Neutral citation [2010] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1121/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

28 April 2010

Before:

VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) DURKAN HOLDINGS
(2) DURKAN LIMITED
(3) CONCENTRA LIMITED

Appellants

- v -

THE OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 14 April 2010

RULING ON DISCLOSURE

APPEARANCES

Mr. Mark Hoskins QC (instructed by Jones Day) appeared on behalf of Durkan Holdings Limited, Durkan Limited and Concentra Limited.

Ms Kelyn Bacon and Mr. Tony Singla (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Office of Fair Trading.

Introduction

1. The Respondent in this Appeal ("the OFT") has applied for an order for disclosure of certain documents which are said to be relevant to one of the main issues in this appeal. That issue is the question whether the First Appellant ("Durkan Holdings") exercised decisive influence over the Third Appellant at the time of the infringements which it is admitted were committed by the Third Appellant. Those infringements were the subject of fines imposed by the OFT in its decision of 21 September 2009 called "Bid rigging in the construction industry" ("the Decision").

2. At the time of the infringements the Third Appellant was called Durkan Pudelek Ltd and I shall refer to it as "Durkan Pudelek" in this ruling. 51 per cent of the shares in Durkan Pudelek were owned by Durkan Holdings and the remaining shares were divided between Michael Pudelek who was the Chief Executive and Colin Simmons who was the Commercial/Managing Director. In the Decision, the OFT found that Durkan Holdings exercised decisive influence over Durkan Pudelek at the relevant time. The effect of this was two fold. First, Durkan Holdings was held to be jointly and severally liable to pay the fine imposed on Durkan Pudelek. Secondly, the fine was calculated on the turnover of the whole Durkan Holdings group, not just on the smaller turnover of Durkan Pudelek.

3. During the OFT's investigation, Durkan Holdings strongly contested the assertion that it exercised decisive influence over Durkan Pudelek. In the Decision the OFT held that the 51 per cent shareholding (which carried 51 per cent of the votes) and other indicia created a presumption that decisive influence existed. They further held that the evidence put forward by Durkan Holdings to rebut that presumption not only failed to do so but in fact showed that Durkan Holdings had *actually* exercised decisive influence over Durkan Pudelek at the relevant time: see paragraphs II.412, II.439 and II.441 of the Decision.

4. In addition to the majority shareholding, the OFT relied on a number of other indicia described in paragraphs II.407 onwards of the Decision. These included the fact that three of the directors of Durkan Pudelek, namely William Durkan, Daniel

Durkan and Alan Fraher, were also directors and full time employees of Durkan Holdings. William Durkan was the Chairman of Durkan Pudelek, Daniel Durkan was appointed its Executive Director and Alan Fraher was its Financial Director. The OFT considered that the fact that directors and full-time employees of Durkan Holdings held senior operational management positions within Durkan Pudelek was evidence that Durkan Holdings exercised decisive influence over Durkan Pudelek.

5. Durkan Holdings submitted that its three directors did not in fact actively participate in the affairs of Durkan Pudelek. The Chairman, William Durkan, only attended about a third of the Durkan Pudelek board meetings and, when he did not attend, he did not appoint an alternate as envisaged by the subscription agreement which governed the relations of the different participants in the business. Durkan Holdings' case was and is that operational control of Durkan Pudelek was exercised exclusively by Michael Pudelek and Colin Simmons and their team.

6. The Appellants appended to the Notice of Appeal witness statements from William Durkan, Daniel Durkan, Alan Fraher, Michael Pudelek and Colin Simmons. All of these state unequivocally that despite the titles given to the three Durkan Holdings directors, all decisions about Durkan Pudelek were taken by Mr Pudelek and Mr Simmons. Durkan Holdings, they say, was only interested in protecting the investment it made when it initially contributed funds to enable Mr Pudelek and Mr Simmons to start up in business. The Notice of Appeal goes on to say that the position as described in the witness statements is confirmed by the Durkan Pudelek Board minutes during the periods of the relevant infringements and those board minutes are annexed to the Notice of Appeal. They comprise the board minutes from eight different meetings, four meetings conducted between February and July 2003 and four meetings between January and July 2006.

