Neutral citation [2004] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1030/4/1/04

Victoria House
Bloomsbury Square
London WC1

7 May 2004

Before:

Sir Christopher Bellamy (President)
Mr Michael Blair QC
Professor Paul Stoneman

BETWEEN

FEDERATION OF WHOLESALE DISTRIBUTORS

Applicant

- v -

THE OFFICE OF FAIR TRADING

Respondent

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Mr Marc Israel and Mr Martin Ballantyne (of Macfarlanes) appeared for the Applicant

Mr Tim Ward (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondent

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JUDGMENT

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1. The applicants, the Federation of Wholesale Distributors ("FWD"), seek the Tribunal's permission under Rule 12 of the Tribunal's Rules SI 2003/1372 to withdraw their application to the Tribunal, lodged on 2nd April 2004, for a review under Section 120 of the Enterprise Act 2002 ("the 2002 Act") of the decision of the OFT under Section 22(1) of that Act, dated and announced on 5th March 2004, but not published until 19th March 2004, not to refer to the Competition Commission the acquisition by Tesco plc of 45 retail outlets in London, owned by Adminstore Ltd. The outlets in question are what are known as convenience stores.

2. The OFT decided in the decision that although there was a merger situation under Section 23 of the 2002 Act, the OFT did not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom within the meaning of Section 22(1)(b)(iii) of the 2002 Act.

3. We are giving this judgment today, in the context of the FWD's application to withdraw its appeal, for the purpose of making some observations on three issues that have arisen. The first is the time for appealing under Rule 26 of the Tribunal's Rules; the second is the Tribunal's approach to amendments under Rule 11 of the Tribunal's Rules arising in applications for review in merger cases; and the third issue is the issue of costs under Rule 55(2) of the Tribunal's Rules.

4. Very briefly, the background is as follows: The OFT took the contested decision on 5th March 2004 and, on that day, published a Press Release that reads:-

> "The OFT today announced the clearance of the anticipated acquisition by Tesco plc of 45 smaller grocery stores in the London area from Adminstore Ltd. Although the proposed acquisition would, if completed, result in a relevant merger situation, the OFT does not believe that it is or may be the case that the merger would give rise to a substantial lessening of competition within any market for goods or services in the UK. The merger will therefore not be referred to the Competition Commission. The OFT has investigated the effects of this merger on national, regional and local competition in relevant grocery markets. On none of these bases does this merger give rise to competition concerns. Third parties raised concerns about Tesco's existing size and potential for future growth but these are not significantly affected by this merger."

5. The detailed reasons for the OFT's decision were then published in the decision itself, published on 19th March, which runs to some eight pages of detailed reasons.

6. On 2nd April 2004, the FWD lodged its Notice of Application to the Tribunal. At the time, the FWD was not legally represented. In its covering letter, the FWD indicated that it was filing its application on a precautionary basis, since there was some uncertainty as to the deadline for filing its Notice of Application. In that connection, it appears there had been contact between the FWD and the OFT and, by an email of 30th March 2004, the OFT expressed to the FWD the view that:

> "If an appeal is made later than this Friday, it is possible that we will, as a first step, seek to have it rejected as out of time. We accept we might lose this application but we might have to do it to preserve our position."

7. So FWD filed its Notice of Application, as it says, on a precautionary basis to make sure that its application was filed in time.

8. We should say at this point that the relevant Rule setting out the time limit is Rule 26 of the Tribunal's Rules which provides:

> "An application under section 120(1) of the 2002 Act for the review of a decision in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation must be made within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier."

9. We return in a moment to the meaning of the words "the applicant was notified of the disputed decision or the date of publication of this decision, whichever is the earlier."

10. The Notice of Application having been filed, there was a certain amount of correspondence. The Tribunal's own Registry pointed out to the FWD that it remained open to it to file a more detailed and perhaps more considered Notice of Application by the date that FWD considered to be the correct deadline. That was done by a letter from the Registry on 2nd April 2004; it was, however, also pointed out in that letter by the Registry that that would create a situation of some procedural uncertainty as to the time for the filing of the OFT's defence.

11. On 13th April 2004, the Treasury Solicitor, acting on behalf of the OFT, indicated to the Tribunal that it was preparing its defence on the basis that the deadline for lodging the defence

was 4th May 2004, and reserved the OFT's position as regards any application FWD might make in relation to an extension of time or amendment of the Notice of Application.

