Neutral citation [2006] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1008/2/1/02

Victoria House
Bloomsbury Place
London WC1A 2EB

17 February 2006

Before:

Sir Christopher Bellamy (President)
Mr. Peter Clayton
Mr. Peter Grant-Hutchison

Sitting as a Tribunal in Scotland

BETWEEN:

(1) CLAYMORE DAIRIES LIMITED
(2) ARLA FOODS UK PLC
(formerly Express Dairies plc)

Applicants

-v-

OFFICE OF FAIR TRADING

Respondent

-supported by-

(1) ROBERT WISEMAN DAIRIES PLC
(2) ROBERT WISEMAN AND SONS LTD

Interveners

Mr. David Farrer QC and Mr. James Flynn QC (instructed by Herbert Smith) appeared for the interveners, and Herbert Smith.

Mr. Jon Turner and Mr. George Peretz (instructed by the Treasury Solicitor) appeared for the respondent.

Mr. Ben Tidswell (of Ashurst) appeared for the applicants.

Held at Victoria House on 17 January 2006.

JUDGMENT

(GUIDANCE ON CONDUCT CONCERNING WITHDRAWAL)

1. This judgment deals with the question of how issues affecting the possible withdrawal of proceedings before the Tribunal should be handled in the circumstances now described. It also deals with the question whether, on this occasion, the Tribunal should take further action. The Tribunal's decision is that, on this occasion, no further action will be taken.

The Background

2. This Tribunal is sitting as a Tribunal in Scotland. Much of the background circumstances of the present matter are set out in the Tribunal's judgment of 2 September 2005 [2005] CAT 30.

3. In late 1998 Express Dairies plc ("Express")[1] acquired an interest in Claymore Dairies Ltd ("Claymore") based at Nairn in the Highlands. According to Express/Claymore, Claymore was thereafter the target of various below-cost and exclusive dealing practices by Robert Wiseman & Sons ("Wiseman"), the largest processor of fresh milk in Scotland, with the object, according to Express/Claymore, of forcing the closure of Claymore and/or the withdrawal of Express from Scotland. Wiseman, for its part, while denying any unlawful activity, maintained that Express' acquisition of its stake in Claymore was in retaliation for Wiseman's advance into the English market for liquid processed milk, Express being the largest liquid processor of liquid milk in England.

4. In early 1999 Express/Claymore complained to the Director General of Fair Trading ("the Director") about Wiseman's activities. On 3 February 2000 the matter was referred by the Director to the Competition Commission ("CC") for investigation and report under the provisions of the Fair Trading Act 1973 ("the 1973 Act").

5. The Competition Act 1998 ("the 1998 Act") came into force on 1 March 2000.

6. The CC reported to the Secretary of State on the reference on 23 October 2000, its report *Scottish Milk* being published on 22 December 2000. The reporting panel of the CC was split. Two members, including the Chairman, considered that pricing below

[1] Express is now part of the Arla group, and has been renamed Arla Foods UK PLC.

cost and other practices pursued by Wiseman were contrary to the public interest as defined by the 1973 Act. The two other members concluded that Wiseman's conduct in Scotland could not be considered in isolation from the wider competitive struggle between Wiseman and Express, including Wiseman's advance into England, and could not be regarded as contrary to the public interest. No action could be taken on the CC Report since there was no two-thirds majority to the effect that the facts found operated, or may be expected to operate, against the public interest.

7. On 26 October 2000 the Director opened an investigation into Wiseman's conduct under Chapter II of the 1998 Act, by then in force since 1 March.

8. Earlier, in June 2000, the Director had already opened an investigation against Wiseman under Chapter I of the 1998 Act as regards allegations of cartel activity by Wiseman in the Central Belt of Scotland, drawn to the Director's attention by Express.

9. In July 2001 the OFT issued a notice of a proposed interim measures direction under section 35 of the 1998 Act against Wiseman in the Chapter II case, following which Wiseman gave the OFT certain without prejudice undertakings as regards its pricing practices in the Highlands.

