



[2003] CAT 14

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1009/1/1/02

New Court,
48 Carey Street,
London WC2A 2JT.

23 June 2003

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR ANDREW BAIN OBE FRSE
PATRICIA QUIGLEY WS

BETWEEN:

ABERDEEN JOURNALS LIMITED

Applicant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

supported by

ABERDEEN INDEPENDENT LIMITED

Intervener

Miss Veronica Roberts of Messrs Herbert Smith appeared for the Appellant.

Mr Simon Brindley of Legal Services, Office of Fair Trading appeared for the Respondent.

Mr John Hill of Messrs Shoosmiths appeared for the Intervener.

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JUDGMENT
Re: CONFIDENTIALITY

1 THE PRESIDENT: One of the matters which we have been considering today in handing down our
2 judgment in the case of *Aberdeen Journals v The Office of Fair Trading* is the question of
3 business confidentiality and in particular what information should appear in the final published
4 version of our judgment.

5 Since the Enterprise Act 2002 has only recently come into force in this respect, from 1
6 April 2003 (see the Enterprise Act 2002 (Commencement No. 2, Transitional and Transitory
7 Provisions) Order 2003 S.I. 2003 no. 766), it is appropriate to take this opportunity to sketch
8 out the relevant statutory provisions.

9 Part 9 of the Enterprise Act 2002 contains restrictions on disclosure that relate in
10 particular to specified information regarding the business of any undertaking: see section
11 287(1). The provisions of Part 9 apply to the Office of Fair Trading and other regulators, and
12 permit disclosure to be made by consent (Section 239) and for the purpose of facilitating the
13 exercise by the relevant public authority of its functions under the Act or any other enactment
14 (Section 241(1))

15 Section 244 sets out the considerations to which the public authority must have regard,
16 when considering disclosure. The relevant consideration for present purposes is to be found in
17 section 244(3):

18 “(3) *The second consideration is the need to exclude from disclosure (so far as*
19 *practicable)-*

20 (a) *commercial information whose disclosure the authority thinks might*
21 *significantly harm the legitimate business interests of the undertaking*
22 *to which it relates...”*

23 But, under section 244(4) the public authority must also have regard to the extent to which the
24 disclosure of the information referred to in section 244(3)(a) is necessary for the purpose for
25 which the authority is permitted to make the disclosure.

26 Those being the provisions that refer to the Office of Fair Trading and other
27 Regulators, section 237(5) of the Enterprise Act provides that “Nothing in this Part affects the
28 Competition Appeal Tribunal”. So the Tribunal itself is not affected by what is set out in Part 9
29 of the Act.

30 The provisions that affect the Tribunal are, however, to be found in Schedule 4,
31 paragraph 1 of the Act, and that provides:

32 “(1) *A decision of the Tribunal in any proceedings before it must-*

33 (a) *state the reasons for the decision and whether it was unanimous or taken by*
34 *a majority;*

35 (b) *be recorded in a document signed and dated by the chairman of the*
36 *Tribunal dealing with the proceedings.*

37 (2) *In preparing that document the Tribunal shall have regard to the need for*
38 *excluding, so far as practicable-*

- 1 (a) information the disclosure of which would in its opinion be contrary to the
2 public interest;
3 (b) commercial information the disclosure of which would or might, in its
4 opinion, significantly harm the legitimate business interests of the undertaking
5 to which it relates;
6 (c) information relating to the private affairs of an individual the disclosure of
7 which would, or might, in its opinion, significantly harm his interests.
8 (3) But the Tribunal shall also have regard to the extent to which any disclosure
9 mentioned in sub-paragraph (2) is necessary for the purpose of explaining the reasons
10 for the decision.”

11 The first point to note is that the only statutory provision that appears to apply to the
12 Tribunal relates, in effect, to the judgment that the Tribunal gives at the end of the proceedings,
13 that being the “document” referred to in paragraph (1)(b) and (2) of Schedule 4.

14 However, self-evidently, in order to preserve the effect of that statutory provision, the
15 Tribunal must, during the course of the proceedings, protect the confidentiality of information
16 that might, in the final judgment, be excised upon the grounds that it falls within one of the
17 statutory provisions that I have just mentioned: otherwise Schedule 4, paragraph 1, of the Act
18 would be without practical effect.

19 There are a number of provisions in the Tribunal Rules which aim at protecting
20 confidentiality during the proceedings, particularly as regards interveners, and as regards
21 matters that are mentioned, or might be mentioned, during the public hearing.

