COMPETITION APPEAL TRIBUNAL

Neutral citation: [2003] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1019/1/1/03
1020/1/1/03
1021/1/1/03
1022/1/1/03

Before:
Sir Christopher Bellamy (President)

UMBRO HOLDINGS LIMITED

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

MANCHESTER UNITED PLC

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

ALLSPORTS LIMITED

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

JJB SPORTS PLC

Appellant

-and-

THE OFFICE OF FAIR TRADING

Respondent

ORDER OF THE PRESIDENT

1. On 1 August 2003 the Office of Fair Trading ("the OFT") issued Decision No. CA98/06/2003 Price-fixing of Replica Kit ("the Decision") against the following ten undertakings: Allsports Ltd ("Allsports"), Blacks Leisure Group plc ("Blacks"), Florence Clothiers (Scotland) Ltd (in receivership) ("Florence Clothiers"), JJB Sports plc ("JJB"), Manchester United plc ("MU"), Sportsetail Ltd (in administration) ("Sportsetail"), Sports Soccer Ltd (now Sports World International Limited) ("Sports World"), The John David Group plc ("JD"), The Football Association ("The FA") and Umbro Holdings Ltd ("Umbro") (together "the parties to the Decision"). The Decision, taken under section 2 of the Competition Act 1998, related to the price fixing of replica football kits and imposed penalties on a number of the parties to the Decision.

2. Four of the parties, namely Umbro, MU, Allsports and JJB, have submitted appeals to the Tribunal. Two parties, JJB and Allsports, contest both the facts relied on by the OFT in the Decision and the amount of the penalty imposed upon them. Two parties (Umbro and MU) contest only the amount of the penalty imposed.

3. Each of the parties to the Decision has received a version of the Decision with confidential material relating to other parties removed from it. Similarly, the published version of the Decision excludes certain confidential information. As a result, at present, no party knows the calculations relating to the assessment of the penalty made in relation to any other party at paragraphs 536 to 790 of the Decision. That approach was no doubt adopted by the OFT in order to protect the confidentiality of turnover figures on which the calculations were based.

4. The relevant confidentiality regime is set out under the Enterprise Act 2002 ("the 2002 Act"). Under section 237 of that Act, the OFT has certain obligations of confidentiality which are imposed notably by section 237 (2). In particular, information supplied to the OFT relating to the business of an undertaking must not be disclosed unless disclosure is permitted under Part 9 of that Act. It is to be noted that by virtue of section 237 (5) nothing in Part 9 of the 2002 Act affects the Competition Appeal Tribunal.

5. Under section 239(1) of the 2002 Act the OFT may disclose information with the consent of any other party. Disclosure by the OFT is also possible under section 244, which sets out various considerations to which the public authority must have regard when considering possible disclosure.

6. The situation regarding confidentiality, as it affects the Tribunal, is essentially governed by paragraph 1, sub-paragraph 2 of Schedule 4 of the 2002 Act. That provision deals only with the decisions of the Tribunal, which are to be recorded in a document.

Schedule 4, paragraph 1(2) provides:

> "(2) In preparing that document the Tribunal shall have regard to the need for excluding so far as practicable---"

that is to say excluding from the Tribunal's final decision or judgment---

> "(a) information the disclosure of which would in its opinion be contrary to the public interest;
>
> (b) commercial information the disclosure of which would or might in its opinion significantly harm the legitimate business interests of the undertaking to which it relates;
>
> (c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests."

But then:

> "(3) But the Tribunal shall also have regard to the extent to which any disclosure mentioned in sub-paragraph (2) is necessary for the purpose of explaining the reasons for the decision."

7. At the first case management conference in these appeals, held on 23 October 2003, the Tribunal expressed the view that in the interests of justice it was proper for each party to the appeals to know the basis on which the penalties were imposed on the other parties to the relevant infringing agreements. In addition, immediately after that conference, the Tribunal had a separate hearing in camera with Umbro to enable Umbro to advance submissions relating to a matter raised in its appeal which it considered was confidential to Umbro and should not be disclosed to the other appellants. Very briefly, Umbro submitted that its penalty should be reduced on the basis that it ought to have been given more credit for having co-operated with the OFT well before the stage of its written representations in reply to the Rule 14 notice. Umbro's argument for a further reduction in its penalty, beyond that already accorded, was based upon the fact that between late 2001 and February 2002 Umbro co-operated with the OFT in providing information and witness statements in the context of an application for leniency which Umbro made at that time.