The documents sought

7. There are three categories of documents in relation to which the OFT now seeks an order:

(a) the board minutes and annual reports of Durkan Pudelek from the time of its incorporation in 1992 until the date of the management buy out in September 2007, other than the ones already annexed to the Notice of Appeal or otherwise provided to the OFT ("the disputed board minutes");

(b) all documents relating to the meetings, described in the witness statement of Mr Pudelek, between Durkan Pudelek and the accountants Grant Thornton regarding the possible sale of the Durkan Pudelek business ("the Grant Thornton meetings documents");

(c) all email correspondence sent from or to any of the directors of Durkan Pudelek between November 2003 and April 2004 inclusive, concerning the compensation payment from the building contractor Mansell which was the subject of the infringement finding against Durkan Limited ("the Mansell payment emails").

8. Durkan Holdings opposes all the disclosure sought. They argue that if any of the material disclosed supports the OFT's case, the OFT will in effect be relying on that material by way of new evidence in the appeal. There is a presumption against permitting the OFT to submit new evidence that could have been obtained in the administrative procedure. The disclosure now sought could and should have been obtained in the administrative procedure before the Decision was taken. Since the OFT, for whatever reason, did not obtain this material during the course of its investigation, it cannot try to rely on it now. To allow it to do so, Durkan Holdings argue, would prejudice Durkan Holdings' rights of defence.

The Tribunal's powers

9. The starting point for this discussion is Rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/ 1372) ("the Rules"). This provides so far as relevant:

> "**Directions**
>
> **19.** - (1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions

as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.

(2) The Tribunal may give directions –

…

(d) requiring persons to attend and give evidence or to produce documents;

(e) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it shall be oral or written;

…

(k) for the disclosure between, or the production by, the parties of documents or classes of documents;

(3) The Tribunal may, in particular, of its own initiative -

(a) put questions to the parties;

(b) invite the parties to make written or oral submissions on certain aspects of the proceedings;

(c) ask the parties or third parties for information or particulars;

(d) ask for documents or any papers relating to the case to be produced;

(e) summon the parties' representatives or the parties in person to meetings."

10. My attention was also drawn to Rule 22 which provides:

"22. - (1) The Tribunal may control the evidence by giving directions as to -

(a) the issues on which it requires evidence;

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the Tribunal.

(2) The Tribunal may admit or exclude evidence, *whether or not the evidence was available to the respondent when the disputed decision was taken*." (emphasis added)

11. These Rules do not draw any distinction between the appellant and the respondent so far as adducing evidence is concerned. They give the Tribunal a wide discretion as to what evidence is placed before it. The Rules also empower the Tribunal to call for evidence on its own initiative under Rule 19(3) and refer explicitly in Rule 22 to evidence that was not available to the respondent when the decision was taken. These powers are particularly relevant in appeals such as this one, where the

Tribunal's jurisdiction is to determine the appeal on the merits rather than by reference to the principles of judicial review: see paragraph 3 of Schedule 8 to the Competition Act 1998.

12. The Tribunal's case law has from its early days drawn a distinction between the position of the Respondent and the Appellant as regards adducing evidence that was not relied on in the decision challenged in the appeal. The reason for this is perhaps best expressed in the Tribunal's ruling in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 3 ("*Napp: preliminary issue*"), at paragraph [77]:

> "77. … In our view the exercise of the discretion to allow new evidence by the Director at the appeal stage should take strongly into account the principle the Director should normally be prepared to defend the decision on the basis of the material before him when he took that decision. It is particularly important that the Director's decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act, with important legal consequences, which in principle fixes the Director's position. In our view further investigations after the decision of primary facts, in an attempt to strengthen by better evidence a decision already taken, should not in general be countenanced."

13. The Tribunal in that judgment also commented that allowing the Director – now the OFT – to bolster the decision by adducing new evidence on appeal would diminish or even circumvent altogether the procedural safeguards that govern the conduct of the investigation before the regulator. Those safeguards ensure that an undertaking which is suspected of an infringement and upon which a substantial fine may be imposed has an opportunity to see and comment on all the evidence on which the regulator proposes to rely in making any such findings. The Tribunal concluded (paragraph [79]):

> "… there should be a presumption against permitting the Director to submit new evidence that could properly have been made available during the administrative procedure".

14. Similar passages make the same point in the subsequent substantive judgment in the *Napp* case: see *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 ("*Napp: substance*") paragraph [133].