22 In that respect the Competition Appeal Tribunal Rules 2003, which came into force on
23 20 June 2003, have explicit provisions - see, for example, Rule 53, request for confidential
24 treatment; Rule 50 which provides for the Tribunal to hear certain matters in camera; and Rule
25 16(8) which applies as regards interveners. The Tribunal of course attaches a high importance
26 to preserving confidentiality during the course of the proceedings.

27 However, when it comes to what is to be published in the judgment, attention has to be
28 paid to the relevant statutory provisions, and it is worth emphasising that in paragraph 1(2)(b)
29 of Schedule 4 to the Enterprise Act the matter first of all depends on “the opinion” of the
30 Tribunal. First, the Tribunal has to have regard to whether the information in question would
31 “significantly” harm the relevant interests of the undertaking to which it relates. Secondly,
32 those interests must be “legitimate” interests; and thirdly, by virtue of paragraph 1(3), the
33 Tribunal must, nonetheless, have regard to the extent to which disclosure is necessary for the
34 purpose of explaining the reasons for the decision.

35 So in effect one has to ask oneself the questions: would disclosure cause significant
36 harm? Is the interest sought to be protected a legitimate interest? And, in any event, is
37 disclosure necessary for the purpose of explaining the reasons for the decision?

38 In this particular case we invited the parties to indicate to us what their position was as

1 regards confidential information. The decision of the Director with which this appeal is
2 concerned accorded confidentiality to quite a large number of items of information relating
3 mainly to market share information, information regarding revenues, information regarding
4 costs, and information regarding yields of various kinds. That is, in the ordinary way, certainly
5 information that can be described as "commercial information" within the meaning of
6 paragraph 1(2)(b) of Schedule 4 of the Act.

7 However, all that information is now over three years old, if not older. Aberdeen
8 Journals (the applicant) has indicated to us that, with one exception - to which I will come in a
9 moment - it does not seek to prevent disclosure in the Tribunal's judgment of that information.
10 We think that is a proper approach for Aberdeen Journals to have adopted in this case. Had we
11 had to decide it, we would almost certainly have decided that in the circumstances of this case
12 the information in question is now too old to be capable of causing significant harm to the
13 interests of the undertakings to which it relates.

14 We would also have been doubtful at this stage of the proceedings whether there would
15 be "legitimate" business interests that still required to be protected; and, in any event, it would
16 in our view be necessary to disclose most of the information for the purpose of explaining the
17 reasons for our decision. In our view Aberdeen Journals has acted properly and responsibly in
18 taking the view that it has as regards the issue of confidentiality.

19 The one outstanding point relates to a table that is set out in paragraph 284 of the
20 Tribunal's judgment, that summarises certain information about advertisers advertising in the
21 *Evening Express* and taking more than a half a page advertisement in March 2000, and who
22 also use a free newspaper. The information in that table shows the size and distribution by
23 volume by those advertisers who are named as between the *Evening Express*, the *Herald &*
24 *Post* and the *Independent*.

25 It is submitted on behalf of Aberdeen Journals that this information shows the degree to
26 which Aberdeen Journals relied on these named advertisers and the extent to which named
27 advertisers were placing advertising in Aberdeen Journals' titles. It is also submitted that
28 although this information could be obtained from published sources it would take a
29 considerable amount of time and effort to obtain the information and to present it in this form.
30 Concern is also expressed about whether the advertisers in question would be content to see
31 this kind of information published.

32 Our view on this is, first of all, that the information in this table is relevant to our
33 decision. Secondly, it relates only to volume figures and not to value figures as to which we
34 may well have taken a different view. Thirdly, the information is, or could be, assembled from
35 sources that are publicly available in the sense that any member of the public could go to the
36 relevant newspapers and perform a calculation of what volume each advertiser was in fact
37 placing in each newspaper during the period in question. Applying the statutory tests we are
38 somewhat doubtful whether the publication of this table could cause significant harm either to

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the applicant, Aberdeen Journals, or to the advertisers who are mentioned in this table. In any event a large part of the information published does seem to us necessary for the purpose of understanding our decision.

However, it has been pointed out to us that it is not perhaps strictly necessary in order to understand the Tribunal's decision for the specific figures set out in the first column of the table in question, which identify the exact volume that these advertisers placed in the *Evening Express* in the period in question.

Having regard to the submissions that have been made, we think the right conclusion is to exclude from the published version of the decision the figures for volume set out in the first column of the table at paragraph 284 of the Decision. That leaves simply general percentages which give, in order of magnitude terms, a picture of how far the relevant advertisers were using the different newspapers during that period. Those percentages expressed as volume figures in our view reveal little or nothing that could be regarded as commercially confidential and appear to us to be necessary for the purposes of understanding our Decision. That is how we propose to decide the issue of confidentiality in this case.
