first to approach the OFT with information that led to the uncovering of the infringement Hasbro's penalty was reduced to nil (paragraph 411 of the Decision).

11. The Decision now under appeal contains a number of redacted passages relating to the representations received by the OFT from Hasbro in response to the original rule 14 notice. The last sentence of paragraph 319

of the Decision states: "In the OFT's view the most reasonable interpretation of the redacted version of the Hasbro representations that was given to Argos is that, while Hasbro denied infringing the Chapter I prohibition as set out by the OFT in the original rule 14 Notice, it did not deny that it had committed an infringement of some kind."

The material sought

12. Argos now seeks disclosure of the following material:

(a) all correspondence between Hasbro and the OFT relating to Hasbro's application for leniency; and

(b) the redacted passages in Hasbro's written representations and the transcript of Hasbro's application for leniency.

13. Littlewoods states in its skeleton argument at paragraph 2 that it also requests these documents, as it had previously done in its letter to the OFT of 4 December 2003. In addition to these categories of documents, Littlewoods stated at the hearing that it also sought disclosure of the redacted passages in the Decision insofar as those matters were related to the disclosure sought.

The procedure before the Tribunal

14. At a case management conference on 1 December 2003 when these issues of disclosure were first raised by Argos and Littlewoods, the Tribunal indicated that if the applications were to be pursued it might be necessary for the OFT to confirm whether Hasbro asserted any interest in maintaining the confidentiality of the material sought.

15. By letter of 18 February 2004 the Tribunal sought confirmation from the OFT that Hasbro was content not to make submissions regarding the applications for disclosure. The Tribunal also directed that the parties' skeleton arguments be served on Hasbro.

16. On 18 February 2004 the OFT replied to the Tribunal stating that Hasbro's UK solicitors were aware of the stance being taken by the OFT and had informed the OFT that Hasbro did not intend to make any written submissions or attend the hearing.

17. The parties' skeleton arguments in respect of the application were filed on 18 February. In a further letter of 20 February, the Tribunal requested the OFT to ensure that the Tribunal fully understood the basis on which Hasbro was maintaining its claim to confidentiality, if such was the case, in respect of the material sought in connection with its leniency application.

18. By letter of 19 February 2004, the OFT wrote to Hasbro to ascertain whether it continued to claim confidentiality in respect of the material in the OFT's possession regarding its leniency application. The OFT's letter to Hasbro set out its understanding of Hasbro's reasons for claiming confidentiality, quoting a letter from Hasbro's solicitors to the OFT, dated 19 November 2002, as "i.e. in general, that disclosure "might significantly harm Hasbro's business interests if two or its main customers felt, rightly or wrongly, that Hasbro had acted in a way contrary to their business interest". Hasbro's solicitors replied to the OFT on 20 February 2004 simply stating that the OFT's understanding in their letter was correct and that Hasbro fully understood that the Tribunal might rule on the question of disclosure at the hearing.

19. At the hearing on 23 February 2004 the OFT on submitted that the requests for material being advanced orally by the appellants were wider than those that had originally been set out in correspondence and in the skeleton arguments. In particular the OFT submitted that there had been no issue raised as to whether material had been rightly or wrongly characterised by the OFT as confidential on the grounds of business secrecy. Moreover the OFT had not focussed on Littlewoods' request for disclosure of redacted parts of the Decision. The Tribunal gave the OFT until 1 March 2004 to make any further submissions it wished.

20. On 1 March 2004 the Tribunal received a letter from the OFT setting out its comments in relation to the redacted parts of the Decision sought by Littlewoods, namely paragraphs 305, 307, 309 and 310.

The arguments of the parties

Argos

21. Argos submits that the material relating to Hasbro's leniency application is relevant and there is no reason why it should be denied access to relevant material.

22. According to Argos in order to obtain leniency under the Director's guidance Hasbro was required to provide the OFT with all information, documents and evidence regarding the "existence and activities of the cartel". In addition Hasbro must not have acted as the leader in the cartel. This type of information by its very nature concerns and/or implicates the other alleged participants. This was recognised by the Tribunal in its judgment in *Umbro Holdings Limited and ors v OFT* [2003] CAT 26 ("*Umbro*"). The principles and policy considerations set out in *Umbro* are not merely confined to cases involving an allegation of discrimination as regards the penalty: see e.g. at [14]. Those principles and policy considerations apply equally in the present case.