12. On 20th April 2004, the Tribunal received a letter from Macfarlanes stating that it had been instructed by FWD. That was followed by a further letter of 22nd April 2004 reserving the right, on behalf of FWD, to amend the Notice of Application. The Tribunal, on the same day, 22nd April, pointed out that it was necessary to apply for permission to amend and that the provisions of Rule 11 of the Tribunal's Rules applied.

13. There was then an intervention on behalf of Tesco made on 22nd April 2004, the Tribunal giving Tesco permission to intervene on 27th April. Tesco has not sought any orders in its favour and no orders are sought against Tesco so we say no more about Tesco as the Intervener.

14. On 29th April 2004, Macfarlanes wrote on behalf of FWD requesting permission to withdraw the application on the basis that each party should pay its own costs. Tesco indicated on 30th April that they had no objection to that course but on the same day, the OFT, through the Treasury Solicitor, stated that they did not oppose the withdrawal but did seek their costs.

15. Following the exchange of further submissions between the parties, we have effectively heard submissions today on the three questions that we outlined earlier: what is the right date for lodging appeals in merger cases under Rule 26; what is the correct approach to amendments under Rule 11; and what is the right order for costs in a case of this kind.

16. Taking the first of those issues, what is the date for lodging an application for a review under Rule 26 of the Tribunal's Rules, the FWD effectively submits that the time for commencing proceedings under Rule 26 should run from the time when the reasons for the decision are published. It is submitted that in this particular case the FWD was, to some extent, bounced into lodging its application too early because it could not risk the OFT taking the point against it that it should have been lodged no later than 2nd April, even though the reasons were not available until 19th March.

17. The OFT, however, has submitted that in Rule 26 the notification of the disputed decision or the date of publication of the decision, within the meaning of that Rule, is in fact, in this case, the

date of the publication of the Press Release dated 5th March. The OFT, in particular, draws our attention to Section 107 of the 2002 Act which draws a distinction under Section 107(1)(a) between the duty of the OFT to publish a decision and the duty under Section 107(4) to also publish the reasons for the action concerned or, as the case may be, of the decision concerned, pointing out in particular that by virtue of Section 107(5), the reasons need not, if it is not reasonably practicable to do so, be published at the same time as the decision concerned.

18. That being the case, says the OFT, the effect of Rule 26 is that the time for lodging an application for review begins to run from the date of the Press Release. If either before or, as we understand it, after the expiry of the four-week period allowed by Rule 26 the reasons for the decision subsequently become available, the correct course for the applicant is then to apply to the Tribunal for permission to amend the Notice of Application under Rule 11 of the Tribunal's Rules.

19. That Rule is in the following terms:

> "(1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.
> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless-
>
> (a) such ground is based on matters of law or fact which have come to light since the appeal or made; or
> (b) it was not practicable to include such ground in the notice of appeal; or
> (c) the circumstances are exceptional."

20. Without actually conceding that in the circumstances envisaged the OFT would not oppose such an application for permission to amend, it is submitted on behalf of the OFT that an applicant in the circumstances we have mentioned would have good grounds for seeking permission to amend on the basis of the various provisions of Rule 11(3), in particular that such matters had come to light since the appeal was made or that it was not practicable to include such ground in the notice of appeal or perhaps even that the circumstances were exceptional.

21. Those being the main arguments, in outline, on this question, the issue for us is the true construction of Rule 26.

22. We are extremely doubtful whether the Press Release can be regarded as "a notification to the applicant of the disputed decision". But the more important question is the meaning of the words "the date of publication of the decision" within the meaning of this rule.

23. In our judgment, the date of publication of the decision within the meaning of this Rule is the date of the publication of the reasons for the decision and not the date of the announcement by the OFT of the fact of the decision. The result of that would be, applied to this particular case, that in our judgment time began to run from the date of publication of the reasons, that is to say 19th March, and not the date of the Press Release which is 5th March. Our basic reasoning is that it is only when a potential applicant is in possession of the reasons for the OFT's decision that he can reasonably assess whether he should apply for a review or not. If applicants are obliged by this Rule to apply for a review at a time when they merely know that there has been a decision but they do not know the reasons for it, in our judgment that is likely to be both an inefficient and an inequitable result.

