

Toys and Football: Double Win for OFT Confirmed on Replay

Argos, Littlewoods and JJB v OFT: Lessons in Brevity, Concertation and Penalties

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"He can compress the most words into the smallest idea of any man I met"
(Abraham Lincoln).

The Court of Appeal began its judgment in the Football Kit and Toys/Games appeals (*Argos, Littlewoods and JJB v OFT* [2006] EWCA Civ 1318) by criticising the length of the judgments of the Competition Appeal Tribunal (CAT), including the one under appeal. Adopting a teacherly tone, the second highest court in the land explained to the CAT that its decisions were "no different in principle from a decision of any other tribunal or court". It was not necessary for the CAT to make a finding on every disputed factual issue, "[n]or is it always necessary for the Tribunal to set out each party's submissions in detail before explaining its reasons for deciding the case". However, perhaps in order to prevent the CAT from becoming despondent, the Court of Appeal also provided some encouragement, saying that it hoped that the CAT would be able to express itself more succinctly in the future, and reassuring it that its efforts to do so would have the support of the Court.

The appeals originated in two high profile decisions of the OFT in 2003, which led to two substantial infringement decisions by the CAT. The OFT had found that manufacturers and retailers had fixed the prices of Hasbro toys and games, including Action Man and Monopoly, and a number of replica football kits. The OFT imposed large fines in both cases, and several parties appealed to the CAT. The CAT upheld most aspects of the OFT's decisions, although some of the penalties were slightly reduced. *Argos, Littlewoods and JJB* appealed again on both liability and penalty to the Court of Appeal, which heard the cases in succession and addressed them in a single judgment.

Only some findings on liability were appealed. In both cases the OFT and CAT found vertical agreements between manufacturers and retailers, but also a trilateral, horizontal agreement or concerted practice between a manufacturer and two retailers. The appeals on liability focussed primarily on the trilateral, horizontal aspect.

JJB's appeal concerned sales of England replica kit in the run-up to the European Championships in 2000. Umbro manufactured the kit and supplied it to retailers, including both JJB and Sports Soccer.

¹ The views expressed in this note are those of the author alone.

JJB complained to Umbro that Sports Soccer was discounting the kit, and placed pressure on it to do something about it. Umbro subsequently had discussions with Sports Soccer, which agreed to raise its prices, on the basis of assurances that the other major retailers would not discount. JJB was one of the retailers which assured Umbro that it would not discount, but there was no direct contact between JJB and Sports Soccer.

Argos and Littlewoods sold toys and games manufactured by Hasbro. Hasbro had regular conversations with Argos, Littlewoods and other retailers in which each retailer would inform Hasbro of its future pricing intentions, and Hasbro would inform that retailer of what other retailers had told Hasbro were their future pricing intentions. These conversations took place in a context in which Hasbro had informed its retailers that it was making a coordinated effort to persuade all retailers to price at RRP's on Action Man and certain core games. As in the JJB case, however, no direct contact took place between retailers.

The EC case law governing the line between concerted behaviour and unilateral conduct is well known. In the leading case, *Bayer*, the CFI stated that "the concept of an agreement ... centres around the existence of a concurrence of wills between at least two parties". Upholding the CFI's judgment, the ECJ referred to the need for the manifestation of the wish of one party to constitute an invitation, whether express or implied, to the other party, to fulfil that goal jointly".

The issue for the CAT and Court of Appeal was, in the absence of any direct contact between the retailers, could it be said that the retailers were party to trilateral, horizontal agreements or concerted practices, including the manufacturer but also other retailers? More specifically, if retailer A provides supplier B with commercially sensitive information which is passed by B to retailer C, facilitating an anti-competitive agreement between B and C, in what circumstances is A also a party to that agreement or concerted practice?

In its judgments, the CAT had appeared at one point to suggest that it could be sufficient if it was reasonably foreseeable to A that B might use the information in that way. Although it did not find it necessary to decide the point, the Court of Appeal stated on more than one occasion that it considered that in saying that the CAT "may have gone too far".