23. Argos advances a number of submissions regarding the potential relevance of Hasbro's redacted written representations to the original rule 14 notice. For example, Argos submits that it is evident from paragraph 6.1 of that document that Hasbro made representations about the "pricing initiative". In particular Argos observes that Hasbro states that the OFT "confuses Hasbro's lawful pricing initiative … and the arrangements." The pricing initiative is an important issue in the Decision and in the appeal but the remainder of paragraph 6.1 has been redacted. Equally, paragraph 6.25 of Hasbro's written representations has been redacted but appears to be

referable to important documents relied on by the OFT in the Decision, such as an email of 18 May 2000. The written representations might contain matters which Argos might wish to put to the OFT's witnesses, for example to suggest that the pricing initiative was in fact lawful.

24. Argos points out that the OFT has already disclosed documents it received from Hasbro as part of its leniency application. This must have been because the OFT acknowledged that the material was potentially relevant. Argos contends that the undisclosed remainder of the material forming part of Hasbro's leniency application is equally of potential relevance. The Tribunal should not take a narrow view with regard to whether material sought may or may not shed light on whether the OFT in the Decision drew the correct inferences from the relevant facts.

25. According to Argos, the recent correspondence between the OFT and Hasbro makes clear that Hasbro's claim for confidentiality maintained by the OFT is insubstantial. In *Umbro* the Tribunal expressly rejected commercial repercussions as a ground for refusing disclosure of material relating to Umbro's failed application for leniency. The interests in fairness and transparency identified in *Umbro* at [43] clearly outweigh any other interests in keeping Hasbro's submissions confidential.

Littlewoods

26. Littlewoods agrees with the submissions made by Argos.

27. Littlewoods submits that the material sought is relevant: (1) in general terms to the credibility of the Hasbro witnesses, (2) to key issues on which Littlewoods' case that there was no agreement and/or concerted practice is based, and (3) to the argument on discrimination as to the amount of the penalty as pleaded in Littlewoods' notice of appeal at paragraph 4.8.

28. Littlewoods submitted that the material sought is, or may well be, relevant to showing inconsistencies in the evidence of the Hasbro witnesses, a

number of which Littlewoods has already identified on the material it already has, and which they will wish to explore further at the main hearing. In particular the ambiguity in Hasbro's representations about whether it accepted that it had infringed the Chapter I prohibition may be highly relevant.

29. Littlewoods also submits that there is or may be evidence in existence which the OFT has ignored or abandoned, reliance on which might assist Littlewoods' defence. At the heart of the OFT's case in the Decision is the way in which Hasbro's pricing initiative developed into unlawful pricing arrangements. According to Littlewoods, Hasbro's submissions as to how this transformation occurred are central to the issues in the case.

30. Contrary to the OFT's submission, disclosure of the leniency material is also relevant for the purposes of the argument on discrimination as to the amount of the penalty as set out in Littlewoods' notice of appeal at paragraph 4.8. This argument raises the question whether Hasbro was in fact the instigator of the arrangements, and therefore not entitled to the leniency the OFT granted it, with the result that the penalty imposed on Littlewoods was unfair and disproportionate.

31. The material obtained from Hasbro in connection with its leniency application is "utterly stale", and if Hasbro had wished to object to its disclosure it was at liberty to appear before the Tribunal and make submissions to that effect. Hasbro has now obtained immunity and it is not suggested that there is anything material which has continuing relevance to its business. To assert its claim to confidentiality Hasbro should have attended the hearing to put forward evidence or submissions which the Tribunal could have considered. Even if there was some confidentiality to be protected that could not outweigh the rights of the defence. That is not altered by Hasbro's recent letter to the OFT of 20 February 2004.

32. Littlewoods does not submit that it cannot cross-examine witnesses without the material sought but that its cross-examination may be more effective if the material were disclosed.

33. Littlewoods is unable to be precise about the exact scope of any material regarding Hasbro's "leniency application" as no list has been provided by the OFT, merely certain categories of material.

34. According to Littlewoods, the Tribunal must exercise its discretion whether or not to order disclosure in a way which is compatible with Article 6 of the European Convention on Human Rights ("ECHR") which in criminal cases requires the prosecution to disclose any material in its possession which "may assist the accused in exonerating himself or obtaining a reduction in sentence": see Clayton & Tomlinson, Law of Human Rights at 11.210.

