



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998

CASE NO 1038/2/1/04

Pursuant to Rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar of the Competition Appeal Tribunal gives notice of the receipt of a notice of appeal, dated 23 June 2004, under section 47(1)(e) of the Competition Act 1998 (“the Act”) by ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) (“Burgess”) of Alfred House, The Common, Hatfield, Hertfordshire AL10 and in respect of a decision made by the Office of Fair Trading (“the OFT”) and notified to the appellant by letter of 27 May 2004 (“the Contested Decision”).

The OFT has been investigating a complaint by Burgess of an abuse of a dominant position contrary to the Chapter II prohibition imposed by section 18 of the Act, but at the time the appeal was lodged has not reached a decision on that complaint.

In the Contested Decision the OFT rejected a request by Burgess to make an interim measures direction under section 35(2) of the Act granting Burgess direct or indirect access to Harwood Park Crematorium (“the Crematorium”) pending its decision on Burgess’s complaint.

The appellant seeks the following relief:

1. an order requiring the Crematorium to grant access to Burgess directly or, alternatively, indirectly through another funeral director, if one is willing to assist;
2. further, or alternatively, an Order that the Crematorium and Austin’s funeral directors and their associates and employees keep all matters relating to the markets in which they operate and any other issues before the OFT confidential until publication of the Decision
3. alternatively, any order that the Tribunal considers appropriate to protect the relevant interest of Burgess and/or the public interest.
4. an Order requiring the OFT to disclose before the hearing all relevant documentation, including any information having a bearing on the reason for the Crematorium’s refusal of access on 22 March 2004.
5. that an oral hearing be fixed as soon as practicable.
6. that Burgess be awarded its costs in any event on the grounds of (a) the delay by the OFT in issuing a decision on the substance of Burgess’s complaint, without which this appeal would have been unnecessary; and (b) Burgess’s limited means.

In summary the principal grounds on which the appellant relies are that the OFT:

1. erred in law in failing correctly to address the interpretation of “urgency” and “serious or irreparable damage” or “damage to the public interest” in section 35(2) of the Act. It failed to address the time period against which the urgent, serious and/or irreparable nature of the loss or damage was assessed not to occur.

2. erred in fact in not concluding that the effects of the withdrawal of supply on the loss or damage (a) to Burgess's reputation and/or (b) to the appellant's business and/or (c) to the public interest, amounted to "serious or irreparable damage" to Burgess or the public interest requiring urgent protection as required by section 35(2)(a) of the Act over any likely period between the withdrawal of all access to the Crematorium and the publication of the OFT's decision.
3. erred in law and/or fact and/or in the exercise of any discretion it might have in that it failed to address and/or take account of its own guidance set out in its rejection of Burgess's first request for interim measures, namely "In assessing whether the financial losses are serious, the OFT will take account of the size and financial resources of the undertaking concerned as well as the proportion of loss in relation to its total revenue."

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with Rule 16 of the Rules.¹

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, New Court, 48 Carey Street, London WC2A 3BZ, so that it is received within **three weeks** of the publication of this notice.

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

Charles Dhanowa
Registrar

12 July 2004

¹ On 30 June 2004 the Office of Fair Trading announced that it had made Decision CA98/06/2004, Refusal to supply JJ Burgess & Sons Limited with access to Harwood Park Crematorium: see <http://www.offt.gov.uk/News/Press+releases/Statements/2004/Harwood.htm>. In the light of that decision the appellant has indicated to the Tribunal that it will be filing an appeal under section 47(1)(a) in respect of that decision.