8. Umbro submitted to the Tribunal that the fact that it had asked for leniency and co-operated with the OFT was a confidential matter as between Umbro and the OFT and that that confidentiality should be protected by the Tribunal during the appeal process. Otherwise, Umbro argued, it would, or might, suffer considerable commercial damage in the market place. Moreover, Umbro submitted that certain correspondence and draft witness statements which it produced to the OFT in the course of making that application for leniency should not be disclosed to other parties.

9. After hearing Umbro’s argument, on 27 October 2003 the Tribunal handed

down, in open court, a judgment rejecting Umbro's application for confidential treatment. The full text of that judgment is available on the Tribunal's website (judgment [2003] CAT 26). In that judgment, the Tribunal made a number of observations on its interpretation of the relevant provisions of the 2002 Act. More specifically, in relation to its duties under paragraph 1 of Schedule 4, set out above, the Tribunal noted at paragraphs 23 to 25:

> "*Although that statutory provision deals only with what is to be included in the Tribunal's judgment, the Tribunal takes the view that, for that provision to be effective, the Tribunal should protect, during the appeal proceedings, information that it would be likely to regard as confidential for the purposes of its judgment subject, of course, to the overriding requirement of ensuring the fairness of the appeal proceedings.*
>
> *It is to be noted in particular, in subparagraph (2), that the need to exclude certain confidential material is expressed to be: "so far as practicable". As regards disclosure that might be contrary to the public interest, the disclosure must be such which would "in its opinion", that is to say in the opinion of the Tribunal, be contrary to the public interest.*
>
> *As regards commercial information, it is information the disclosure of which would, or might, again in the "opinion of the Tribunal", significantly harm the legitimate business interests of the undertaking to which it relates, so there must be first of all significant harm, and secondly legitimate business interests. All those matters are, however, also to be borne in mind in the light of subparagraph (3), whereby the Tribunal has to have regard to the extent to which disclosure is necessary for the purpose of explaining the reasons for its decision*."

10. More generally, the Tribunal noted at paragraphs 32 to 33:

> *"… the Tribunal takes the view that its proceedings should be conducted on the basis that is as fully open as possible, subject only to the protection of vital business secrets or for some other overriding reason. It must be remembered that the Tribunal's judgment is a public document that has to be published. The Tribunal's hearings are in public, the transcripts of its hearings are published and so on.*
>
> *Equally, in a case such as the present, which takes place in a setting in which parties have had penalties imposed upon them, it is, in the Tribunal's judgment, of overriding importance that the parties should be able to exercise their rights of defence without having possibly relevant material held back or inaccessible. In the event of a conflict between the rights of the defence and other claims to confidentiality there must, in our judgment, be a presumption that the rights of defence prevail."*

11. Against that background, the Registrar wrote by letter of 31 October 2003 to each of the parties to the Decision in the following terms:

> "*The [four appeals referred to at paragraph 1 above] are pending before the Competition Appeal Tribunal. The appeals relate to the Decision of the Office of Fair Trading No. CA98/06/2003 of 1 August 2003 ("the Decision"). In each of those appeals the relevant party puts in issue, amongst other matters, the calculation and fairness of the penalties imposed.*
>
> *At present neither the appellants nor any other addressee of the Decision has a complete picture of the methodology adopted by the OFT (except in their own particular case) since the turnover figures on which the calculations are based are masked in the published versions of the Decision, for reasons of business confidentiality.*
>
> *The Tribunal's present view is that the proper conduct of the appeals requires that the basis of the OFT's calculations should be fully transparent. Since the turnover figures on which the calculations are based in most cases relate to financial years ending in 2000 or 2001, the Tribunal does not presently consider that there is an overriding need to protect the confidentiality of those figures, applying the criteria set out in paragraph 1 of Schedule 4 of the Enterprise Act 2002. Similarly the Tribunal does not consider that such information can be dealt with on a "counsel only" or similarly restricted basis.*
>
> *The Tribunal understands that a number of addressees of the Decision have exchanged details of the calculations on a counsel only basis, whilst others have objected to any such disclosure. However for the reasons given above, the Tribunal has it in mind to order the general disclosure of the calculations of the penalties set out in the Decision.*
>
> *The purpose of this letter, which I am sending to all addressees of the Decision, is to inform you that if you have any objection to the Tribunal making such an order, you are invited to send to me any written representations you may wish to make by no later than 5pm on Monday 10 November 2003.*
>
> *If necessary any oral representations you may wish to make will be heard by the President of the Competition Appeal Tribunal at 2.00pm on Thursday 13 November 2003.*
>
> *I look forward to hearing from you as soon as possible*."