15. Mr Hoskins QC, on behalf of Durkan Holdings, referred me to the Tribunal's judgment in *Argos & Littlewoods v Office of Fair Trading* [2003] CAT 16 ("*Argos*"). There, the Tribunal, having considered the two *Napp* judgments and the judgment in *Aberdeen Journals Limited v Director General of Fair Trading* [2002] CAT 4 ("*Aberdeen Journals (No 1)*"), confirmed that:

> "The Tribunal must determine the appeal on the merits, but by reference to the grounds of appeal set out in the notice of appeal. Since the notice of appeal must refer to and so far as necessary put in issue the facts as set out in the decision, it follows that the Tribunal is concerned with the facts in the decision, as contested in the notice of appeal, and not with the correctness of other facts sought to be adduced as evidence of the infringement after the notice of appeal has been lodged and which, by definition, the notice of appeal has not dealt with." (see paragraph [65(3)]).

16. The judgment in *Aberdeen Journals (No 1)* also determines that it makes no difference whether the source of the new evidence on which the regulator wishes to rely is the appellant itself. So here, the fact that the disputed board minutes are and have always been available to the Appellants does not mean that there is no prejudice in ordering their disclosure. Durkan Holdings did not know, during the administrative procedure, what significance the OFT might want to attach to them and, if disclosure is ordered, they will not have been given the chance to respond to material which is alleged to point to decisive influence being exercised.

17. All those authorities make clear, however, that the presumption described is not a blanket prohibition on the regulator being able to adduce new evidence on appeal. In *Argos* the Tribunal said (paragraph [66(4)]) that the presumption may be rebutted "notably, where what the OFT wishes to do is to adduce evidence in rebuttal of a case on appeal, as distinct from evidence that is intrinsic to the proof of the infringement alleged in the decision". In *Napp: preliminary issue* the Tribunal expressed the matter as follows:

> "80. On the other hand, there may well be cases where the Tribunal is persuaded not to apply the presumption we have indicated. … the procedures of this Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under Rule 1.1 of the Civil Procedure Rules. That includes, so far as practicable, ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate, proceeding expeditiously, and allotting to the case an appropriate share of the court's resources. Those considerations may militate against permitting new evidence by the Director, but in some circumstances considerations of fairness may point in the

> other direction. An obvious example is where a party makes a new allegation or produces a new expert's report which the Director seeks to counter.
>
> 81. One factor that may well be relevant in this connection is the fairness of the appeal process itself. In accordance with the Act, the first occasion on which the Decision first receives full public judicial scrutiny is in this Tribunal. An appellant will often have submitted voluminous pleadings, witness statements, and documents unconstrained by the evidence presented to the Director. The Director, at the administrative stage, may not always be able to foresee (although of course he should endeavour to do so) from what direction or in what strength an attack might come at the appeal stage. A situation whereby the appellant could always have a "free run" before the Tribunal, but the Director was always confined to the material used in the administrative procedure could lead to a significant lack of balance and fairness in the appeal process."

18. These passages show that there may be circumstances where it is appropriate to allow the OFT to rely on new evidence that was available but not relied on at the time of the decision. One example – but not the only instance – of such circumstances is when a new point is raised by the appellant and the regulator seeks to adduce new evidence to rebut it.

19. Ms Bacon on behalf of the OFT sought to rely on other passages in *Napp: substance* where the Tribunal was not considering the admissibility of proposed new witness statements but of documents disclosed. She argued that these passages were more relevant to the current application because the OFT was seeking disclosure of documents, not seeking to adduce new witness evidence. In my judgment that is not the right way to approach this. There is no relevant distinction for these purposes between evidence in the form of a witness statement from one of the parties and evidence in the form of contemporaneous documents. If, for example, the disputed Durkan Pudelek board minutes reveal material which supports the OFT's assertion of decisive influence then that material is evidence before the Tribunal on which the Tribunal can rely in deciding the issue of substance in this appeal on the merits. Its admissibility does not hinge on it being accepted by the witness to whom it is put in cross-examination or on it being appended to a witness statement lodged by the OFT.

20. The reason why the admissibility of documents was considered separately in the *Napp: substance* judgment from the issue of the admissibility of the witness statements was because the documents had been disclosed pursuant to the exercise

by the Tribunal of its powers to call for documents on its own initiative: see paragraph [81] of that judgment which records the request sent by the Tribunal to Napp on 31 August 2001. The issue under consideration at paragraphs [127] onwards of the judgment was therefore whether the presumption against allowing the Director to adduce new evidence meant also that the Director could not rely on new material which was produced in response to a request from the Tribunal if that material was favourable to his case. The Tribunal concluded that where documents were requested by the Tribunal it was open to the Director to rely on them if they turned out to be favourable to him, provided that there was no unfairness: see paragraph [314] of that judgment. I do not see that the passages dealing with that situation are relevant to the issue before me.

