IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1134/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5 July 2010

Before:

VIVIEN ROSE
(Chairman)
GRAHAM MATHER
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) INTERCLASS HOLDINGS LIMITED
(2) INTERCLASS PLC Appellants

– v –

OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Mr. Aidan Robertson QC (instructed by Watson Burton) appeared for the Appellants.

Mr. David Unterhalter SC and Mr. Philip Woolfe (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Yes, Mr. Robertson.

MR. ROBERTSON: Good afternoon Madam Chairman, members of the Tribunal. In this appeal I act for the appellants, collective Interclass. My learned friends Mr. Unterhalter and Mr. Woolfe appear for the respondent, OFT.

May I first of all deal with housekeeping matters and check that the Tribunal has the following. You should have one bundle being Interclass' Notice of Appeal.

THE CHAIRMAN: Yes.

MR. ROBERTSON: The OFT's penalty defence.

THE CHAIRMAN: Is that in the same bundle as the Notice of Appeal?

MR. ROBERTSON: I do not think so. There should also be our skeleton argument which has appended to it a second witness statement from Mr. Jones dated 28th April, and the OFT's skeleton.

Madam, in relation to confidentiality there are a number of points where I wish to refer to confidential information and will not be able to do so simply by referring the Tribunal to the relevant passage. We wrote to the Tribunal to request that part of this hearing take place in private in accordance with the Tribunal's Guide to Proceedings. I have agreed, subject to your approval, with my learned friend that we should adopt the same approach as was adopted in two hearings before Lord Carlile last week. That is to say I will indicate when I need to go into a private hearing, I will try to keep that as brief and to the point as possible. We will then resume in public and then Mr. Unterhalter, when he comes to address his submissions, will need to go into private again for a short period in which to respond. It seemed to work well last week.

If I may, my oral submissions follow the outline of our Notice of Appeal, and indeed our representations to the OFT in response to the Statement of Objections. We will deal first with the impact of the penalty, secondly the Tribunal's jurisdiction, thirdly the seriousness of the infringement, fourthly flaws in the OFT's penalty calculation, and fifthly mitigating factors. A number of the points that I will make I will do simply by adopting submissions that were made this morning. They were points that were probably taken about as far as we can take them usefully orally.

If I may, then, impact of the penalty, the first of my headings. Interclass is a small, local contractor. When I say "small", it is owned by a single individual, Mr. Christopher Watkins. There are three directors. In addition to Mr. Watkins: there is Mr. Don Ward and Mr. David Jones. All three attended the oral hearing with the OFT of which you have the transcript annexed to the Notice of Appeal. There are currently 65 employees. The

background to Interclass is described by Mr. Jones in his first witness statement at tab 3 of the Notice of Appeal at paragraphs 1-3.

The OFT has imposed a penalty on Interclass of £464,406. That is, on any analysis we submit, an extremely harsh penalty. It represents over five times the Interclass' average annual pre-tax profit. We make the same point as was made this morning as a point of comparison in *Sainsbury* and *Imperial Tobacco* where fines for much more serious infringements ended up as 5 per cent of pre-tax annual profits; for us it is 500 per cent.

The construction industry has been hard hit by the recession. Interclass is no exception. The current financial position is explained in Mr. Jones' second witness statement and as that contains confidential information I now wish to go into a private hearing.

THE CHAIRMAN: Yes, if there is anybody who is not in the confidentiality ring and does not need to be here – we have not got a confidentiality ring as such, have we?

MR. ROBERTSON: We do not have a confidentiality ring.

THE CHAIRMAN: There do not seem to be any members of the public here.

MR. ROBERTSON: No.

THE CHAIRMAN: There is nobody from the press here.

MR. ROBERTSON: So for the purposes of the transcript we are now going into a private hearing.

(For hearing in Private see separate transcript)

THE CHAIRMAN: Yes, thank you.

MR. ROBERTSON: I will be brief with the remainder of my submissions. My client is well aware that many of these matters were dealt with in submissions this morning, so just to run through the key points, they are: we provided the OFT with complete cooperation, accepted the fast track offer.

