

IN THE COMPETITION APPEALS TRIBUNAL

Case No. 1006/2/1/01

The Competition Commission  
Room 309 New Court  
48 Carey Street  
London WC2

Thursday 20 December 2001

Before:

THE PRESIDENT  
**SIR CHRISTOPHER BELLAMY QC**  
(The Chairman)

MR MICHAEL DAVEY  
MR DAVID SUMMERS

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B E T W E E N:

**BETTERCARE GROUP LIMITED**

**Appellant**

- and -

**THE DIRECTOR GENERAL OF FAIR TRADING** **Respondent**

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MR JAMES FLYNN (instructed by L'Estrange & Brett Solicitors)  
appeared on behalf of the Appellant.

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

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**JUDGEMENT**  
(As approved)

1 THE PRESIDENT: We have to rule on certain matters that have arisen during this first Case Management Conference, which takes place in the context of the appeal lodged by BetterCare Group Limited against what BetterCare submits is the rejection of a complaint that BetterCare made to the Director General of Fair Trading under the Chapter II prohibition of the Competition Act 1998.

2 The complaint made by BetterCare was essentially that the North and West Belfast Health and Social Services Trust was abusing a dominant position, contrary to the Chapter 2 prohibition of the Act, essentially in offering unfair terms in its purchase from BetterCare of nursing and residential care services. BetterCare carries on business in the supply of those services.

3 After correspondence between BetterCare and the Director, the Director rejected BetterCare's complaint essentially on the grounds that the North and West Belfast Health and Social Services Trust was not an undertaking. BetterCare then appealed by an application lodged on 21 November 2001 to this Tribunal.

4 The appeal at this stage raises two issues. Firstly, whether the Director has in fact taken a decision that is appealable to this Tribunal under Section 46 or Section 47 of the Competition Act 1998; and, secondly, whether North and West Belfast Health and Social Services Trust is an undertaking for the purposes of the 1998 Act.

5           In terms of the case management of this appeal, there are three issues  
at the moment. First, whether the issue of whether or not the Director has  
taken any appealable decision, should be heard as a preliminary point;  
secondly, what should be the location of these proceedings for the purposes  
of Rule 16 of the Tribunal's Rules; and, thirdly, what should be the rule in  
relation to two applications for intervention that the Tribunal has received  
from the Registered Homes Confederation of Northern Ireland Limited and  
the Bedfordshire Care Group respectively.

6           The first of those issues (whether there is an appealable decision as a  
matter to be heard as a preliminary point) is one on which the Tribunal  
indicated to the parties that it saw merit in deciding that issue before going  
on to the question of whether the Trust is an undertaking.

7           The Director General supported that way of proceeding, but the  
appellant, BetterCare, opposed it on the ground principally that, should  
BetterCare succeed on that preliminary issue, then it, BetterCare, will incur  
extra costs if the matter then proceeds thereafter.

8           On this issue we are of the view that it is appropriate to deal with the  
question of whether there is an appealable decision as a preliminary point.  
As a matter of principle our entire jurisdiction depends upon that point  
being resolved and it does not seem to us appropriate to go into the  
subsequent question of whether the Trust is an undertaking until we are  
satisfied that we have jurisdiction to do so. Like many cases where  
preliminary issues are decided, it may well be that costs will be saved in the  
end. If we were to decide that there was no appealable decision, clearly  
that would be the end of the case. On the other hand, if we were to decide  
that there is an appealable decision and the case should proceed, in our  
view the extra costs of having taken the matter in two stages are not  
sufficiently significant to outweigh the advantages of dealing with the

matter as a preliminary issue. The main advantage in dealing with the matter as a preliminary issue is that we can in fact deal with that issue relatively quickly.

9           As has already been canvassed with the parties, we would expect the Director's defence, in the first instance, to be limited to the question of whether there is an appealable decision and on that basis the Director has told us that he can file his defence by Friday 11 January, a date which we are in principle prepared to accept. I will come back later in this judgment to the subsequent course of the proceedings, but we are of the view at the moment that the hearing of this preliminary issue can conveniently be heard in the week commencing 4 February, and that we should therefore be able to deal with the preliminary issue relatively expeditiously on that basis.

10           We then come to the question of the location of the proceedings. We originally indicated to the parties our view that the proceedings could conveniently remain as proceedings before a tribunal in England and Wales, at least pending the resolution of the preliminary issue, notably since that point is a point of general importance that affects not just Northern Ireland but the whole of the United Kingdom and indeed the structure of the Act.

11           The Director General expressed a preference for that point being decided by a tribunal in England and Wales, but the appellant, BetterCare, has strongly urged us to treat this as a case proceeding before a tribunal in Northern Ireland, since the principal participants are based in Northern Ireland, that their instructing solicitors are in Northern Ireland and that there is no merit in splitting the case in the way originally suggested.