10. On 9 August 2002 the Director wrote to Express/Claymore indicating that the OFT was closing its file on the Chapter II investigation into Wiseman's conduct.

11. On 9 October 2002 the Director similarly wrote to Express/Claymore closing the OFT's file on the Chapter I investigation.

12. On 6 November 2002 Express/Claymore appealed against the closure of the Chapter II investigation to the Tribunal (Case 1008/2/1/02). Wiseman was granted permission to intervene in that case ("the Chapter II case") on 9 December 2002.

13. On 3 February 2003 Express/Claymore appealed the closure of the Chapter I investigation to the Tribunal (Case 1011/2/1/03). Wiseman was granted permission to intervene in that case ("the Chapter I case") on 27 March 2003.

14. The proceedings in both cases are Scottish proceedings. Admissibility of the Chapter II case was contested, and the Tribunal found that case admissible on 18 March 2003 [2003] CAT 3.

15. At a case management conference on 27 March 2003 the Tribunal considered both cases, one of the principal issues being business confidentiality. A further ruling by the Tribunal on confidentiality in the Chapter II case was made on 9 June 2003 [2003] CAT 12. That ruling required the OFT to disclose further details of its reasoning in reaching the Chapter II case closure decision of 9 August 2002, subject to certain safeguards to protect commercial confidentiality. On 26 June 2003 the Tribunal informed the parties that a hearing on confidentiality issues in the Chapter I case would be heard on 2 September 2003.

The meeting of 26 June 2003

16. We now come to the incident with which this judgment is concerned. On 26 June 2003 a meeting took place between Mr. Scott of Messrs Herbert Smith, who acted for Wiseman, and Mr. Finbow of Messrs Ashurst (then known as Ashurst Morris Crisp). Ashurst acted for Express/Claymore although Mr. Finbow did not have the conduct of the proceedings on behalf of Express/Claymore. Mr. Scott was apparently Herbert Smith's "relationship partner" for Wiseman. This meeting apparently followed a telephone call to Mr Finbow by Mr. Scott on 24 June 2003.

17. According to Mr Finbow's note of the meeting:

> "On 24th June I was telephoned by Jonathan Scott, a partner in Herbert Smith whom I have known for many years and for whom I have high regard. He is a senior anti-trust partner there. He told me he wanted to spend thirty minutes with me and we arranged that he should visit my office on the morning on 26th June.
>
> He was unwilling to tell me the purpose of the meeting and I speculated that he might have been sent by his partners to suggest a merger between our two firms or that he might be seeking a move from Herbert Smith.
>
> In the event it was neither of these but rather in connection with the action which Express has undertaken against Herbert Smith's client Wiseman, whom he explained was a client for whom he was responsible, although he was not working on the

> matter personally, and had relied on the information he had been given by his colleagues which, however, he has no reason to doubt.
>
> He said he was speaking from a prepared note and that what he would be saying was "without prejudice". I replied that as I knew nothing about the matter, other than that it existed, nothing I could say in response could be regarded as prejudicing anything but that, for what it was worth, my responses should in that case also be regarded as without prejudice.
>
> He opened by saying that his client acknowledged that there were some difficult issues raised by the reference to the Competition Appeals Tribunal (CAT) notably his client's statement as to Express being an "illegitimate competitor" (which of course I knew nothing about).
>
> What was galling to them, however, was that Express was also appealing under Chapter I, alleging Wiseman's involvement in a cartel, when they had "proof" that Express and other participants in the English milk market had been parties to a cartel for many years. He indicated they would be able to establish this before the CAT, in order to demonstrate that Express was, if anything, more anti-competitive in its actions than Wiseman. He commented that this would be bad for both parties and of course bad for the industry as a whole.
>
> At this point he produced a redacted copy of a witness statement…"