12. Of the parties to the Decision, Sports World, MU, JJB, Allsports and JD confirmed to the Tribunal in writing that they consented to the disclosure of confidential information in the Decision relating to the calculation of the penalty. The Tribunal did not receive any response from Blacks, Florence Clothiers, or Sportsetail.

13. Umbro raised formal objections to the lifting of confidentiality in a letter of 11 November 2003 on the following grounds:

    - that the information had already been deemed confidential within the meaning of section 55 of the Competition Act 1998, i.e.

- the information relates to turnover of replica products which may allow parties to understand not only the turnover of Umbro for the relevant period but also the percentage of replica turnover in comparison to Umbro-only branded business;
- in turn, it would be possible to calculate the turnover of The FA's business in relation to Umbro. This is because the percentage of the total payable by Umbro to The FA represents the royalty income due under the terms of the sponsorship agreement.

14. The FA also objected to the disclosure of the relevant information and put forward various arguments in a letter of 10 November 2003. In that letter, the FA stated that it would be prepared to disclose all confidential data that deals with 'the basis' of the calculation (essentially all confidential information in paragraphs 776 to 785 of the Decision) but "*subject to the usual safeguards*". Those safeguards were said to be that "*The FA would expect parties receiving confidential information to give the usual confidentiality undertakings that they will use such information solely for the purpose of conducting the appeal and will indemnify The FA in respect of any damage arising from any other use*". However, The FA was not prepared to disclose the information which, according to The FA, "*goes beyond explaining the 'basis' or 'methodology' for calculating the penalty which has been imposed on it*". This latter information relates to masked information in paragraphs 766 to 769 of the Decision. The FA did, however, consent to disclosure of this latter information on a counsel only basis to the lawyers for the appellants to the four appeals of the Decision.

15. The FA (but not Umbro) requested to make further oral submissions on this matter, and a hearing was held on 13 November 2003 before the President sitting alone, pursuant to his powers under Rule 62(1) of the Tribunal's Rules. At that hearing The FA elaborated on the arguments set out in its letter as to why it did not consent to full disclosure of the relevant confidential information.

16. In relation to the information relating to the 'basis' of the calculation of the penalty, i.e. paragraphs 776 to 785 of the Decision, the thrust of The FA's oral argument was that a party might seek commercial advantage outside of the Tribunal in making public comparisons, for example in a national newspaper, to explain its culpability or lack of culpability, or to seek generally to gain position and advantage. According to the FA, during the administrative proceedings before the OFT some information was published in the Daily Mirror newspaper. According to The FA "*the entire direction of the story was that The FA and the England Team were culpable, even though it was clear from the detail that (a) the journalist was informed and (b) the journalist was aware that at most the FA was a party to a limited part*".

17. In relation to the masked information in paragraphs 766 to 769 of the Decision, The FA submitted that the appellants, in order to exercise their rights of defence, do not need to know what was the 'relevant turnover' for other parties, or the detail, on a contract by contract basis, of how that 'relevant turnover' was made up. Moreover, the appellants should not be

provided with such information where it reveals confidential information about the remuneration structure of their competitors or their suppliers or customers.

18. As is explained further in paragraphs 536 to 790 of the Decision, the OFT calculates the amount of a penalty to be levied on an infringing undertaking according to a five step process. At Step 1 of that process, the OFT calculates the 'starting point' of the penalty. The 'starting point' is calculated by applying a percentage rate to the 'relevant turnover' of the undertaking up to a maximum of 10 per cent. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. The percentage rate applied depends on the nature of the infringement. The more serious the infringement, the higher the percentage rate is likely to be. There are a number of factors which the OFT takes into account in assessing the seriousness of the infringement. These factors include the type of infringement, the structure of the market and the market share of the infringing undertaking. The remainder of the calculation, carried out at Steps 2 to 5, consists of the OFT making adjustments to the amount arrived at at Step 1. The amount will be increased to take account of factors such as duration, deterrence and the role played by the relevant undertaking in the infringement. The amount may be decreased to reflect mitigating factors such as co-operation with the OFT's investigation above and beyond what is legally required.