24. It will be inefficient because, in those circumstances, the applicant does not know where to direct his fire, as it were, and may later have to seek leave to amend his application when the reasons become known. That seems to us likely to create uncertainty and disrupt the proceedings. It is likely to disrupt the preparation of the defence and to lead to a number of disputes under Rule 11 as to whether or not leave to amend should be given. It is likely also, we fear, to lead to a number of appeals being lodged on a purely precautionary basis brought by appellants before they know whether they have grounds or not for appealing. All that appears to us to be extremely unsatisfactory.

25. It also seems to us, in principle, to be inequitable to require an appellant to appeal before he is in a position to assess the legality of the decision, a sufficiency of the reasons being of course a key element in reviews taking place under Section 120 of the 2002 Act.

26. We also notice that Rule 8(6) of the Tribunal's Rules requires the appellant to annex to his Notice of Appeal a copy of the disputed decision. In our judgment, that does not mean the Press Release setting out the fact that a decision has been taken, but the reasoned decision that the OFT has taken.

27. The provisions of Section 107 of the 2002 Act that have been cited to us do not lead us to a different conclusion, given that we are here construing the Tribunal's Rules in the light of the purpose and intention of the Rules and the general efficiency of the system established by them. We take the view that the above construction is the fairest and clearest at which we can arrive.

28. There is, however, a connected point which is the second matter that has been the subject of some discussion before the Tribunal today, which is the scope of Rule 11 in merger cases. The view that we take on the construction of Rule 26, and the fact that this application for review is being withdrawn, means that we do not have to get into the question of whether or not, in this particular case, we would have given permission to amend under Rule 11(3).

29. A recent judgment by the Tribunal in another case, Floe Telecom v Ofcom [2004] CAT 6, has given a certain amount of guidance on the scope of Rule 11(3) and we do not need to repeat that here.

30. However, assuming we are right about Rule 26, we take the view that in merger cases it is likely to be the case that the Tribunal will be slow to give permission to amend under Rule 11(3). The bringing of proceedings for a review in a merger case is a serious step. If the applicant has, as we think, the full four weeks from the date when he has the reasons to prepare his application, he should in principle, in our judgment, be held to the application that he then prepares, and that all main points should be fairly and squarely placed before the Tribunal in the notice of application.

31. We can, of course, never legislate in advance for all situations that might arise or exclude the various exceptional circumstances that may come about but, in principle, in these sorts of cases once they have been launched they should continue within the framework of the original Notice of Application and not otherwise. That seems to us a rule that we should try to enforce fairly strictly as a counterbalance to the construction of Rule 26 which we have just indicated.

32. That takes us on to the question of the costs in this particular case. We have had both written and oral submissions on costs.

33. The FWD essentially submits that it would not be just to order costs against it, referring to

previous decisions of the Tribunal; that it was only late in the proceedings, about 19th or 20th April, that the Federation, which itself has limited resources, was able to get authority from its members to raise a fighting fund; that as soon as the money was available, legal advice was sought; that the withdrawal has taken place within a reasonable time of that advice being sought; that it was quite a complicated matter for the lawyers brought in to assess the issues in the case, particularly in the light of previous decisions of the Competition Commission in relation to supermarkets and the contested takeover battle for Safeway; that it would have been appropriate for the OFT, in view of the procedural uncertainty that had arisen, not to go on incurring costs and should have put the defence on hold, or at least contact the Tribunal in some way; that it would be unreasonable to award 100% of the OFT's costs against the FWD because at least part of the cost is incurred in the public interest; and that in any event the costs sought by the OFT, which amount to some £12,000, are excessive.

34. The OFT, on the other hand, points to the fact that, after all, the appeal has been withdrawn and a previous decision of the Tribunal in Hasbro (Costs) [2003] CAT 2 is to the effect that in those circumstances withdrawing applicants should normally pay a proportion of the respondent's costs; the OFT acted, it is submitted, entirely reasonably in preparing its defence in the way it did; the OFT has to be conscious that it should not delay matters; it is not the OFT's responsibility that the FWD did not get legal representation earlier; the FWD, so submits the OFT, is not as impecunious as it may appear since it has members that serve some 55,000 outlets, some of whom are apparently substantial companies. Therefore, in those circumstances, there is no reason why the OFT should bear the costs of this particular appeal.

35. Rule 55(2) of the Tribunal's Rules provides:

> "The Tribunal may, at its discretion, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings. In determining how much the parties are required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings."

