



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998 CASE NO 1041/2/1/04

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar gives notice of the receipt of an appeal, lodged on 12 July 2004, under section 47 of the Competition Act 1998 (“the Act”) by the British Horseracing Board (“the appellant”) in respect of a decision (CA98/2/2004)¹ taken by the Office of Fair Trading (“the OFT”) and published on the OFT website on 10 May 2004 (“the decision”).

The decision relates to certain of the rights sold by corporate groups owning 49 racecourses (together “the Courses”) to Attheraces plc (“Attheraces”) in an agreement dated 2 May 2001 (“the Rights Agreement”). The rights in question were the Non-Licensed Betting Offices (“LBO”) Bookmaking Rights. These are the rights licensed by the Courses necessary to permit Attheraces to supply programming covering British horseraces to UK bookmakers other than LBOs for distribution in combination with betting services. The decision found that the Courses collectively sold those rights and, in doing so, infringed section 2 (“the Chapter I prohibition”) of the Act, and failed to qualify for individual exemption pursuant to section 4 of the Act. In particular, the decision refers at paragraph 448 to the following provisions of the Rights Agreement as infringing the Chapter I prohibition:

- (i) the collective grant by the Courses of their Non-LBO Bookmaking Rights (i.e. Clause 3 of the Rights Agreement insofar as it relates to the Non-LBO Bookmaking Rights); and
- (ii) the payment for such grant of the Non-LBO Bookmaking Rights (i.e. Clause 12 of the Rights Agreement insofar as it relates to the Non-LBO Bookmaking Rights plus the Income Distribution Formula – Interactive Minimum Guarantees).

The decision found that the Courses that signed with Attheraces collectively sold their Non-LBO rights and that such collective sale restricted competition in two ways: first it increased the price that Attheraces paid for the Non-LBO rights, and secondly it restricted the incentives on the Courses to compete on fixtures.

The appellant appeals against the decision on the basis that it contains a number of fundamental errors of fact, law and economics including the following.

Product definition

The OFT fails at the outset to understand the nature of the product at issue in the arrangements, which include the Rights Agreement notified to the OFT, and in addition rights to data, and various ancillary arrangements (together “the Attheraces Arrangements”).

The OFT states it is examining the rights necessary to supply programming rights to non-LBO bookmakers. In so doing the OFT fails to recognise that:

- (1) the product it identifies is not an identifiable product at all;
- (2) there is no identifiable “price” for that product, nor does the OFT even seek to propose one;

¹ The text of the decision can be found at: <http://www.ofg.gov.uk/NR/rdonlyres/A98734AE-9CC1-4240-9E86-BD1DD47AFE6C/0/atr.pdf>

- (3) the product the OFT identifies is simply part of the “other rights” licensed in the Attheraces Arrangements and cannot be distinguished;
- (4) the relevant inputs, those “other rights” included (necessarily) data as well as pictures, and that those products are complements;
- (5) whatever the correct definition of the product at issue, the rights in question were rights to the “British Racing” product. “British Racing” refers to horseracing run under the Orders and Rules of Racing, which are the governing and regulatory rules for all aspects of horseracing in Great Britain, created by collaboration, governed and regulated by the appellant and the Jockey Club. The British Racing product endows the rights with valuable characteristics.

Market definition

The OFT’s market definition analysis in respect of the rights to Non-LBO bookmakers, suffers from a number of crucial flaws, many of which stem from the OFT’s erroneous approach to product definition. In particular the OFT:

- (1) fails to realise the significance of downstream competition;
- (2) fails to take account of substitution possibilities for Attheraces and for ultimate consumers;
- (3) fails to take account of the requirement of critical mass;
- (4) fails to identify the counterfactual or to realise that the counterfactual price may be higher;
- (5) assesses substitutability based on expected rather than the realised profitability of the Attheraces product; and
- (6) has misused the evidence in this regard.

Market power

The OFT’s analysis of market power mischaracterises the entry barriers, and fails to realise that those that exist are the features that create the value of British Racing. There are, in addition, significant errors in assessing buyer power.

Anti-competitive effects

The OFT cannot show any anti-competitive effect, still less to the required standard of proof.

The OFT’s principal effects argument is that the price to Attheraces was increased by the collective sale. The OFT has wholly failed to show such an effect. In particular the OFT:

- (1) has failed to define the price that was actually paid for non-LBO bookmaking rights under the Rights Agreement;
- (2) fails to put forward an appropriate counterfactual price for the non-LBO bookmaking rights based on behavioural assumptions; and
- (3) has not shown that the collective sale raised the price from whatever its counterfactual would be. In fact the OFT cannot show that the deal even could have been done at all individually (given the need for critical mass and associated strategic behaviour of courses), and in any event the OFT has not attempted to adduce evidence to demonstrate that the price would have been lower under individual sale.

The only other anti-competitive effect the OFT puts forward is that the distribution formula (an agreed formula set out in the Rights Agreement which sets out how the revenues derived from the Rights Agreement would be distributed among the Courses) dampens incentives for non-price competition between the Courses. Even if the OFT had shown that to be true

(which is denied), in fact the distribution formula has no practical effect given the small proportion of the Courses' overall revenues that Attheraces provides.

The only real effect the OFT can demonstrate is a transfer of profit from Attheraces' shareholders to the Racecourse Association/Courses. The OFT argues that on that basis it is assisting consumers because Attheraces' shareholders are consumers. A transfer of profits of this kind, where, as even the OFT acknowledges, the Rights Agreement had no effect on the final prices to Attheraces' consumers, nor any effect on quantities, is not, however, the proper realm of competition law.

The OFT fails to appreciate the significance of these benefits and of the context of the Attheraces Arrangements, namely the system, encouraged by Government, for the funding of British Racing by the commercialisation of data and picture rights.

Exemption

The OFT's analysis of exemption amounts to a statement that the considerable benefits it identified could not have been achieved without the collective sale. There are a number of significant errors in the OFT's exemption analysis, for example:

- (1) the OFT has attempted to reverse the burden of proof by considering a number of matters under exemption that should have been considered in analysing the prohibition itself;
- (2) the OFT has incorrectly rejected a number of the appellant's arguments by relying on self-serving statements by the Attheraces companies; and
- (3) the OFT has incorrectly analysed consumer benefits, indispensability and solidarity.

Procedural errors

The decision suffers, in addition, from a number of procedural defects which, without more, require annulment of the decision. In particular the OFT has:

- (1) distorted and failed to discharge its burden of proof;
- (2) failed to conduct a proper investigation;
- (3) used evidence improperly; and
- (4) failed adequately to take into account the appellant's submissions.

In any event, there is a need for full discovery by the OFT and if the Tribunal does not consider annulment to be appropriate, the appellant will seek to cross examine witnesses and to have documents produced by the relevant executives of the Attheraces companies.

The appellant seeks the following relief from the Tribunal:

- (1) an Order setting aside the decision;
- (2) an Order for cross examination of witnesses;
- (3) an Order requiring disclosure of documents;
- (4) such other or further relief as the Tribunal may consider appropriate; and
- (5) an Order that the OFT and/or any intervener in support of the OFT pays the appellant's costs of and incidental to this appeal.

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.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, 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 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa

Registrar
15 July 2004