Instead, the Court of Appeal made clear that it would be sufficient if A *intended* that B should use the information provided to facilitate an anti-competitive agreement, and that in those circumstances A could not escape liability simply because it may not have known how B in fact acted (see paras 88 to 91 and 141 to 144). However, while intention was the main concept fastened on by the Court of Appeal, it also used other wording in places. Plainly, A will be liable where it knows that the information will be used anti-competitively (para 104), to the extent that it is possible to 'know' how somebody else will act in the future. The judgment also suggests that A will be liable where it wanted the information to be used anti-competitively, and foresaw that it might be (para 86). All of these tests rest on a subjective state of mind, representing a move away from the objective "reasonably foreseeable" test of the CAT.

The Court of Appeal also considered the position where A *complains* to its supplier B about the conduct of retailer C. If B responds to the complaint by entering into an anti-competitive agreement with C, under what circumstances will A be a party to a tripartite anti-competitive practice? The answer appears to be similar to when commercially sensitive information is provided, i.e. A will be liable where it intends or expects B to respond by taking anti-competitive action, but will or may not be liable where it has not subjectively foreseen the possibility of such action.

Despite rowing back a little from the CAT's approach, on the facts the Court of Appeal upheld the CAT's judgment and the OFT's decisions. The Court of Appeal decided that the Tribunal had rightly found each of Argos and Littlewoods (in the Toys/Games appeals) and JJB (in the Football Kit appeal) to have had the requisite mental state as to be parties to the tripartite, horizontal concerted practices identified by the CAT, and the appeals on liability were dismissed in full.

Before leaving liability, the Court of Appeal's judgment shows the limitations of arguments based on a detailed analysis of individual words and phrases taken in isolation from the text as a whole. The appellants attempted to show how, here and there, the CAT in its judgments had used different words in different places to express its view on the same finding or issue. They argued that this disclosed some lack of precision or clarity on the part of the CAT, such that the appellants must be given the benefit of the doubt. The Court of Appeal accepted that the CAT's wording could in some places have been better, and noted that it was desirable to achieve precise and consistent wording throughout a judgment. Nonetheless, it felt that "it would be unreasonable to pick on slight differences of language here or there in relation to the same or similar subject matter, in order to cast doubt on the nature of the Tribunal's finding on a point". Rather, the question "is whether on a fair reading of the judgment as a whole there is any such doubt".

This is sensible, as perfect consistency of language will in most cases be impossible to achieve, at least if courts are to continue to explain their conclusions rather than simply set them out. As is evident from the discussion above, the language of the Court of Appeal in its own judgment also varied from place to place, but the essential thrust of what it was saying is clear. The CAT has recently taken a similar view of OFT decisions, commenting in the context of a section 120 judicial review application that they "should not be read in a manner akin to a statute" (*Celesio*, para 188).

Turning to the appeals on penalties, the appellants, and in particular JJB, raised a large number of arguments, all of which were rejected. Many were rejected on the facts, but the Court of Appeal's reasoning includes a number of comments of more general application, summarised below.

- Section 38(8) of the CA98 requires the OFT to have regard to its Guidance on penalties. The OFT is not obliged to follow its Guidance in every respect in every case, but must provide reasons if it departs from it (paras 160 and 161).
- However, if an OFT penalty is appealed, there is no obligation on either the CAT or the Court of Appeal to have regard to the Guidance. Rather, the CAT has full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way in which the OFT approached the issue (paras 160 and 230).
- In *Napp*, and in the cases under appeal, the CAT made its own assessment of the penalty, in the light of its view of the seriousness of the infringement, on the basis of a "broad brush" approach, taking the case as a whole. It then carried out a 'cross check' to see whether the amount arrived at would be within the parameters set out in the Guidance. That was an appropriate approach for the CAT to follow (para 163).
- When a penalty that has been upheld or imposed by the CAT is appealed, the question for the Court of Appeal is whether the CAT was wrong to impose the penalty which it did. In addressing that question, the Court must have regard to the reasoning of the CAT (para 230).
- The Court of Appeal should recognise that the CAT is an expert and specialised body, and should be slow to interfere with the CAT's assessment of the appropriate penalty, for example in the light of the gravity of the infringement or the need for deterrence (paras 165 and 170).
- The first step for the OFT in its Guidance is to identify the "relevant turnover" of the undertaking, namely the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. In Chapter I cases (such as those involving price-fixing) there may not have been a determination and full analysis of the relevant product market, as there must be in a Chapter II case. In such cases, neither at the stage of the OFT investigation, nor on appeal to the CAT, is a formal analysis of the relevant product market necessary in order that regard can properly be had to the first step in the Guidance in determining the appropriate penalty. However, the OFT and in turn the CAT do have to be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market (or markets) affected by the infringement (paras 167, 169 and 170).