The OFT

35. The OFT reiterates that all documents supplied to the OFT by Hasbro as part of its application for leniency that are relevant to the substantive issues and which were treated as evidence by the OFT in the Decision have been made available to the appellants as part of the rule 14 procedure.

36. The remainder of the material has been withheld on the grounds of commercial damage to Hasbro's interests under rule 14(6)(a) of the Director's Rules, and/or on the grounds that disclosure would undermine the effectiveness of the leniency programme under rule 14(6)(b) of the Director's Rules.

37. The OFT submits that Argos has failed to demonstrate why these documents are relevant to any issue in its appeal. As the Tribunal observed in *Umbro,* marginal relevance or interest is not a sufficient basis on which to order disclosure. Unless the appellants can demonstrate that the material is properly relevant, it cannot be said to be in the interests of

justice to override the OFT's interest in keeping these documents confidential.

38. The OFT submits that there is no impediment to Argos challenging the evidential value of the statements made by Hasbro personnel in October 2001 without recourse to the documents that it seeks. In particular Argos will be able to cross-examine by reference to the notes of the witnesses' interviews which have already been disclosed.

39. According to the OFT, it is the fact of Hasbro's application for leniency that is relevant to Argos's arguments. The details of the negotiations surrounding that application will add nothing to the appellants' submissions. In particular the material includes the submissions made by Hasbro's lawyers on its behalf to the OFT. The OFT's witnesses cannot comment on submissions made by lawyers which are themselves merely comments as to why one particular inference rather than another is justified from the facts. If the appellants' submissions as to disclosure were accepted, there could never be any confidentiality in the leniency process.

40. In relation to issues concerning "primary" factual material it may well be the case that the Tribunal would actually have to look at the material to decide whether or not disclosure is appropriate. However, in relation to secondary material such as the submissions of Hasbro's lawyers, material of that sort cannot on any view be relevant to the issues in the case and disclosure can be refused on that basis.

41. Any challenge to the three witness statements filed by the OFT in May/June 2003 on the basis that they were made in the expectation of Hasbro obtaining leniency is fanciful. The statements were made some 20 months after leniency was granted and two of the witnesses concerned no longer work for Hasbro.

42. The appellants' reliance on *Umbro* is misplaced as the facts of that case were fundamentally different from those in the present case. In *Umbro* both the fact of Umbro's failed application for leniency and supporting documents were of potential relevance to the determination of Umbro's appeal, and to the issue of discrimination by the OFT between Umbro and the other parties as to the amount of the respective penalties imposed.

43. In the present case the OFT submits that no issue arises as to discrimination in the imposition of the penalties as there is no relevant difference that they can point to in the way the fines imposed on them were calculated. Hasbro was subsequently granted leniency but its position was completely different to that of Argos and Littlewoods. Even if it transpires that Hasbro was wrongly granted leniency, it cannot properly be argued that any issue of discrimination arises therefrom in respect of which disclosure should be ordered.

44. According to the OFT, the Appellants' references to the disclosure of Hasbro's "leniency application" are more accurately described not as references to a single document but rather as a reference to all documents on the OFT's file dealing with this issue including Hasbro's written and oral responses to the OFT's rule 14 notice. According to the OFT, it is in the public interest that documents coming into existence in the course of leniency proceedings should be protected from disclosure as far as possible.

Outline of the relevant legal framework

45. It appears that issues of confidentiality and disclosure of information in relation to the earlier decision No.CA/98/2/2003 of 19 February 2003 were originally dealt with by the Director General of Fair Trading under the provisions contained in section 56 of the 1998 Act. Section 56 of the 1998 Act provided that, when considering disclosure:

"(2) [The Director] must have regard to the need for excluding, so far as is practicable, information the disclosure of which would in his opinion be contrary to the public interest.

(3) [The Director] must also have regard to—

(a) the need for excluding, so far as is practicable—

(i) commercial information the disclosure of which would or might, in his opinion, significantly harm the legitimate business interests of the undertaking to which it relates,

…

(b) the extent to which the disclosure is necessary for the purpose for which the … the Director is proposing to make the disclosure."