The Tribunal's analysis

21. In my judgment the question is simply whether the presumption against allowing the OFT to rely on new evidence would apply to anything included in the documents now being sought. If it would, then there is no point in ordering them to be disclosed. If the circumstances of this case mean that that presumption does not apply, then there is no other reason why they should not be disclosed. It is accepted that the documents have been gathered together and that they are not voluminous. There is no doubt that they are or might be relevant, though the authorities cited above make it clear that even highly relevant documents are also subject to the presumption.

22. In my judgment, this case is one where the circumstances mean that the presumption against allowing new evidence to be adduced is rebutted. The OFT's case (so far as relevant to the disputed board minutes) against Durkan Holdings was and remains that decisive influence is demonstrated by the fact that three Durkan Holdings directors were appointed to be directors of Durkan Pudelek; that provision was made in the subscription agreement to ensure that they had an opportunity to have a say in important decisions affecting Durkan Pudelek; and, moreover, that they were given titles which indicate that they held senior positions within Durkan Pudelek. Durkan Holdings' case is that these apparent indicia do not in fact give the correct picture because the directors never in fact exercised the powers or

influence that they had – they left operational matters entirely in the hands of Mr Pudelek and Mr Simmons.

23. In support of their case on appeal, Durkan Holdings wish to point to certain board minutes as supporting the picture they paint because, they say, the minutes do not show the three directors contributing to the meetings in a way which would indicate the exercise by them of decisive influence over Durkan Pudelek on behalf of the Durkan Holdings. Reliance on the board minutes as demonstrating the lack of involvement of the three directors may not be a new allegation of the sort referred to in the Tribunal's earlier case law. But I am satisfied that there would be "a significant lack of balance and fairness in the appeal process" (to quote paragraph [81] of *Napp: preliminary issue*) if Durkan Holdings were allowed to rely on these board minutes in that way, without the OFT having an opportunity to see whether there is anything in the disputed board minutes that points in the opposite direction.

24. I fully accept that Durkan Holdings has not "cherry picked" the board minutes it chose to append to its Notice of Appeal as the ones which happen to suit its case. They were chosen because they relate to the periods covered by the infringements. But I agree with the OFT's submission that, given there is no suggestion that there was any material change in the management of Durkan Pudelek between its incorporation and the management buy out in September 2007, all the disputed board minutes are relevant to the issue for determination.

25. It is true that the OFT could have asked for the disputed board minutes to be produced during the administrative procedure. Rule 19 and the earlier case law cited above make clear that their failure to do so is not fatal to their current application for disclosure. This does however raise a point which the Tribunal's earlier judgments rightly stress, which is the importance of ensuring that the regulator cannot bypass the rights of the defence that are protected by the rules governing the administrative procedure. To ensure a fair balance between the OFT and Durkan Holdings here, the direction for disclosure of the disputed board minutes should be accompanied by a direction that the OFT, within two weeks of receiving them, write to the Appellants and to the Tribunal indicating on which passages, if any, in the documents they intend to rely in support of their case.

The Grant Thornton meetings documents

26. So far as the Grant Thornton meetings documents are concerned, the same principles apply. The meetings are referred to in Mr Pudelek's witness statement when he states that one of the reasons why it was difficult to make progress with the sale of Durkan Pudelek was the need to find successors for Mr Simmons and him as they were "clearly identifiable as the drivers and controllers of the business". This is more than simple background material. The inference is that it was acknowledged in the meetings with Grant Thornton that prospective purchasers would be put off from buying Durkan Pudelek if they thought that Mr Simmons and Mr Pudelek were not going to continue to be involved because it would be clear to such purchasers that the two men were effectively running the business.

27. In a letter of 18 February 2010 Durkan Holdings state that a limited number of documents have been identified in this class. In my judgment those documents should be disclosed on the same terms as the disputed board minutes. I have seen a letter dated 17 March 2010 from ReSolve Partners LLP, the administrator of Durkan Pudelek (now known as Concentra Limited), describing what searches have been undertaken for Grant Thornton meetings documents and saying that any additional efforts to locate more documents would be time consuming and not for the benefit of the creditors as a whole. For the present, therefore, the order is limited to the documents already available and does not require any further searching on the part of the administrator.