As to our second heading, jurisdiction, that was dealt with this morning. Similarly, seriousness of the infringement. We have already engaged in a comparison with some criminal case law.

Turning to flaws in the penalty calculation, for tendered and non tendered work see Tomlinson tomorrow. High turnover and low margin, the only additional point I wish to make about that to what was dealt with this morning is to refer you to paragraph 8 of Mr. Jones' second witness statement where he gives an example of how Interclass' turnover is made up: a recently tendered project with an electrical package as a part of it, particular equipment, valued at £200,000. The amount of work carried out by Interclass employees

was valued at £100,000. The turnover generated from the project would be £500,000. There is an example we looked at the principle this morning.

Similarly, with Seddon, we rely on lack of effect on price. We dealt with that this morning.

Similarly, multiple penalties, we are a case, as Harper was, of two penalties but the principle about doubling and trebling penalties that we discussed this morning still applies.

Discrimination against small and medium sized firms, we adopt the submissions that were made this morning. In fact, all of our turnover is generated in the West Midlands area delineated by the OFT. We draw the comparison with undertakings involved in compensation payments.

Last business year of turnover, again it is the same principles as an Article 7 point. Our two infringements date from 2001-2003. So they reflect the same submissions as were made this morning.

As to financial hardship, we have covered that in private. The OFT says you cannot compare with current situation to that which was one of the reasons why they imposed no fine at all on the Northern Ireland Livestock Auctioneers Association. That was the aftermath of the BSE crisis of the mid 1990s, and then the Foot and Mouth outbreak in 2001. We say the financial crash and the way in which the bottom has dropped out of the public sector construction market is comparable and is a relevant circumstance.

As to mitigating factors, which is my final heading, we have set those out in writing. We have responded to the OFT's call to suggest an appropriate level of penalty. This morning I suggested appropriate methodologies. Of course, this tribunal, faced with the current situation, could simply take the robust approach which the Court of Appeal took in *R v Patchett Engineering* when it comes to substitution of a penalty. There are precedents indeed for this Tribunal having taken a similarly robust approach (without going through a detailed step by step analysis) in the *Genzyme* case where a penalty of £6.8 million was quashed by this Tribunal and substituted with a penalty of £3 million. The *Genzyme* judgment has, from recollection, one paragraph addressing that particular point. We have addressed our submissions on that in writing. Unless I can assist the Tribunal further, those are our submissions.

THE CHAIRMAN: Thank you very much, Mr. Robertson. Mr. Unterhalter.

MR. UNTERHALTER: Thank you, Madam Chairman. The appellant is placing you in a position where, more or less in the course of the address that has been made, you should start reading these financial statements, comparing auditors reports and seeking to reach certain judgments about the financial viability of the appellant. We will submit that, as is

often the case when one starts to examine the financial statements, that they tell different stories depending on who the teller is and which numbers one is looking at.

I will, in due course, come to the relevant principles that are of application in financial hardship cases, the burden of proof that rests upon the appellant and which we do not understand to be in contention before you. But there are two levels of judgment, indeed identified by you, Madam Chairman, which were: what was presented to the OFT for the purposes of its making an assessment, and that is explained in the defence; and what is it that is now placed before you that you should and can consider making a judgment upon? It is, of course, obvious that in so far as the 2009 and provisional 2010 financials are placed before you, those were not before the OFT and in a sense you are therefore being called upon to make a judgment which was wholly outside the scheme of what the OFT could ever have considered.

As I understand my learned friend, he suggests that even on a proper application of the relevant financial parameters on the financial information that was provided, there should nevertheless have been financial hardship provision made, and all the more so in the light of the 2009 and 2010 figures. Can I begin possibly with some of the detail and, for that purpose, may we go into a private hearing for the purposes of the record?

THE CHAIRMAN: Yes. I do not think it makes much difference at the moment, but we will make sure that nobody impinges on it. For the sake of the record, yes, we are now going into camera.