12           We have come to the view that there is force in those submissions. If we take the various matters to which we are required to have regard under Rule 16(2) of the Tribunal Rules, we note that the applicant is

habitually resident in Northern Ireland, or has his place of business there. The Trust, which although not a party to the case is concerned by it, is also situated in Northern Ireland and, as we understand it, is established under Northern Ireland legislation. The appellant indeed is incorporated under the laws of Northern Ireland. One of the interveners, to which I shall come in a moment, the Registered Homes Confederation of Northern Ireland Limited, is also based in Northern Ireland.

13           Those various matters, in our view, point towards Northern Ireland as the correct forum for this case.

14           We also foresee the possibility of some complication arising in the future if we were to decide the preliminary issue of whether there is an appealable decision under the jurisdiction of England and Wales, with an appeal to the Court of Appeal in England and Wales, and subsequently decide the substantive issue of whether the Trust is an undertaking under the jurisdiction of Northern Ireland, with an appeal to the Court of Appeal in Northern Ireland. It does not seem to us in principle particularly desirable to split the proceedings in that way, which might involve two different Courts of Appeal hearing appeals at different stages of the case.

15           Taking into account those matters, we are of the view that the location of the proceedings for the purpose of Rule 16 should be Northern Ireland and that the hearing to be arranged in the week beginning 4 February should therefore take place in Northern Ireland.

16           That leaves only the question of the two interventions. There is no objection to the intervention by the Registered Homes Confederation of Northern Ireland Limited raised by the Director. That is a trade association representing those with interests similar to BetterCare and we are prepared to admit that intervention.

17           As far as the Bedfordshire Care Group is concerned, we are informed by that body that it represents the interests of private nursing and residential home owners in the County of Bedfordshire and acts on behalf of around 80 per cent of the private nursing and residential homes in that county.

18           Although the Bedfordshire Care Group is not in any way connected with Northern Ireland, in our view they do have a sufficient interest in this case for the purposes of Rule 14 of the Tribunal Rules. The Bedfordshire Care Group does supply private nursing and residential home services, notably to local authorities, and it therefore has an interest in the question whether a body such as a hospital trust or a local authority is an undertaking for the purposes of the 1998 Act when purchasing private nursing and residential home or care services.

19           That being the case, it does not seem to us fruitful at this point to speculate, as the Director invites us to, on whether the Bedfordshire Care Group can in fact usefully add anything to the proceedings. That, in our view, is not the point. The only question before us is whether that Group has a sufficient interest to intervene, and in our view they do.

20           We are however concerned, as we indicated in our preliminary views, that interventions should not result in a proliferation of paper and should not result in intervening parties raising issues which do not form part of the main appeal, or are in effect side issues or issues which are collateral to the main appeal.

21           In this particular case the two interveners are in fact represented by the same legal advisers as the appellants, BetterCare. We understand that neither intervener has a specific point of view to submit on the question whether there is an appealable decision before this Tribunal. It further seems to us that, on the question of “the undertaking”, there is no particular

reason why the submissions of the interveners should not be made through the legal advisers who jointly represent the appellant and the interveners.

22 In those circumstances, as at present advised, we see no need for any statement of intervention to be served by the two interveners. They will formally be interveners in the case, but for all practical purposes we expect their legal submissions to be made jointly with those of the appellant through their joint representatives. If that gives rise to any difficulty, there will of course be liberty to apply, as there is on any point that arises in relation to a case management conference before this Tribunal.

23 We admit the interventions. We will proceed to hear the preliminary question, as I have indicated, and we will do so in Northern Ireland.

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24 THE PRESIDENT: Unless there are any points that arise immediately on that, I suggest we look back to the agenda to see whether there are any other matters that we ought to be covering before we adjourn.

25 I have the impression, Mr Flynn and Mr Turner, that we have covered most matters. We need to come back to a specific date for the hearing. We are in principle content with the week beginning 4 February and our preferred date would be Tuesday 5 February. I do not know if anybody here is able to indicate any fundamental problems with that date?

26 MR FLYNN: Sir, I have a hearing which is going to be on the morning of either Tuesday 29 January or Tuesday 5 February. At the moment I do not know which, but if that is the only date in the week which suits the Tribunal I shall make other arrangements.

27 THE PRESIDENT: For various reasons Monday 4th is not particularly convenient. Wednesday 6th is not convenient and Mr Flynn, we gather, is engaged on Friday 8th. I think it will have to be Tuesday 5th, but that, of

course, is subject to our arranging appropriate court accommodation in Belfast, which we need to do. I think we will say that it is 5 February provisionally and plan on that basis.

28           If we say that, then I would have thought myself that the timetable suggested by the Director, that is to say that the applicant's skeleton on the preliminary issue by 18 January and the Director's skeleton by 25 January, would be a reasonable timetable. In fact, that timetable leaves some latitude for a little slippage, but if that is the timetable the parties are prepared to work to, then I think we would encourage them to do so.