The Mansell payment emails

28. So far as the Mansell payment emails are concerned, these relate to an issue over whether Mr Fraher knew, when he chased Mansell for payment of a sum he was told was owed to Durkan Pudelek, that that payment was an unlawful compensation payment given in return for a cover price. Mr Fraher denies that he knew this. The OFT found in the Decision that the fact that Mr Fraher chased this payment for Durkan Pudelek was "clear evidence of a director and employee of Durkan Holdings taking business, financial and operational decisions for and on behalf of Durkan [Pudelek], even to the extent of having direct involvement in respect of an

Infringement" (see paragraph II.417). Mr Pudelek, Mr Simmons and Mr Fraher have provided witness statements which were appended to the Notice of Appeal and are expected to be presented for cross-examination by the OFT at the substantive hearing scheduled for mid July 2010. Mr Fraher's statement appends an email dated 30 March 2004, which is the document on which the OFT relied in coming to its findings as regards Mr Fraher's involvement. Given that this email is likely to be an important document for the purposes of the appeal, it is essential, in my judgment, to establish whether there exist any other emails relevant to the issue.

29. In response to the OFT's initial request for these emails, Durkan Holdings replied that Mr Fraher does not believe that any such emails were still available and that Mr Simmons and Mr Pudelek are no longer involved with Durkan Pudelek. The OFT now asks for a direction that Messrs Jones Day, who act for the appellants (but not for the two men), request Mr Simmons and Mr Pudelek to produce any correspondence falling within this class. It would be better, in my judgment, for the Tribunal to order them to disclose any such material directly rather than order the appellants to ask them. That way, if there are no such documents, then Mr Pudelek and Mr Simmons will confirm that fact to the Tribunal rather than to the appellants. If there are such documents, the Tribunal will send them on to the OFT.

30. At the Tribunal's request shortly before the hearing, Jones Day wrote to Mr Pudelek and Mr Simmons inviting them to attend the hearing but at such short notice neither witness was able to. I will therefore exercise the Tribunal's power under Rule 19(2)(d) to direct Mr Pudelek and Mr Simmons to produce to the Tribunal any Mansell payment emails in their possession. Since they were not able to make representations to me at the hearing, I will grant them liberty to apply to set aside the direction within 21 days. Again, the OFT should be required, within 14 days of the production of any such emails, to indicate whether they intend to rely on them.

31. I therefore direct as follows:

    (a) the appellants disclose to the respondent forthwith all board minutes and annual reports of the Third Appellant from the time of its incorporation in

1992 until September 2007, other than the ones already annexed to the Notice of Appeal or otherwise already provided to the respondent;

(b) the appellants disclose to the respondent forthwith documents and email correspondence relating to the meetings between the Third Appellant and Grant Thornton referred to in the witness statement of Mr Michael Pudelek; provided that this direction is limited to those documents referred to as having been identified in relation to this class in the letter from Messrs Jones Day to the respondent of 18 February 2010;

(c) Mr Michael Pudelek and Mr Colin Simmons, who have made witness statements appended to the Notice of Appeal, provide to the Tribunal as soon as practicable either

i. all email correspondence in their possession sent from or to any of the directors of the Third Appellant between November 2003 and April 2004 inclusive concerning the compensation payment from Mansell which was the subject of infringement 135 as set out in the Decision; or

ii. a written statement that they have, after reasonable investigation, been unable to locate any such emails.

(d) within 14 days of the receipt of any documents disclosed pursuant to these directions, the respondent write to the appellants and the Tribunal stating whether they intend to rely on any such document in support of paragraphs 15 to 20 of their Defence on Liability served on 30 March 2010 and, if so, indicating on which documents or parts of documents they intend to rely and in relation to which aspect of their Defence;

(e) the appellants have liberty, if so advised, to submit a written statement in response by 4 June 2010;

(f) Mr Michael Pudelek and Mr Colin Simmons have liberty to apply to the Tribunal within 21 days of this order if they seek to set aside the direction in paragraph (c) above.

Vivien Rose

Charles Dhanowa
Registrar

Date: 28 April 2010