(For hearing in Private please see separate transcript)

MR. UNTERHALTER: The defence indicates how, under the section dealing with financial hardship, from para. 152 onwards, and at 170 to 171 the specifics of the Interclass case are dealt with. I would refer you in particular to para. 156 where it is made plain what the two financial metrics are and that it is first as a percentage of adjusted net assts – reminding the Tribunal of the difference between current and simply a net asset value –t hat is adjusted to take into account dividend payments, and secondly as a percentage of profit after tax.

> "These indicators reflected the fact that payment of a penalty might be financed either by way reduction in shareholder funds …"

- which is the NAV figure we have been looking at –

"… or from the future profits a firm might make during the period over which a penalty is payable."

And obviously the phasing of the penalty is very relevant to the burden that it might have to bear. Those parameters were applied and in the case of Interclass it was not thought that

there was a sufficient indication of the key question, and the key question in our submission is a continuing confusion between two different issues. The relevant consideration for the question of hardship is: is this firm about to become insolvent by reason of the imposition of the fine. It is a viability standard, that is the relevant consideration. The consideration is not: would this firm be better able to negotiate its way in tough markets by getting some reduction in its fine, that is not the question. The OFT was very clear in its decision that it was really a viability standard that was being considered, because – if I could ask you to have regard to VI.287, p.1693:

> "Of the Parties listed in paragraph VI.284 above, there were some for which there was a reasonably strong indication on one or more of the bases set out in paragraph VI.285 above that the imposition of the penalty might threaten the viability of that party, but the OFT has nonetheless concluded that in the light of other factors a party was not eligible for a reduction in penalty. For such Parties, an individual assessment has been briefly set out …"
>
> Finally, each of the following parties submitted a claim that the penalty would cause financial hardship, accompanied with supporting information … which was checked. On the basis of these claims and considerations of the financial circumstances of the parties the OFT considers that for each of the Parties there is sufficient indication that the penalty would otherwise impose would seriously threaten the viability of the Party concerned."

So the test is a serious threat to the viability of the party, that is the measure that has to be met. The metrics that are used are one way of trying to reach that decision based on the 2008 figures those metrics are not met at all. We submit even on the 2009 position those metrics are not met.

I am sorry, can we briefly go back into private hearing?

THE CHAIRMAN: Yes.

(<u>For hearing in Private please see separate transcript</u>)

MR. UNTERHALTER: If I could very briefly then address the case law. In the *Sepia Logistics* case it is very clear where the onus rests. These are exceptional claims, it is not a routine allowance that is given for the purpose of helping companies on their way because they have now encountered rougher water than they expected. It has to be a properly documented, fully worked through case and they bear the onus. So if you are left in doubt on any of the metrics, or if you are left in doubt on the ultimate question, which is: is this a

company that is seriously threatened as to its viability, they do not prevail, and that is the effect of *Sepia Logistics* (vol. 4 authorities bundle, tab 58, paras.100 to 101).

The only other reference I wanted to take you to, albeit very briefly is at vol.4, tab 53, which is the *Achilles Paper* decision. At para. 55 of that decision, the Tribunal adopts the reasoning in *Tokai Carbon* and says:

> "But in any event, the OFT submits, the fact that a fine may result in a company going into liquidation and exiting the market is something that the OFT should take into account but is not necessarily a reason for reducing the fine."

And then *Tokai Carbon* is cited.

> "… the fact that a measure taken by a Community authority leads to the insolvency or liquidation of a given undertaking is not prohibited as such by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible or intangible elements represented by the undertaking would also lose their value."
>
> 56. The Tribunal considers that the same principle applies here."

And then the important proposition in para. 56 in the last sentence:

> "The OFT's decision not to reduce the fine in response to this request is, in our view, well within its margin of appreciation and is not something which this Tribunal should disturb."

That gives rise to the following legal question which is on the 2008 figures we say it is absolutely clear that there was no warrant whatsoever for a financial hardship allowance, therefore there is no error on the part of the OFT. Additional evidence is now produced before you and you are asked to consider it for the purposes of now making an allowance, even if the OFT is not in error, which is the alternative submission of my learned friend. The question is: how do you do that in circumstances where the determination that has been made is part of the margin of appreciation that the OFT has for the purposes of coming to its decision.