18. Mr. Finbow's note then goes on to say that the witness statement, of some eight pages, then described various cartel activities allegedly involving Express "within the 1990's but for how long was impossible to gather". Mr. Finbow's note continues:

> "I did not ask Jonathan what he expected us to do about it, nor did he make any specific requests for action on our part, although he expressed the hope that I would discuss the matter with Nigel Parr, whom I had indicated was the partner responsible for the matter.
>
> I suggested that it might look suspicious if having reconsidered our position in the light of what he had told me, Express were now to withdraw their appeal; to which he suggested that it might be that this could be done on the basis of our having seen the OFT's file.
>
> He said he didn't necessarily expect any response from us but would simply leave it to me to deal with".

19. According to Mr. Scott's note of the meeting, which does not materially disagree with Mr Finbow's, he (Mr. Scott) said:

"I said that it had long been my view that the dispute between our respective clients was not in reality a competition law dispute but rather a commercial dispute. Finbow agreed. Against that backdrop there were issues which I wanted to speak to him about on a without prejudice basis. The reality is that we are now in litigation before the CCAT and therefore, just as in civil litigation where post Woolf one is encouraged to disclose and discuss key elements of one's client's defence, so we thought it helpful to do the same here.

One issue raised by Express was that Wiseman regarded Express as an illegitimate competitor. This was characterised as evidence of Wiseman's intent to exclude Express from the Scottish market. Considerable weight had been placed upon a statement made by Alan Wiseman at the Competition Commission Joint Hearing.

We had known for some considerable time about a cartel run across the UK dairy industry. Indeed some of those facts and matters were within the personal knowledge of our client. What we had also heard about, but had previously had no evidence of, was an attempt by Express to set up a fighting fund to keep Wiseman out of England. The Statement which we now had provided the missing link. Finbow commented that he agreed that if we could show that intent on the part of Express then it would 'bugger us up'."

I explained that I had not proofed the witness but I had spoken to him and more importantly I was satisfied that a number of his key allegations were supported by his diary entries. In other words, there was other evidence which we were also in the process of collecting together.

I said that [Express] should also be aware that it was particularly galling for our client now to have Express appealing a Chapter I decision and making allegations that we had been running a cartel in Scotland, such allegations having been rejected by the OFT.

Finally, I made the point that this was not a step which Wiseman would take lightly but that it had to do whatever was necessary now to defend its own position in the proceedings before the CAT. We were well aware that by defending ourselves in this way we would make life difficult for ourselves and that the matter would be damaging not just to Express but to the industry.

I then gave Finbow a copy of the draft Statement (attached). He asked whether he could take notes and I said that he could. He asked whether I would provide him with specific dates: I said I was not prepared to do that because his clients would know what the dates were in any event. We were anxious to protect the anonymity of the person who had assisted us…

> Having read the Statement, he said that he would have to report back to Nigel Parr who was dealing with the case. I said that we understood this.
>
> He asked as to the current status of the proceedings and what would be the likely reaction if Express were now to decide not to proceed. I said that the proceedings had reached a stage where we had another hearing coming up and that hearing was on the test to be applied by the Competition Appeal Tribunal in its review- was it a full review or was it a judicial review style review? I understood that Express had received, or would shortly receive, much of the information that the OFT had relied on and therefore I saw no reason why they could not take the view that, for example, they now saw that the OFT had done a very thorough job and that whilst they disagreed with the outcome, it had become apparent to them that ultimately they would not be successful.
>
> I said that so far as I was concerned, I was not now expecting or asking for any response or comment. Finbow said that he thought that Nigel Parr would probably want to contact me to read the Statement.
>
> I said that I appreciated his making the time to see me with regard to such a difficult issue not least of all because clearly given the involvement of the CEO, there would be difficult corporate governance issues."

A copy of Mr. Scott's speaking note, along similar lines, has also been disclosed.

20. We emphasise at this point that any allegation of cartel-like or other improper activity involving Express or its senior executives is strenuously denied by Express.

