

Replica Kit Penalties Varied by CAT

By Elisa Holmes¹
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On 19 May 2005, the Competition Appeals CAT ("CAT") handed down its judgment on penalty in the Umbro Holdings Limited ("Umbro"), Manchester United plc ("MU"), JJB Sports plc ("JJB") and Allsports Limited ("Allsports") appeals.² The CAT varied the penalties imposed by the Office of Fair Trading ("OFT") in its Decision of 1 August 2003 ("the Decision"). The penalties imposed on JJB, MU and Umbro were each reduced, whilst Allsports' penalty was increased.

Background

In its Decision, the OFT found various infringements of the Chapter I prohibition as set out in section 2 of the Competition Act 1998 ("the Act") as a result of price fixing by various parties. Only Allsports and JJB appealed in relation to liability. In its decision of 1 October 2004, the CAT substantially upheld the OFT's decision on liability, although JJB's appeal was allowed to a limited extent.³

JJB, Allsports, MU and Umbro each appealed the OFT's decision as to penalties. The CAT revised the penalties imposed by the OFT as follows:

JJB – Reduced from £8.373 to £6.7 million
Allsports – Increased from £1.35 to £1.42 million
MU – Reduced from £1.652 to £1.5 million
Umbro – Reduced from £6.641 to £5.3 million

Application of Director General's Guidance

The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000 ("the Guidance") was published pursuant to section 38 of the Act. It is divided into two parts and provides for "steps for determining the level of penalty" and "lenient treatment for undertakings coming forward with information". In particular, the Guidance provides five steps to be followed in determining the amount of the penalty: (1) a starting point (calculated as a percentage of turnover), (2) adjustment for duration of the infringement; (3) adjustment for other factors (such as deterrence); (4) adjustment

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

¹ Pupil barrister, Monckton Chambers

² [2005] CAT 22

³ [2004] CAT 17

for further aggravating and mitigating factors; (5) adjustment to prevent maximum penalty being exceeded. The 2000 edition of OFT 423 was replaced in 2004, but was applicable at the time of the Decision.

The CAT – affirming the approach taken in the recent judgment on penalty in the *Argos and Littlewoods appeals*⁴ - held that the OFT must have regard to the Guidance, which imports a stronger obligation than merely to take it into account. However, the OFT retains a margin of appreciation as to its interpretation and application. The CAT, on the other hand, is not bound by the Guidance, and whether or not the OFT correctly applied the Guidance, the CAT retains jurisdiction under Schedule 8, paragraph 3(2) of the Act to fix the penalty. Following its decision in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1, [2002] Comp AR 9, the CAT will, however, take into account the Guidance when reaching its own conclusion as to what the penalty should be. Further, it is not appropriate to analyse each individual step of the Guidance in isolation from the other steps and the CAT, therefore, should focus primarily on whether the overall penalty imposed is appropriate for the infringements in question. (Paragraphs 104-106)

Product markets

In Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for a finding of, infringement. This is because the primary purpose of defining the relevant product market is to determine whether an undertaking has market power, and market power is irrelevant to establishing cartel infringements. It would, therefore, be inappropriate to require the OFT to devote resources to a detailed market analysis where the only issue to which market definition is relevant is penalty. It is sufficient in these cases for the OFT to show that it had a reasonable basis for identifying a certain product market for the purposes of step 1 of its calculation. (Paragraphs 109-112)

Step 1, as set out in the Guidance, refers to the turnover in the relevant product market affected by the infringement. According to the CAT, however, such calculation may contain an arbitrary element. Further, in this respect, the OFT is entitled to take into account not only the turnover in the products or markets directly affected by the infringement, but also the turnover in neighbouring products or markets which may reasonably be considered to have been affected by the infringement. (Paragraphs 115-116) Moreover, in a case involving many parties with multiple infringements of various kinds, it is reasonable for the OFT to use the same relevant product market across the board for calculating the penalties, unless there are strong reasons for not doing so. (Paragraph 120)

In this case, arguments were made that junior shirts, infant kits, goalkeepers' shirts and shorts and socks should not be included, with adult home and away shirts, in the relevant product market. The CAT concluded, however, that the OFT did not act unreasonably in bringing into account the turnover relating to these products, as well as adult home and away shirts, as turnover "affected by the infringement" as the starting point for the calculation.

Other steps in the calculation of penalties

Starting percentage

The appellants challenged the starting percentage adopted by the OFT of 9% in the case of MU, Allsports and JJB. MU and Allsports argued in particular that the different starting percentage applied to them as compared to the starting percentage applied to Umbro (to which a starting percentage of 8% was applied) was discriminatory. The CAT held, however, that the question of discrimination must be judged by looking at the total effect of the various steps of the calculation of penalty, and since the overall penalty imposed on Umbro was much higher than that imposed on

⁴ *Argos and Littlewoods v OFT* [2005] CAT 13. See the Monckton Chambers' case note of May 2005.

Allsports and MU, both in absolute and proportional terms, there was no ground for holding that the overall penalty imposed on MU or Allsports was discriminatory. (Paragraphs 154-166)

In the case of Umbro, however, the CAT indicated that it might be the case that its starting percentage was too low. But since it concluded that the overall penalty was in fact too high, it would be inequitable to impose on Umbro a higher penalty.

