



Neutral citation [2011] CAT 17

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1121/1/1/09

Victoria House  
Bloomsbury Place  
London WC1A 2EB

3 June 2011

Before:

VIVIEN ROSE  
(Chairman)  
PROFESSOR JOHN PICKERING  
MICHAEL BLAIR QC

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) DURKAN HOLDINGS LIMITED**  
**(2) DURKAN LIMITED**  
**(3) CONCENTRA LIMITED**  
**(formerly DURKAN PUDELEK LIMITED)**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

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**RULING ON COSTS**

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1. In the judgment handed down on 22 March 2011 ([2011] CAT 6) (“the Judgment”) the Tribunal disposed of the appeal brought by the Appellants against a decision by the OFT fining them for breaches of the Chapter 1 prohibition of the Competition Act 1998. The Appellants pursued a number of grounds of appeal, some challenging the OFT’s findings of liability for the infringements and some challenging the amount of the fine that the OFT had imposed. The ruling we now give adopts the same abbreviations and terminology as, and should be read with, the Judgment, which contains the background to this matter.
2. The first ground of appeal brought by Durkan Holdings and Durkan Pudelek alleged that the OFT had erred in finding that Durkan Holdings exercised a degree of influence over Durkan Pudelek sufficient to entitle the OFT to make Durkan Holdings jointly and severally liable to pay the fines for Infringements 135 and 240. The Tribunal rejected this ground of appeal, holding that the OFT had been right to find that the two companies formed part of the same undertaking for the purposes of the Competition Act so that they were both properly held liable to pay those fines. The second ground of appeal alleged that the OFT had erred in finding that Durkan Limited had given a cover price to Mansell and was thus liable for Infringement 220. On this ground the Tribunal found in favour of Durkan Limited, holding that the OFT had not established to the requisite standard that Durkan Limited had committed the Infringement (see section III of the Judgment).
3. Of the three challenges brought by the Appellants against the level of fine imposed, the Tribunal found that the OFT had erred in basing its penalty calculation on relevant turnover in the Decision Year rather than the Infringement Year. The Appellants also complained that the OFT had been wrong to use a starting point of 7 per cent in its calculation of the fine for Infringement 135 and that there had been various inadvertent errors in the financial data they had provided to the OFT that they asked the Tribunal to correct. These two other challenges to the fine were dismissed.
4. The overall result of the Tribunal’s disposal of the appeal was that the fine originally imposed for Infringement 220 of £3,294,715 was overturned as a consequence of the Tribunal allowing the appeal against liability. The fines imposed on Durkan Holdings

and Durkan Pudelek were recalculated and reduced from £947,592 for Infringement 135 and £2,478,244 for Infringement 240 to £789,000 for Infringement 135 and £1,647,000 for Infringement 240.

5. After handing down judgment in this appeal, we indicated that we were minded to make no order as to costs. However, the Appellants have applied for an award of two-thirds of their costs. They argue that they have been largely successful because their appeal on liability for Infringement 220 was upheld and overall fine for the other infringements was substantially reduced from £6.72 million to £2.44 million. They submit that a one-third reduction in their costs would properly reflect the OFT's success in defending the attribution of liability to Durkan Holdings of the infringement by Durkan Pudelek. The Appellants contend that it would be grossly unfair if the OFT were not required to pay a significant part of their costs; the practical reality is, in their view, that the Appellants achieved a "significant success".
6. The OFT argue that costs should lie where they fall and that no order should be made. They argued that of the five distinct challenges to the decision, only two were successful. As regards the attribution of time and effort, the major issue was that relating to the question of Durkan Holdings' control over Durkan Pudelek and on that the OFT was entirely successful.
7. The parties are content for us to decide this matter on written submissions, without a hearing. The ruling which follows is our unanimous decision.
8. Rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) provides that the Tribunal may, at its discretion, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings. In determining how much the party is required to pay, Rule 55 provides that the Tribunal may take account of the conduct of all parties in relation to the proceedings. The Tribunal's costs jurisdiction has been considered in a number of previous decisions, all of which have emphasized the discretionary nature of our jurisdiction in this regard.

9. We agree with the OFT that the fair outcome as regards costs in this appeal would be for us to make no order. We do not consider that, wherever the final result of an appeal is that the penalty is reduced or even substantially reduced, costs must necessarily be awarded against the other side. That is certainly a factor that can be taken into account. However, where, as in this case, there were a number of entirely discrete challenges to different parts of the decision, the Tribunal may also have regard to the respective successes and failures of the parties and the time and resources devoted to each challenge.
10. In the present case, the challenge to the OFT's decision to attribute liability for Infringements 135 and 240, committed by Durkan Pudelek, to Durkan Holdings required the parties' detailed consideration of a substantial volume of documentation, the cross-examination of five witnesses, detailed analysis of legal authority and lengthy legal submissions. On that ground the OFT was successful.
11. The Appellants' ground of appeal in relation to liability for Infringement 220 also required the cross-examination of a number of witnesses and lengthy legal submissions. That ground was decided in the Appellants' favour.
12. As regards the fine, the Appellants advanced three different and independent arguments for a reduction in the calculation of the penalties imposed on them. As explained in section IV of the Judgment, the Tribunal dismissed two of those arguments, namely those challenging the use of a 7 per cent starting point for Infringement 135 and seeking to correct errors made in the relevant turnover figures provided to the OFT. However the Tribunal agreed with the Appellants that the OFT had erred in using relevant turnover from the Decision Year, rather than the Infringement Year. While it is true that their success on that one point resulted in a reduction in the total fine, it is also true that the unsuccessful challenges occupied the Tribunal for a good part of the time we devoted to considering the penalty.
13. Taking all these factors into account we conclude that there should be no order for costs.

Vivien Rose

John Pickering

Michael Blair QC

Charles Dhanowa  
Registrar

Date: 3 June 2011