36. That has been the subject of a number of previous decisions by the Tribunal, in particular in Napp: Interest and Costs [2002] CAT 3. The Tribunal said that Rule 55(2), as it now is:

> "...gives the Tribunal a wide discretion on the question of costs to be exercised in the particular circumstances of the case. There is no explicit rule before the Tribunal that costs follow the event, nor is there any rule that costs are payable only when a party has

behaved unreasonably. All will depend on the particular circumstances of the case."

37. There are then a number of other cases to which we have referred ourselves which, in the interests of brevity, we will not take time to recite but which will appear in the approved version of this extempore judgment. [See Institute of Insurance Brokers v Director General of Fair Trading [2002] CAT 2 ("GISC: Costs"); Napp: Interest and Costs; Freeserve.com plc v Director General of Telecommunications [2003] CAT 6; Aberdeen Journals Limited v Office of Fair Trading [2003] CAT 21; Aquavitae (UK) Limited v Director of Water Services [2003] CAT 23; and IBA Health Limited v Office of Fair Trading [2004] CAT 6.]

38. In broad terms, some of the considerations that have emerged in the Tribunal's previous case law apply, in our judgment, to applications under Section 120 of the 2002 Act. It is important in our view that we should not frustrate the objectives of the 2002 Act by making orders for costs in a way that might deter appellants or would have a chilling effect on the development of this jurisdiction.

39. That is a matter to which the Tribunal referred in GISC: Costs at paragraph 54:

> "[It] could be seriously counter-productive, from the point of view of achieving the objectives of the Act, particularly as regards smaller companies, representative bodies and consumers."

40. In Hasbro (Costs) the Tribunal stated however:

> "On the question of principle, where an appellant unilaterally decides to discontinue [an appeal] it will often be the case that the withdrawing party should pay at least a proportion of the Respondent's costs."

41. Bearing all that background in mind, in this particular case we have essentially to strike a balance: on the one hand there is a public interest in applicants being encouraged to withdraw if they feel that their appeal is no longer sufficiently worth pursuing; on the other hand, it is also important that public authorities should not be obliged to incur what are wholly unnecessary expenses as a result of appeals being lodged and then subsequently discontinued.

42. In our judgment, the various considerations can be summed up in the following way: in favour of the arguments put forward by the FWD, it seems to us that at least part of the problem in this

case has arisen as a result of uncertainty as to the date by which the appeal should have been filed. We cannot tell what might have happened if there had been clarity on that point or if the OFT had not taken the view that it did on the construction of Rule 26, which we have found to be incorrect. There would have been more time for the applicants to consider their position and possibly obtain legal representation, or at least some degree of advice if they had had more time in the first place.

43. We also take the view that once they had obtained legal advice, they desisted within a reasonable time and that, in accordance with the position taken by the OFT in the Hasbro judgment, there are arguments for encouraging applicants to discontinue in appropriate cases, and that in order to so encourage them, it would be wrong to make full costs orders in such cases.

44. We also bear in mind what the Tribunal has said in previous cases about the difficulties faced by smaller companies, representative bodies or consumer organisations. It has not been submitted by the OFT that this appeal fell into the category of frivolous or vexatious.

45. So those are the arguments that are essentially the arguments in favour of FWD.

46. On the other hand, in favour of the OFT we take the view on the material we have that in this case the Federation did not perhaps entirely think through its position before lodging its appeal and perhaps to some extent misunderstood the seriousness of the step it was taking. The Federation itself, although not well resourced as far as its own resources are concerned, does apparently have behind it some not insubstantial companies.

47. In all those circumstances, it seems to us that we should follow our indication in the Hasbro case and order the Federation to bear at least a proportion of the costs but not the whole costs, taking into account the considerations that we have just set out above.

48. What we propose to do is to order the FWD to bear 25% of the costs which, on our calculations, is approximately equivalent to the OFT's external disbursements in this case; leaving the OFT to bear its own internal costs, the FWD to bear its own costs and Tesco to bear its own costs.

49. To some extent, in a case such as this and in the early stages of this new regime, we regard the internal costs incurred by the OFT as part of the general costs of the system. We are sure that the work done has not been wasted and may well be of value in other cases and is not, in all the circumstances, a cost that we feel we should in fairness attribute to FWD.

50. So the Tribunal's order is that the FWD has permission to withdraw its application on the basis that it pays 25% of the OFT's costs, not including the costs of today.