29   MR FLYNN: I have indicated to Mr Turner that I would be quite happy with that.

30   THE PRESIDENT: In that case, let us say the defence on the 11th, limited to the preliminary issue, the skeleton on the 18th and the Director's skeleton in reply on 25th for a hearing on February 5th, the precise venue to be notified.

31           It seems to us, certainly at this stage, that there are not going to be any witnesses, further documents or issues of confidentiality.

32   MR FLYNN: No, Sir.

33   THE PRESIDENT: I think unless there are any other points by way of case management that any party would like to raise, we for our part have only one matter that we would like briefly to ventilate with the parties. Are there any other points or submissions?

34   MR TURNER: We have two small points. The first is just to remind the court on point 7 of the agenda that the Director General has made certain requests for clarification.

35   THE PRESIDENT: That is what we were going to ask about.

36   MR TURNER: The Tribunal, I believe, has been copied the letter in which we made those requests. Some of them related to the undertakings issue

but three or four of them related to the question of the decision and how the applicant says that an appealable decision was made and how this appeal has been constituted. Really just to record, Mr Flynn has outlined in his submissions that he expects to be able to answer that tomorrow and, for our part, we are obviously content with that but we would want to have answers on those points because of settling the defence.

37 THE PRESIDENT: Of course, yes.

38 Are you able to give us any indication of what the answers are, Mr Flynn? If you really want to wait until tomorrow and do it formally so much the better, but if we were to look at the letter of 17 December and question 4 which asks "Which OFT letter contains the contested decision, which asks for the variation of that decision", etc, are you able to tell us now what the position is?

39 MR FLYNN: The plan was to meet with my instructing solicitor after this and put the letter together. I would not want to anticipate that. It may be that the answer is not simply 'yes, no, or the letter of such and such'. But we will respond.

40 THE PRESIDENT: And you can do so by tomorrow?

41 MR FLYNN: Yes, Sir.

42 THE PRESIDENT: Very well.

43 MR FLYNN: The second request (at paragraph 5) is as to sources of information and so forth. We think that falls away for the moment.

44 THE PRESIDENT: The requests as regards market information probably do fall away at the moment. Of course, it is up to you whether you want to provide it. You can still provide it if you want to, obviously.

45 MR TURNER: We shall not press for it.

46 THE PRESIDENT: You will not need to press for that, no.

47            Similarly Mr Turner, although in the first instance we are not going  
to tackle the undertaking point, it is probably just as well to assemble any  
further information that you need about that just in case it is relevant. It is  
bound to come up at some point, isn't it?

48    MR TURNER: We shall be actively pursuing that, doing what we can to  
ascertain the facts with the North and West Trust and any other relevant  
body.

49    THE PRESIDENT: Yes. Certainly when you have had the clarification  
that you seek from the appellant, when it comes to your defence, one point  
that we would be interested in is to know by what route, if any, you think  
decisions of this kind could or should be challenged if they cannot be  
challenged under section 47 of the Act. Is it that there is no challenge at all,  
or that it is a challenge by way of judicial review or some other procedure,  
or what? I think that would be relevant.

50    MR TURNER: Sir, the other point was in relation to the factual content of  
any statement of interventions. We expect that also to be deferred for the  
moment and revisited if the need arises.

51    THE PRESIDENT: Absolutely. We are not envisaging at the moment, or  
for some time to come, the need for any statements in intervention, but we  
will revisit that if and when, once the preliminary points have been decided.

52    MR FLYNN: Sir, if I can clarify that. It was always the intention that  
these interveners would be making no separate legal submissions, as it  
were, that those would be made through the single channel of the applicant.  
The interveners are there simply, should we come to the issue of  
undertakings, to speak from their experience which is necessarily wider  
than that of the applicant, so the Tribunal would have it from the horse's  
mouth so far as it was necessary.

- 53 THE PRESIDENT: Let us not cross that bridge until we get to it, Mr Flynn, but if we did get to it what we would be deciding was whether North and West was an undertaking and not whether anything else was an undertaking, so although it is, up to a point, background information, it is not directly relevant to the issue perhaps.
- 54 MR FLYNN: Sir, I would not want to confuse what is in the statements supporting the request to intervene with what would go into a statement of intervention, which would go clearly to the issues in the case, which is not what happened on the ground.
- 55 THE PRESIDENT: Yes. If we were to get to the undertaking point, we would need from both sides a fairly full factual matrix in which to decide that point, as I think Mr Turner has already indicated in an earlier skeleton. It will depend very much on the particular facts, I think.
- 56 Very well. Are there any other points or applications that anybody wants to make?
- 57 MR FLYNN: Not from us, Sir.
- 58 MR TURNER: Nor from us, Sir.
- 59 THE PRESIDENT: Thank you all very much indeed.

(The hearing concluded at 3.45)