46. Rule 14(5) of the Director's Rules provides that where the Director is considering taking an infringemet decision under the 1998 Act he must give each person concerned a reasonable opportunity to inspect the documents in the Director's file relating to the proposed decision. However, rule 14(6) of the Director's Rules provides that:

"The Director may withhold any document:

(a) to the extent that it contains information which a person has stated to that Director to be, and which that Director has found to be, confidential, in the sense given to that word by sub-paragraph (1)(c) of rule 30 below;

(b) which is, in the opinion of that Director, otherwise confidential;

…"

47. Rule 30(1)(c)(i) of the Director's Rules provides that information is confidential if it is "commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of the undertaking to which it relates".

48. Section 56 of the 1998 Act was repealed by sections 247(j), 278(2) and Schedule 26 to the Enterprise Act 2002 which was brought fully into force

on 20 June 2003: see The Enterprise Act 2002 (Commencement No.3, Transitional and Transitory Provisions and Savings) Order 2003, SI 1397 2003. No savings or transitional provisions were enacted in relation to section 56 of the 1998 Act.

49. Since 20 June 2003 issues of confidentiality and the disclosure of information by the OFT have been governed by the Enterprise Act 2002 ("the 2002 Act"). It has apparently not been thought necessary to make any amendments to the Director's Rules to take account of the enactment of the 2002 Act. The 2002 Act merely provides that references to the Director in any enactment shall in so far as is necessary have effect as if they were references to the OFT: see section 2(3) of the 2002 Act.

50. Thus although the provisions of section 56 of the 1998 Act under which the material sought was originally redacted have since been repealed, the regime governing the question of whether that material should now be disclosed by the OFT is that contained in Part 9 of the 2002 Act. There does not, however, appear to be any material difference between the two regimes.

51. Under the 2002 Act information which has come to the OFT in connection with the exercise of its functions (section 238) and which relates to "any business of an undertaking" (section 237(1)(b)) may not be disclosed unless that disclosure is made by consent (section 239) or the disclosure is made for the purpose of facilitating the exercise by the OFT of its functions under the 2002 Act or any enactment specified in Schedule 14, of which the 1998 Act is one (section 241(1)).

52. Section 244 of the 2004 Act sets out three considerations that the OFT must have regard to when considering possible disclosure, as follows:

> "(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure [*the OFT*] thinks is contrary to the public interest.
>
> "(3) The second consideration to which [*the OFT]* must have regard is the need to exclude from disclosure (so far as practicable)--

(a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates

…

(4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which [*the OFT*] is permitted to make the disclosure."

53. By virtue of section 237(5), nothing in Part 9 of the 2002 Act affects the Competition Appeal Tribunal.

54. The situation regarding confidentiality, as it affects the Tribunal, is essentially governed by paragraph 1(2) of Schedule 4 to the 2002 Act. That provision deals only with the decisions of the Tribunal, which are to be recorded in a document. Schedule 4 paragraph 1(2) provides:

"In preparing that document the Tribunal shall have regard to the need for excluding so far as practicable---"

that is to say excluding from the Tribunal's final decision or judgment—

"(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."

But then:

"(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."

55. In *Umbro Holdings Limited v Office of Fair Trading* [2003] CAT 26, the Tribunal stated as follows:

"23. Although [Schedule 4, paragraph 1(2) of the 2002 Act] deals only with what is to be included in the Tribunal's judgment, the Tribunal takes the view that, for that provision to be effective,

> the Tribunal should protect, during the appeal proceedings, information that it would be likely to regard as confidential for the purposes of its judgment subject, of course, to the overriding requirement of ensuring the fairness of the appeal proceedings.
>
> 24. It is to be noted in particular, in subparagraph (2), that the need to exclude certain confidential material is expressed to be: "so far as practicable". As regards disclosure that might be contrary to the public interest, the disclosure must be such which would "in its opinion", that is to say in the opinion of the Tribunal, be contrary to the public interest.
>
> 25. As regards commercial information, it is information the disclosure of which would, or might, again in the "opinion of the Tribunal", significantly harm the legitimate business interests of the undertaking to which it relates, so there must be first of all significant harm, and secondly legitimate business interests. All those matters are, however, also to be borne in mind in the light of subparagraph (3), whereby the Tribunal has to have regard to the extent to which disclosure is necessary for the purpose of explaining the reasons for its decision."