We submit that these kinds of ex post efforts to put up further evidence on this score are ones to be treated at best with considerable caution, and particularly so because this is really not the place to seek to debate and ultimately determine the intricacies of the financial state of a company which are ones as my cursory treatment indicates that can bear very different interpretations. But if you should want to go down that road, then not only is there the onus

point, but one is really having to say: "Could the OFT reasonably, even on the 2009 figures – had they had them – have come to the conclusion that nothing was due by way of financial hardship?" That would be the test that you would apply. Unless you can say that this is such a clear case of a serious threat to viability that something must be done, and that obviously the OFT would have intervened had it known the true picture, as at 2009, we submit that there is simply no warrant for intervention.

My learned friend has residually gone through numbers of his standard arguments ----

THE CHAIRMAN: Just before you get on to that, the "Bathroom Fixtures" case, do you see that as a move away from *Tokai Carbon* taking a slightly more accommodating view to companies? It is hard to really interpret what it means as to its significance, it is a statement that has been made which suggests perhaps there is some rethink. The OFT could have simply taken a very hard line on financial hardship and said: "We are just not going to get into these issues, because we do not care whether firms go into liquidation as a result of our fines", and they probably would not have made a legal error had they done so, but they did not adopt that position; they were willing to take up a serious viability problem and entertain it, and we are content that that standard would be one that you would apply, so I am not certain that much turns on Bathroom Fixtures one way or the other.

MR. MATHER: Just following that up though, under s.60 we are obliged to have regard to the Commission's statements, and in the decision in that case, even recorded in the press release quite a detailed methodology is set out as to how the European Commission considered the applications of the 10 companies who claimed they would be unable to pay a fine, and then the Commission applying those tests reduced the three companies fined by 50 per cent. That presumably is for the future binding authority or strongly persuasive power on the UK authorities?

MR. UNTERHALTER: It would be certainly something to take into account for the purposes of working out relevant financial metrics. If there were something of that which was not captured under the standards that have been applied by the OFT, but in our submission there is not a fundamental difference of consideration that has actually been given in this case to the question of viability.

MR. MATHER: The Commissioner said in terms: "The objective of anti-cartel enforcement is not to precipitate the fall of companies in financial difficulties", that would not sit with your hypothetical presentation that the OFT could ignore the issue.

MR. UNTERHALTER: It is for that reason that I have said I am not certain that much turns on this because, as a matter of the way in which the OFT approached the problem in this case it

did consider a serious threat to viability which is congruent with the statement that has been made. So, as matters stand, the OFT acted within the scheme of what that statement suggests. Whether it would have had to do so is an issue which I do not believe the Tribunal needs to confront.

Given the time I am not going to deal with the miscellany of the sort of laundry that was offered at the end of my learned friend's address of the various arguments that they have relied upon. We have substantially traversed them this morning. They are also dealt with in our skeleton. Unless there is a particular one of those points which you want further comment on, we would rest our case.

MR. MATHER: I just have one point, Mr. Unterhalter, going back to the margin of appreciation which you discussed with Mr. de la Mare yesterday and reverted to today. Am I right to detect a sort of hardening of tone in your presentation today, vis-à-vis yesterday, or are you essentially on all fours with your exchange then?

MR. UNTERHALTER: I am hoping that there is no hardening because I certainly did not intend to convey any difference. The point that we were making on Friday in respect of the question as to how the guidance is objectively to be interpreted - that is to say, as to what its legal meaning is - we take the position that it has an objective meaning and we have interpreted it, and the Tribunal will tell us if our interpretation is right or not. But, as to how it is applied and whether deviations are warranted or not warranted from the Guidance, those are matters of discretion and those are matters in respect of which the margin applies. Certainly as I understood my learned friend, Mr. de la Mare, he agreed with that formulation and we were more or less at one on that position. Because this appellant does not raise any point of legal interpretation as to what the Guidance means, but simply complains about aspects of its application, we are in margin territory rather than in legality territory.

THE CHAIRMAN: Thank you very much, Mr. Unterhalter. Mr. Robertson?

(For hearing in Private see separate transcript)