[2005] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1014/1/1/03 - 1015/1/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29th April 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
THE HONOURABLE ANTONY LEWIS
MS VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

ARGOS LIMITED
&
LITTLEWOODS LIMITED — Appellants

and

OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading) — Respondent

Mr. Mark Brealey QC and Mr. Mark Hoskins (instructed by Burges Salmon LLP) appeared for Argos Limited

Miss Marie Demetriou (instructed by DLA LLP) appeared for Littlewoods Limited.

Mr. Brian Doctor QC and Miss Kassie Smith (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

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RULING (OBSERVATIONS ON COSTS)

THE PRESIDENT:

1 We would like to make some final comments on the issue of costs that has arisen in the present case. At the end of our judgment handed down today ([2005] CAT 13) we indicated that we would like to hear argument on the question of costs. What in fact has happened is that the OFT has reached agreement with the other parties that no party would seek costs of these proceedings.

2 Mr. Doctor (for the OFT) has explained to us that in the light of the Tribunal's comments in two previous cases, namely *Napp* and *Aberdeen Journals*, the OFT did not consider that this was a case in which the mere fact of success would necessarily entitle the OFT to its costs or was the right case in which the OFT would put forward such a submission. The OFT (through Mr. Doctor) referred to the Tribunal's Judgment of 30th July 2003 ([2003] CAT 16) in which the matter was remitted to the OFT for the issue of a second Rule 14 Notice which might well have caused additional cost to be incurred, as well as the fact that the Tribunal has slightly reduced the penalties imposed in this case. There was from the OFT's point of view some danger of a counter application for costs relating to the proceedings up to and including July 2003. In addition, the OFT says that the issue of costs has now fallen away. There is agreement between the parties; the Tribunal should not go behind that agreement and, indeed, no order as to costs is being sought.

3 Argos and Littlewoods effectively support the OFT's position. Argos argues in particular that there is no longer any *lis* between the parties upon which the Tribunal can adjudicate because agreement has been reached on the issue of costs. In any event, Argos adds, Argos (and no doubt Littlewoods) would have sought a counter order for costs of the proceedings leading up to the Tribunal's Judgment of 30th July 2003, which undoubtedly resulted in the Appellants incurring costs that were thrown away.

4 Taking those various points in turn: first, the Tribunal, as at present advised, does not accept that in the circumstances of this case we would have no jurisdiction to make an order for costs under Rule 55(2) of the Tribunal's Rules. That provides:

> "(2) The Tribunal may at its discretion, subject to paragraph (3), 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 and in determining

> how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings."

In fact, that Rule does not make the Tribunal's power as to costs subject to the need for any application for costs to have been made, nor does it appear to us to be appropriate for the Tribunal's jurisdiction to be ousted by an agreement between the parties. We bear in mind that in terms of modern litigation all cases before the Tribunal are subject to the overriding objective of disposing of the case as justly as possible and, in the exercise of its general powers, we do not at all exclude the possibility of making orders for costs without an application having been made, even if the parties' view of the matter is different from the view the Tribunal has arrived at.

5 However, we do not in this particular case propose to interfere with the agreement that has been reached given the particular circumstances that have arisen. What does seem to us, however, appropriate is to make a further clarification of the situation in relation to cases that may have to be decided hereafter.

6 It is true that in the first two Judgments that the Tribunal issued in *Napp*: *interest and costs* [2002] CAT 3 at [23] and *GISC: costs* [2002] CAT 2 at [54] the Tribunal said that it would "lean against" costs orders against unsuccessful appellants in cases involving penalties. However, in *Aberdeen Journals: costs* [2003] CAT 21 – a somewhat later case – the Tribunal qualified those first comments and said this:

> "However, the Tribunal's developing experience is that appeals impose a significant resource cost on the public purse in cases involving penalties. If the Tribunal does not use its costs powers to keep cases within manageable bounds, the appeal system may not function correctly. In these circumstances it may well, in the future, be appropriate to make orders for costs against unsuccessful appellants in penalty cases, depending of course on the circumstances of the particular case."

7 The reference in that Judgment to keeping cases within manageable bounds was not, in our view, intended to limit the jurisdiction to order costs against unsuccessful appellants in penalty cases only to those cases where, for some reason, the case had been presented in an excessive way or had in some way exceeded "manageable bounds". The jurisdiction seems to us to be a general one.

8 In the Tribunal's recent decision *Apex Asphalt and Paving Co. Limited v Office of Fair Trading* [2005] CAT 11, the Tribunal declined to award costs in that case, particularly since a small undertaking was involved. The Tribunal, however, expressly left it open at [28] that in future cases it may be appropriate to make orders against unsuccessful appellants in penalty cases.

9 We take this opportunity to say again that in penalty cases, and especially in heavy price-fixing cases involving substantial undertakings where the OFT is successful, there may be strong grounds for considering Orders for costs even if, in the course of the case, procedural issues have arisen and even if the OFT has not necessarily prevailed on every point. We hope that message will be borne in mind for the future.