- The product market affected by the infringement does not necessarily have to be the same as that which would result from a formal analysis, such as those carried out for Chapter II cases, and may include products which might otherwise be analysed as being in a related or neighbouring market from the products that were the actual subject-matter of the agreement. One reasonable approach might be to define the market by reference to product categorisations adopted internally by the companies concerned (paras 189, 228)

Finally, the Court of Appeal devoted a long passage to addressing the argument of Argos and Littlewoods relating to unequal treatment. The OFT had granted Hasbro leniency and remitted all of its fine, which would otherwise have been £15.59 million. Argos and Littlewoods argued that Hasbro did not satisfy the criteria in the OFT's Guidance for total leniency, and that the most it should have been granted was a 50% reduction. Accordingly, Hasbro had been favoured to the extent of at least 50%, and the principle of equal treatment demanded that Argos and Littlewoods also have their fines reduced by a similar amount.

The Court of Appeal accepted that Hasbro were Argos and Littlewoods were entitled to raise the argument as they were in a comparable position to Hasbro except insofar as the application of the leniency regime to Hasbro was objectively justifiable. The OFT had relied on various European authorities, including *Woodpulp* and *Dunlop Slazenger*, for the proposition that an undertaking in breach of Article 81 cannot escape being penalised on the ground that no penalty had been imposed on another undertaking. The Court distinguished those cases on the basis that there, the comparator company had either not been central to the cartel activity, or had not been investigated at all, so there were no facts against which to test the argument. Indeed, the Court noted that there would be other cases in which the CAT would be unable to consider an unequal treatment argument because the relevant facts were not before it.

The Court of Appeal agreed that if and to the extent that it was possible to determine that a grant of total immunity was not objectively justified, the less favoured undertakings would in principle be entitled to a reduction of their penalties corresponding to the extent to which the reduction of the other undertaking's penalty was not justified. In making that assessment, the correctness of the OFT's leniency decision had to be assessed by reference to the material available to the OFT at the time. Further, the correct approach for the CAT was to consider whether the leniency decision was open to the OFT to make, essentially on a judicial review basis, rather than, as with other aspects of the appeal, to decide the issue on the basis of all the evidence before the CAT.

However, on the facts, there was little for the Court or the parties to go on, as the OFT had not set out its reasons for granting full leniency to Hasbro as a matter of confidentiality (a matter not complained of as such by the appellants). On the limited information that was available, which included correspondence between the OFT and Hasbro's solicitors in which Hasbro's solicitors had set out reasons why Hasbro should continue to benefit from complete immunity from fines, the Court of Appeal found it impossible to say that the OFT could not rationally have concluded that it was appropriate to grant Hasbro full leniency. The Court of Appeal therefore dismissed this final argument of the appellants, as it had their other arguments. When it handed down judgment, the Court refused leave to appeal to the House of Lords.

Monckton representation in the appeals was as follows: Jon Turner QC and Kassie Smith represented the OFT in the Argos and Littlewoods cases, and Jon Turner QC and Anneli Howard the OFT in the JJB case. Paul Lasok QC represented JJB.

Julian Gregory specialises in competition law. Recent cases include adidas, GNER, Celesio, Somerfield, and the CC's Grocery Market inquiry.

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