Multiplier and deterrence

The multipliers applied by the OFT in step 3 of its determination on penalties were applied in order to achieve a deterrent effect. The appellants argued before the CAT that the multiplier of 3 which was applied in the case of JJB, Allsports and MU was excessive and discriminatory. The CAT held once again, however, that it was not excessive in order to achieve a deterrent effect. In the case of Umbro, the OFT was correct to decide to apply a lower multiplier (of 2), since the resulting penalty, expressed as a proportion of Umbro's turnover, was sufficiently high to have a deterrent effect. It followed also, that the multipliers applied did not have a discriminatory effect on MU, Allsports or JJB. (Paragraphs 167-179)

Duration

The CAT accepted that at some point in the assessment of a penalty, the fact that an infringement was of a relatively short duration may, depending on the circumstances, be taken into account. However, it rejected the submission advanced by MU and Allsports that there should be built into step 2 referred to in the Guidance an automatic rule that agreements of less than a year should attract a multiplier of less than one. It reached this conclusion for two reasons: first, an important element of the infringement committed is the fact that an agreement was made in the first place, and secondly, depending on the circumstances, an agreement of short duration may be more serious than one which lasted longer but had less serious effects. (Paragraphs 180-182)

The duration of the infringement should run from the date of the agreement, rather than the date when it was put into effect. In this case, although the agreements were of relatively short duration, this was because they related to events which were themselves of short duration. In the case of Allsports and MU, therefore, there was no reason to alter the multiplier of 1.5 applied by the OFT. In the case of JJB, however, the CAT reduced the multiplier applied from 1.5 to 1 on the ground that it could not proceed on the basis that a continuing period of infringement was proved against JJB of 15 months, and there was a significant gap in the evidence for nine months of that period. (Paragraphs 183-191)

The CAT's overall assessment

In the case of each of the appellants, the CAT took a "broad brush" approach to the calculation of penalties. In relation to JJB, it then cross-checked its conclusions as if it was applying the methodology of the OFT, or, in other words, the steps set out in the Guidance.

JJB

JJB's penalty was reduced by the CAT from £8.373 million to £6.7 million (a reduction of about 20 per cent) on the ground that certain infringements alleged by the OFT were not proved. The penalty of £6.7 million represented about 1 per cent of JJB's United Kingdom turnover.

Allsports

The CAT took the unusual step of increasing the penalty in the case of Allsports. It held that the CAT has jurisdiction to increase penalties pursuant to Schedule 8, paragraph 3 of the Act. In particular, the reference in subparagraph 2(b) therein to "vary" included the power to vary upwards as well as downwards. Further, in the course of an appeal to the CAT, a great deal of new material might come to light, as indeed happened in this case. (Paragraphs 213-214) However, the jurisdiction to increase the overall penalty as a result of new facts found about an appellant's

conduct should not be exercised lightly, and exceptional circumstances should normally be shown. (Paragraphs 218-219)

In the view of the CAT, Allsports' infringement was more serious than that found by the OFT. In particular, the CAT withdrew the reduction of five percent granted by the OFT for cooperation. That discount had been given on the basis that Allsports had admitted organising a meeting with other retailers with anti-competitive intent. According to the CAT, it now appeared that that admission made by Allsports was "disingenuous" in that it glossed over highly adverse evidence in a diary produced on appeal but at the OFT stage shown neither to the OFT nor to its own lawyers. A disingenuous admission should not be regarded as "co-operation" for the purpose of mitigation of penalty. As a result, Allsports' penalty was increased from £1.35 to £1.42 million (1 per cent of its annual UK turnover). (Paragraphs 220-235)

MU

The penalty applied by the OFT to MU was reduced by the CAT. In particular, it was prepared to give MU credit for taking steps subsequently to strengthen its compliance policy, including the introduction of a Competition Compliance Manual and a whistle-blowing policy, and some credit for the full apology given to the CAT, albeit belatedly. The CAT, however, rejected other submissions made by MU in relation to the extent of its cooperation and to the uplift of the penalty in the Decision due to the involvement of senior management in the introduction of a compliance programme at the same time as they were implicated in the infringement. Accordingly, it reduced the penalty on MU to £1.5 million (1.3 percent of its annual UK turnover). (Paragraphs 236-268)

Umbro

The penalty imposed upon Umbro was reduced by the CAT from £6.641 million imposed by the OFT to £5.3 million. This reduction occurred following the findings of the CAT in the liability judgment. Despite the fact that Umbro did not contest its participation in any of the infringements, the fact that certain infringements were found not proved against JJB was held to show that the infringements of Umbro were less serious than considered by the OFT. According to the CAT, following the hearing on liability, it could now make an informed assessment of Umbro's overall responsibility for the infringements relative to the other appellants.

It was incumbent upon the CAT to reduce Umbro's penalty since, in view of the findings of the CAT in relation to liability, not to do so would result in Umbro being subject to a penalty which was disproportionately high relative to JJB. The CAT, therefore, reduced Umbro's penalty by the same overall amount as it reduced JJB's penalty, namely 20 percent. The CAT noted that despite this reduction, Umbro's penalty remained relatively high as a percentage of its then United Kingdom turnover (about 6.3 per cent) as compared to the other appellants (1 to 1.3 per cent). It declined to alter the penalty accordingly, however, since Umbro was "expertly represented", and had not taken the point eventually relied upon by the CAT, preferring instead to pursue its appeal on a very limited basis (paragraphs 340-353).

Moreover, the CAT rejected Umbro's arguments in relation to the failure of the OFT to grant it leniency, or to award a higher discount for cooperation (paragraphs 281-333). The CAT upheld the OFT's arguments that leniency applicants must show complete and continuous cooperation and that the OFT was entitled to reject applications based on incomplete or inadequate information. The CAT also held that the OFT was entitled to impose a maximum discount for cooperation outside the leniency regime so as to encourage leniency applicants to come forward with information.

In the penalties and liability appeals, Jon Turner and Anneli Howard acted for the OFT and George Peretz appeared for Allsports Limited. In the liability appeal, Peter Roth QC and Paul Harris appeared for Manchester United plc. Rupert Anderson QC and Andrew Macnab acted for Sports Soccer, which was granted informal observer status during the liability appeal.

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