19. The Tribunal considers that, in the interests of justice, there should be a presumption that confidentiality should not be maintained as regards the calculations of the penalty in paragraphs 536 to 790 of the Decision. It appears to the Tribunal that information contained in those paragraphs, and notably the percentage rate applied to the 'relevant turnover' in arriving at the 'starting point' for the various parties, are of potential relevance to the rights of defence of the appellants in these appeals. Moreover, as the Tribunal noted in its judgment of 27 October 2003, it is likely that it will need to make reference to such information during the course of these proceedings and in its final judgment. In such a case, the rights of the defence and the need properly to explain the Tribunal's judgment should normally prevail.

20. In this case all the turnover figures in question relate to financial years ending at least two, and in some cases three years ago. In these circumstances the Tribunal doubts whether there is a risk that disclosure of the commercial information involved would "significantly" harm the business interests of the relevant undertakings, or that there is any "legitimate" business interest which requires protection, within the meaning of paragraph 1(2)(b) of Schedule 4 to the 2002 Act. In any event, in the Tribunal's view the need to disclose the figures in question is likely to be necessary for the purpose of explaining the reasons for the Tribunal's ultimate decision under paragraph 1(3) of that Schedule.

21. As regards specifically the information relating to The FA at paragraphs 776 to 789 of the Decision, the Tribunal is not persuaded that the disclosure of the

percentage rate applied to The FA's 'relevant turnover' in order to determine the starting point of the penalty, nor the amounts by which the starting point was increased or decreased at Steps 2 to 5 amounts to commercial information which would or might significantly harm the legitimate business interests of The FA within the meaning of paragraph 1(2)(b) of Schedule 4 to the 2002 Act. As regards The FA's suggestion that the information might be disclosed on a counsel only basis, the Tribunal has expressed in its judgment of 27 October 2003 its misgivings about such arrangements. The Tribunal stated at paragraph 30 of that judgment "*[s]uch a basis does put the legal advisers in an extremely difficult position, and in a case involving penalties we do not consider that it is an appropriate basis on which to proceed unless there are very strong countervailing considerations to the contrary*."

22. Moreover, in relation to The FA's turnover stated at paragraph 769 of the Decision, the Tribunal considers that there are no compelling countervailing considerations as to why The FA's 'relevant turnover' cannot be disclosed. The Tribunal is not persuaded that the information would or might significantly harm the legitimate business interests of The FA. On a practical point, in light of the Tribunal's decision to raise confidentiality in relation to paragraphs 776 to 789 of the Decision, it would be possible for anyone who might wish to do so to work out the approximate amount of the 'relevant turnover' of the FA, set out at paragraph 769, by using the turnover figures and percentage rates applied to those figures in the following paragraphs. Moreover, there is nothing the Tribunal can do about possible press comment on these proceedings.

23. However, paragraphs 766 to 768 of the Decision do contain details of The FA's licensing arrangements and various figures the disclosure of which does not appear essential at this stage for the fair conduct of the proceedings.

24. As regards Umbro's arguments, the Tribunal is likewise not persuaded that there are any countervailing reasons why the information in paragraphs 572 to 602 of the Decision should be protected. The turnover figures for which confidentiality is claimed relate to the year ending 31 December 2000. This information is thus now nearly three years out of date. The disclosure of such information in late 2003 cannot therefore be said to harm the legitimate business interests of Umbro. Moreover, it is likewise very likely that the Tribunal will need to refer to such information throughout these proceedings and in its final judgment. Accordingly, for the reasons set out above, the Tribunal considers that it is in the interests of justice and the fairness of the appeal proceedings that this information should be disclosed.

25. However, paragraphs 700 to 702 of the Decision contain confidential figures relating to the licence arrangements between Umbro and MU and the question of what proportion of the total licensed sales is affected by the infringements. It does not seem to the Tribunal at this stage that it is necessary for the fair conduct of the present proceedings to lift the confidentiality in relation to these paragraphs.

26. On those grounds, the Tribunal makes the following Order:

(1) This Order is to be served by the Registrar on all the parties to the Decision.

(2) The time for applying to the Tribunal for permission to appeal this Order under section 49 of the Competition Act 1998 and Rule 58 of the Tribunal's Rules is abridged to two days from the date of service of this Order.

(3) If no application is made to the Tribunal for permission to appeal within the time limit referred to in subparagraph (2) above, then within five days thereafter, the OFT shall serve on each of the appellants a copy of the confidential version of Part V of the Decision (i.e. paragraph 536 to 790) except that the confidential information in paragraphs 700 to 702 and 766 to 768 shall remain confidential and shall continue to be shown as in the published, non-confidential version of the Decision.

(4) Liberty to apply.

Sir Christopher Bellamy
President of the Competition Appeal Tribunal

Made 18 November 2003
Drawn 18 November2003