56. In our view, the scheme envisaged by the 2002 Act and the earlier, now repealed, provisions of the 1998 Act, is that information which was quite properly protected from disclosure by the OFT during the administrative stage may, depending on the circumstances, become disclosable in the course of appeal proceedings before the Tribunal. That may happen, for example, because information that was once commercially confidential has become less sensitive with the passage of time; because the balancing exercise that the Tribunal is required to perform under paragraph 2(1) of Schedule 4 gives a different result to that which obtained at the OFT stage; or because the overriding interest of fairness in the appeal requires disclosure. In that latter connection, the Tribunal has held that it is the Tribunal's role to ensure that the requirements of Article 6(1) of the ECHR are respected: see *Napp Pharmaceuticals Limited v Director General of Fair Trading* [2001] CAT 3 and [2002] CAT 1.

57. In the *Umbro* case, Umbro appealed to the Tribunal on penalty only, arguing that the OFT had not sufficiently taken into account Umbro's cooperation during the proceedings. Umbro resisted disclosure to the other

parties of a failed application for leniency, certain draft witness statements and accompanying correspondence. The Tribunal outlined its approach to such contentions as follows:

> 32. More generally, the Tribunal takes the general view that its proceedings should be conducted on a basis that is as fully open as possible, subject only to the protection of vital business secrets or for some other overriding reason. It must be remembered that the Tribunal's judgment is a public document that has to be published. The Tribunal's hearings are in public, the transcripts of its hearings are published and so on.
>
> 33. Equally, in a case such as the present, which takes place in a setting in which parties have had penalties imposed upon them, it is, in the Tribunal's judgment, of overriding importance that the parties should be able to exercise their rights of defence without having possibly relevant material held back or inaccessible. In the event of a conflict between the rights of the defence and other claims to confidentiality there must, in our judgment, be a presumption that the rights of defence prevail.
>
> 34. We entirely see and accept the public interest considerations which lie behind Umbro's application and which are particularly emphasised by the OFT. It is, in our judgment, desirable that those who seek leniency should be able to do so, at least in the first instance, in confidence and should not be denied that confidence, unless there are important countervailing reasons. It is equally desirable that parties who seek leniency should not be placed unnecessarily at risk of some kind of commercial retaliation in the market place. Indeed, the Tribunal and, we trust, the OFT, is likely to take a particularly severe view if there is evidence that some kind of commercial reprisal has been sought by any party as a result of another party seeking to co-operate with the authorities.
>
> 35. That said, as we have already mentioned, it is clear that there is no guarantee of confidentiality when an application for leniency is made, as the Director's guidance makes clear.
>
> 36. It also appears in this case that Umbro knew that there was no guarantee of confidentiality for its leniency application. That emerges particularly from representations made by Umbro on 4 March 2003.
>
> 37. In our judgment there are insuperable difficulties in maintaining the confidentiality which Umbro claims. Given that the only point raised in its appeal is very largely based on its earlier application for leniency, in our judgment it would be virtually impossible to write the Tribunal's decision without referring to that application. Indeed, as we understand it, Umbro accepts that the fact of that application for leniency will come out in due course anyway.

38. In our judgment it would, however, be impossible to conduct the public hearing without revealing the fact of the application for leniency. In addition, in a case such as the present it would be extremely difficult to conduct Umbro's appeal at a hearing that was held in camera.

39. In addition, in this particular case, the fact of the application for leniency has, or to put it at its lowest, might - because "might" in this case would be sufficient - have a horizontal effect as regards other parties to the agreement. The first and obvious such effect is in relation to the calculation of penalty. In so far as other parties may wish to argue that they have been unduly penalised by comparison with other appellants, or have been in some way discriminated against, the reasons for, and the mechanics of, the calculation of the penalty in Umbro and other cases, seem to us to be matters which should not, in principle, be protected by confidentiality. That is underlined, in particular, by Manchester United's application for permission to amend its Notice of Appeal in order to plead that it should be treated in the same way as Umbro.

40. The fact of having sought leniency is, in our judgment, also possibly relevant, or at least at this stage cannot be excluded as irrelevant, to any argument that the other appellants may wish to put forward as to the reliance to be placed on Umbro's evidence and witness statements. It has already been suggested, as emerges from the decision, that Umbro's witnesses may have been producing self-serving statements. That is a matter that it would be difficult for the Tribunal to go into without disclosure of the matters we are considering.

41. It is also, in our view, doubtful whether Umbro, having decided to base its appeal (which is made publicly) on its failed leniency application has any longer "a legitimate interest" within the meaning of Schedule 4 of the 2002 Act in maintaining confidentiality of the principal fact on which it relies in that appeal, or that, at this stage of the proceedings, such a claim for confidentiality can any longer be legitimately maintained within the meaning of that provision.

