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IN THE COMPETITION

Case No. 1044/24/04

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15th February, 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR JOHN PICKERING
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

M.E. BURGESS, J. J. BURGESS AND S. J. BURGESS
(trading as J.J. BURGESS & SONS)

Appellants

and

THE OFFICE OF FAIR TRADING
and

Respondents

W. AUSTIN & SONS
&

THE CONSUMERS' ASSOCIATION

Interveners

Mr. Peter Roth QC and Mrs. Jennifer Skilbeck (instructed by Howell & Co.) appeared for the Appellants

Mr. John Swift QC and Miss Kassie Smith (instructed by Director of Legal Services, Office of Fair Trading) appeared for the Respondent.

Mr. Cameron Maxwell Lewis (instructed by Messrs. Brignalls Balderston & Warren) appeared for the first and second Interveners.

Mr. Andrew Macnab (instructed by the Legal Department, The Consumers' Association) appeared for the second Intervener.

Transcript of the Shorthand notes of
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PROCEEDINGS
DAY ONE
APPLICATION: DISCLOSURE

1 THE PRESIDENT: I gather the Tribunal is being invited to make an order of some kind, Mr. Swift?

2 MR. SWIFT: Yes, Sir. The background: I have discussed the matter with my client during the brief
3 adjournment, and looking at Part 9 of the Enterprise Act, 2002 we are satisfied that under s.241
4 – I am not going to read all this out – the OFT, as a public authority, would have the discretion
5 to disclose the information that is in the Decision, the Defence and the skeleton and in
6 particular the tables at the back, the annexes.

7 THE PRESIDENT: Yes.

8 MR. SWIFT: But I have a serious problem with s.244 and that is the need to exclude from
9 disclosure commercial information, whose disclosure the OFT thinks might significantly harm
10 the legitimate business interests of the undertaking to which it relates. The undertakings I have
11 in mind are those set out in annex 2A and in annex 4, which are the funeral directors, other
12 than those represented here today. So far as we are concerned, therefore, I am asking you, Sir,
13 to make an order within the powers under s.237(5) of the Enterprise Act, which says nothing
14 in this part affects the Competition Appeal Tribunal. That is our position; we do not believe
15 we can make progress on this matter until we have an order. So far as the Office of Fair
16 Trading is concerned, the documents, the subject of the order would be the Decision itself, of
17 29th June, 2004, the Defence to the Notice of Appeal and the skeleton argument filed in
18 November 2004.

19 I do not want to go back over the past history, but my attention has been drawn to
20 orders made by this Tribunal in October 2004, dealing with the delicate issues on disclosure,
21 but so far as we are concerned we need the order. I think the position is probably different for
22 my learned friends who are not under any statutory duty.

23 THE PRESIDENT: Well, shall we just deal with your position first? What you envisage is a
24 confidentiality ring order to counsel and solicitors only.

25 MR SWIFT: So far as we are concerned, in the past we have disclosed it to counsel. I have always
26 found counsel only restrictions extremely difficult so far as my clients are concerned. We are
27 going to leave this to your discretion, your judgment, Sir, as to whether it should be counsel
28 only or counsel and other legal advisers, solicitors, unless I am told ----

29 THE PRESIDENT: It would normally be counsel and solicitors.

30 MR. SWIFT: Their solicitors, that is fine, yes. That is our position.

31 THE PRESIDENT: Well I am invited to make an order in those terms as a first step. Mr. Roth and
32 Mr. Maxwell Lewis, any observations on that?

33 MR. MAXWELL LEWIS: No, that would certainly assist us and if it could be solicitors as well ----

1 THE PRESIDENT: Yes, absolutely, it should be. Mr. Watson, I wrongly called you “Mr. Thomas”
2 during the course of this morning, I am awfully sorry, I apologise.

3 Very well, I make an order that the Office of Fair Trading should disclose to counsel
4 and solicitors respectively for the Appellants and the First Intervener unredacted versions of
5 the Decision of 29th June 2004, the Defence to the Notice of Appeal, and the OFT’s skeleton
6 arguments in this case, restricted to counsel and solicitors on the basis that the Registry will in
7 due course invite and those concerned will give the usual undertakings to keep those matters
8 confidential so far as they contain confidential material.

9 MR. SWIFT: Sir, I have just checked the order of October 2004 – it is an extremely technical point
10 and not one I would normally make – I believe it has to extend to the First and Second
11 Interveners.

12 THE PRESIDENT: Well we have not got the Second Interveners here.

13 MR. SWIFT: No, they are separate, it is Harwood Park as well as Austin.

14 THE PRESIDENT: I am sorry, first and second, thank you for correcting me, Mr. Swift. This has
15 not affected the Consumers’ Association yet?

16 MR. ROTH: Well I think it would – I would have thought it should extend to the Third Intervener.

17 THE PRESIDENT: Well unless there is some overwhelming objection let us do it for the
18 Consumers’ Association as well.

19 MR. ROTH: I have no brief for them, I should say.

20 THE PRESIDENT: Maybe there is an objection.

21 MR. SWIFT: I would hesitate about that.

22 THE PRESIDENT: I see.

23 MR. SWIFT: I spoke to Mr. Macnab on timetable just after you rose, Sir, and he said that he would
24 not be more than 10 minutes himself, so if you want to try and keep to the timetable maybe the
25 disclosure of confidential information – no, I am not sure what their position is.

26 THE PRESIDENT: Well let us limit it at the moment to the First and Second Interveners and if they
27 want to come back and make an application later to day that is up to them. That deals with
28 that. Now, Mr. Roth, there is still the question of some Burgess information, or things being
29 relied on by Burgess vis à vis Austins.

30 MR ROTH: All I can say at the moment is that we are making good progress as invited to by the
31 Tribunal.

32 THE PRESIDENT: I will let that unfold.

33 MR ROTH: We are working through that.

34 THE PRESIDENT: Fine.

1 | MR ROTH: We do not, of course, need an order so the same considerations do not apply.

2 | THE PRESIDENT: Very well, thank you very much.

3 | (For continuation of hearing see separate transcript)