

Fairness in Context

***Abbey Mine Limited v The Coal Authority* [2007] EWHC 1189 (Admin)**

**By Elisa Holmes
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The application of rules of procedural fairness to the decision-making and review procedures of the Coal Authority was considered by the Administrative Court in *Abbey Mine Limited v The Coal Authority*. In refusing the application, Mrs Justice Dobbs emphasised the underlying requirement that the Applicant is made aware of, and has a proper opportunity to deal with, "material issues of concern". The manner in which this is achieved will depend upon the circumstances of each case, and there is no general duty for decision-makers or review bodies to disclose all relevant documents and information.

In addition, in dealing with Abbey Mine Limited's (AML's) claim that the Coal Authority had contravened Chapter I of the Competition Act / Article 81 of the EC Treaty, the Court emphatically determined that the Coal Authority was not an undertaking, since it did not engage in the pursuit of economic activity capable of being carried on in principle by a private undertaking with a view to profit.

Background

The review proceedings arose out of a challenge by AML of the decision of the Authority to grant a mining licence and other rights in coal to Corus, an interested party in the proceedings. The rights related to the Margam area of South Wales. Following notice of the decision, including a summary of the reasons, AML applied for review of the Authority's decision pursuant to a process set out in the Coal Authority's Guidance Notes. The Review Hearing was not adversarial and proceeded by way of submissions from AML, a response from the Coal Authority's Director of Mining Projects and Property, and AML's reply. The Authority upheld its decision following the review hearing.

Grounds of review

AML applied for judicial review on several grounds, most notably that the process was fundamentally unfair and that the Authority's decision was anti-competitive and a breach of Chapters I and II of the Competition Act and Articles 81 and 82 of the EC Treaty. AML also complained of the failure of the Review Panel to disclose certain documents it had before it and the alleged failure to give the Claimant the opportunity to deal with certain issues. It also claimed that the Review Panel had failed to take certain relevant matters into consideration and had improperly taken irrelevant matters into consideration.

Unfairness

AML claimed that it should have been given advance disclosure of all facts and matters relevant to competing applications both before the initial decision and prior to the Review Hearing, so as

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to allow AML the opportunity to comment on material aspects of that application and / or to draw appropriate comparisons with its own application.

The Court accepted the submission made on behalf of the Coal Authority, represented by Christopher Vajda QC and Josh Holmes, that the requirements of procedural fairness should be assessed in the context of the decision and Review procedures. The procedure in this case does not give rise to a right to disclosure of facts and matters relevant to a competitor's application. There is no general right to disclosure and at most, an applicant should be put in a position to address specific adverse impressions that may weigh against its own application.

Mrs Justice Dobbs observed that on the facts of this case, there was no statutory duty of disclosure, and the question for the Court was what constituted fairness in the context of the statutory framework and the purpose of the Review. In this case, the purpose of the Review was to provide the unsuccessful applicant with an opportunity to set out why the decision taken in relation to its application is unsustainable. It is not an opportunity to introduce new material or restructure the application. The purpose of the review hearing in this case was not to enable the Claimant to comment on rival applications. Further, there was no general duty or requirement for disclosure of all documents either before the initial decision or before the Review Hearing. The overriding important issue is that the Applicant is made aware of and has a proper opportunity to deal with "material issues of concern".

The Court also held that it was appropriate for the rival application not to be disclosed to AML during the hearing, even though it was part of the documentation before the Review Board. Similarly, the licensing recommendation and the overall view of the two competing applications were working documents for internal use which summarised the issues and the Coal Board's views as to the strengths and weaknesses of each application, were not required to be disclosed. It is significant to note, however, the distinction made by the Court between such documents which were internal working documents and a document which was prepared for the hearing by the original decision-maker and which dealt with the application for review. In the case of the latter, the Court held that it would have been preferable for such a document to have been disclosed, although in the circumstances of this case the Claimant was not prejudiced by its lack of disclosure.

Competition law

The Court dismissed AML's arguments that the Authority was an undertaking since it was engaged in the commercial activity of disposing of rights in un-worked UK coal in return for royalties. The Court held that the Authority was not an undertaking, for the following reasons:

- The Coal Authority is a public authority acting pursuant to statute and the powers and duties of the Authority and its purpose are in keeping with powers typical to be exercised by public authorities
- The Authority was acting to regulate the exploitation of a scarce resource
- It is not in competition with any other body and in fact is prevented from being so
- The Authority is precluded by statute from acquiring land and other property without the permission of the Secretary of State and consent of the Treasury
- There can be no mining of coal without a licence from the Authority, even in respect of coal which the Authority does not own
- The activity carried out by the Authority is not capable of being carried out either in principle or practice by a private undertaking with a view to profit and the revenue generated by the Authority is remitted to central funds.

In summary, the Authority is a public authority disposing of public assets having regard to commercial considerations and is not, therefore, an undertaking for the purposes of Chapter I / Article 81.

For more information on Christopher Vajda QC and Josh Holmes, who were instructed by Nabarro, or Elisa Holmes, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on www.monckton.com.