42. In our judgment, both at the stage of making the original application for leniency and in bringing the appeal, Umbro must have taken, or been aware of, taking a certain risk. It must have known that the fact of the application might come out at some stage and must be taken to have weighed that risk against other possible adverse consequences.

43. In any event, in our view, this is a case in which the needs of fairness and transparency clearly outweigh any other interests there

may be in keeping this matter confidential. We are not persuaded that, in this particular case, there would be any lasting harm to the leniency system. Persons who genuinely seek leniency are still able to come forward and, if successful, will profit thereby. Those who come forward on some failed basis simply have to run the risk that that fact may be identified in due course in the event of appellate proceedings before the Tribunal. For those reasons we come to the conclusion that we are unable to keep confidential the fact of having sought leniency upon which Umbro relies.

44. As regards the statements submitted to the OFT in the course of that application for leniency, the OFT has already, very properly, been seeking Umbro's consent to disclose those statements, at least in their finalised versions. In our judgment the OFT has acted quite correctly at this stage in taking the view that those statements should be disclosed to the other parties. In our judgment those documents, by which we mean the original draft statements and the later finalised statements, should be disclosed to the other parties in the appeal, both in their draft and final form.

45. Similarly, the correspondence between Umbro and the OFT throws light on the reasons why the OFT did not accept the application for that leniency. We are not able at this stage to say that matters contained in that correspondence cannot be relevant at this stage to the defence of other parties before the Tribunal, and we therefore reach the conclusion that that correspondence too must be disclosed in the interests of justice to other parties before the Tribunal."

Analysis

58. It seems to the Tribunal that there are potentially two aspects to the disclosure now being sought. The first aspect is the protection of "business confidentiality" under Schedule 4, paragraph 1(2)(b) of the 2002 Act. The second aspect is "disclosure contrary to the public interest" under paragraph 1(2)(a) of Schedule 4. We deal with those issues separately, and also with the issue of the redacted passages in the Decision.

Business confidentiality under Schedule 4, paragraph 1(2)(b)

59. At the hearing the OFT clarified that the material sought from Hasbro's responses to the Rule 14 notice contained not only material relating to Hasbro's application for leniency but also confidential material of a wider commercial nature relating to Hasbro's affairs. It should be noted that that

Hasbro has not chosen to advance any separate point about the confidentiality of the latter material.

60. In *Aberdeen Journals Limited v The Director General of Fair Trading* [2003] CAT 14, the Tribunal considered the question of the confidentiality of information that could be described as "commercial information" within the meaning of paragraph 1(2)(b) of Schedule 4 to the 2002 Act. In that case the information consisted of information relating to market shares, revenues, costs and information regarding yields of various kinds. The Tribunal indicated that the material in that case which was over three years old was too old to be capable of causing significant harm to the interests of the undertaking concerned, or that there would be any "legitimate" business interest that still required protecting, with the consequence that much of the material covered would be included in the judgment.

61. In the present case the agreements in question are stated in the Decision to have come to an end no earlier than 15 May 2001 and no later than 14 September 2001. The remaining commercial information in the OFT's possession is at least two and a half years old and no separate arguments have put forward by Hasbro as to any harm it might suffer if that material was disclosed. In those circumstances the Tribunal is unable to conclude that Hasbro retains any legitimate business interest that requires protection from disclosure as the regards business confidentiality of commercial information of the kind mentioned in *Aberdeen Journals Limited v Director General of Fair Trading* [2003] CAT 14 cited above.

62. However, the basis of Hasbro's claim to business confidentiality, which is being maintained by the OFT on this application, is apparently the concern that disclosure "might significantly harm Hasbro's business interests if two of its main customers felt, rightly or wrongly, that Hasbro had acted in a way contrary to their business interest" (letter from Polly Weitzman to Bob Lawrie, OFT, dated 19 November 2002).

63. As far as that claim is concerned, it should be noted that a claim to business confidentiality under paragraph 1(2)(b) of Schedule 4 normally involves information relating to market shares, costs, margins and so on. No such information of that kind is relied on here. Hasbro relies simply on "commercial repercussions" if two of its main customers thought, rightly or wrongly, that Hasbro had acted contrary to their interests.

64. The question for the Tribunal is whether that claim for confidentiality on the part of Hasbro, which merely repeats what was said in a letter some 15 months ago, is justifiable under paragraph 1(2)(b) of Schedule 4 to the 2002 Act as "commercial information", the disclosure of which "would or might, in [the Tribunal's] opinion, significantly harm the legitimate business interests" of Hasbro.

65. In this case the position is that Hasbro as long ago as September 2001 took the view that its business interests were best served by making an application for leniency to the OFT. At that stage it was able to approach the OFT in confidence. The very considerable benefits of that application to Hasbro are obvious in that it has avoided having to pay a penalty of £15.59 million. In those circumstances it is understandable that undertakings which come forward under the OFT's leniency programme may be concerned at the reaction of those other undertakings when they learn that their illegal activities have been exposed by the information provided.

66. However, as the Tribunal stated in *Umbro* at paragraphs 17 and 35, the grant of leniency under the OFT's guidelines does not provide an absolute guarantee of indefinite confidentiality. The position in this case is that both Argos and Littlewoods have known since 1 May 2002, when the original Rule 14 notice was issued, that the investigation into their activities was prompted by information and documents provided by Hasbro. Both Argos and Littlewoods are aware that Hasbro has throughout been closely cooperating with the investigation, and that its

employees and former employees are due to give evidence at the main hearing in this appeal.

67. In those circumstances it seems to us extremely unlikely that there are likely to be any further commercial repercussions, at this stage, as a result of further disclosure. In any event, as the Tribunal said in *Umbro* at paragraph 32 the general presumption before the Tribunal is in favour of disclosure unless the contrary is shown. Hasbro has not appeared before the Tribunal to put submissions to the Tribunal, despite having every opportunity to do so. In our opinion the harm required under paragraph 1(2)(b) of Schedule 4 to the 2002 Act has not been shown, and the principle of disclosure should prevail.

Leniency documents under paragraph 1(2)(a) of Schedule 4

68. It remains to consider whether there is some public interest ground under paragraph 1(2)(a) relating to the documents that relate solely to leniency, the existence of which was indicated by counsel for the OFT during the hearing on 23 February 2004. The Tribunal accepted in *Umbro* that those who seek leniency should be able to do so at least in the first instance, in confidence and should not be denied that confidence unless there are important countervailing reasons: see *Umbro* at [34]. However, it is apparent from the *Umbro* judgment that the Tribunal's approach to disclosure in that case was to balance the interests in the effectiveness of the OFT's leniency programme with other considerations. In the present case the Tribunal does not feel able to carry out that exercise without a better knowledge of the relevant documents.

69. We take the view that if the OFT continues to maintain that the documents should not be disclosed under paragraph 1(2)(a) of Schedule 4 on grounds which relate to its leniency programme, the proper course in the first instance is for the OFT to prepare a numbered list of those documents including a brief description of each of the documents. That list should be filed with the Tribunal and served on the other parties. If the parties

remain in dispute as to the disclosure of particular items or the adequacy of the list, the Tribunal will determine the matters in issue after hearing the parties.

The redacted passages in the Decision

70. The Tribunal has examined the redacted passages in the Decision without objection by the OFT. It seems to the Tribunal that they contain no confidential information within paragraph 1(2)(b) of Schedule 4 to the 2002 Act and no reference to leniency under paragraph 1(2)(a). What Hasbro was saying to the OFT at the time of the Decision about its own role is at first sight potentially relevant to the question of the Tribunal's appreciation of whether the infringement found in the Decision has been established and possibly the relative fairness of the penalties imposed. The Tribunal can see no reason why those passages in the Decision should not be disclosed. If the passages in the Decision accurately summarise the underlying representations made by Hasbro, it almost inevitably follows in the Tribunal's view that Hasbro's underlying representations should also be disclosed.

71. For all those reasons we unanimously consider that the OFT should within 7 days:

(1) disclose to the appellants any remaining material which has been withheld solely on the grounds that it is information of the kind referred to in paragraph 1(2)(b) and schedule 4 of the 2002 Act

(2) disclose to the appellants the redacted passages in paragraphs 305, 307, 309 and 310 of the Decision;

(3) provide the Tribunal and the appellants with a list of the material on the OFT's file relating to Hasbro's leniency application for which disclosure is resisted on the grounds set out in paragraph 1(2)(a) of Schedule 4 of the 2002 Act.

Christopher Bellamy Antony Lewis Vindelyn Smith-Hillman

3 March 2004

Charles Dhanowa
Registrar