The subsequent correspondence

21. Following that meeting, which took place on 26 June 2003, Ashurst reported the matter to Express. Express immediately instructed Messrs Browne Jacobson to represent them independently, Mr. Finbow being considered to be a potential witness.

22. On 11 July 2003 Browne Jacobson wrote to Herbert Smith. After reciting the course of the meeting and strongly denying the allegations made, this letter states:

> "After Mr. Finbow had read the statement Mr. Scott made no specific requests for action on the part of Ashursts although he expressed the hope that Mr. Finbow would discuss the matter with Nigel Parr who is the partner of Messrs Ashursts responsible for the representation of Express in the proceedings

> now on foot in the Competition Appeal Tribunal. However at the outset he indicated it would be bad for both parties and the industry as a whole for the proceedings to continue. Inferentially this was because if Express persisted in its complaint your client would raise allegations against our client's behaviour in England.
>
> …
>
> Our client treats the meaning and effect of the meeting as an attempt to influence its decisions in relation to a matter of public interest namely its involvement in an enquiry concerning anti-competitive behaviour in Scotland. The attempt to interfere in its involvement in this enquiry is pursuant to a clearly implied threat of disclosure of inaccurate information concerning our client's conduct in relation to trading arrangements in England.
>
> As far as our clients can see, the only reason why Mr. Scott wished to meet with Mr. Finbow was to persuade Express to withdraw its co-operation from the OFT and the CAT and presumably also to encourage the withdrawal of allegations concerning [Wiseman's] anti-competitive behaviour in Scotland.
>
> When Mr. Finbow indicated it would be impossible for Express to withdraw from these proceedings Mr. Scott suggested a device, which in effect involved misleading the CAT."

23. Browne Jacobson also requested a copy of the witness statement which had been referred to in the meeting.

24. Herbert Smith replied to Browne Jacobson on 15 July 2003. Mr. Scott, Herbert Smith said, had acted having taken the advice of leading counsel and was speaking from a prepared script. Herbert Smith and their clients were content for the meeting to be treated as an open meeting and to exchange attendance notes. That letter continues:

> "No threat or demand was made at the meeting, and as we have already said we took detailed advice from Leading Counsel before the meeting. Whilst it is of course a matter for your clients as to who they instruct in relation to this matter, we are somewhat surprised that Ashursts are not corresponding with us on this aspect of the matter (if indeed they share your views), because it was they and not you that were present at the meeting, and it is they who will fully understand all the surrounding circumstances and the relevance of the contents of the statement to the current enquiry. Indeed, your client's Application to the Competition Appeal Tribunal repeatedly claims that Alan Wiseman viewed Express as an "illegitimate competitor" as a result of comments he made at the joint

> hearing held before the Competition Commission, an issue which is central to the witness statement. These matters were discussed at the meeting and Mr Finbow certainly appeared to accept the points made by Mr Scott as to the relevance of the statement.
>
> We do not intend to comment further on precisely what occurred at the meeting itself in the light of our offer to provide you with our notes on the basis of your providing a copy of Mr Roger Finbow's notes. The rules of natural justice or the rules of the Competition Appeal Tribunal will provide your client with a full opportunity to comment on the whole statement or issues raised therein in due course. As to the purpose of the meeting, we entirely refute the three points at the end of your letter setting out what you regard as the "illegitimate" purposes for which the meeting was called. No threat was made at the meeting, there was no implied attempt to interfere with the proceedings and your clients' actions and their reaction to our client's entry into the English market are indeed relevant to the current proceedings."

25. The relevant attendance notes were exchanged on 21 July 2003 together with a copy of Mr. Scott's speaking note.

26. On 28 July 2003 Ashurst sent a copy of the correspondence between Browne Jacobson and Herbert Smith (including the attendance notes) to the Treasury Solicitor, acting on behalf of the OFT, and to the Tribunal.

27. At a case management conference on 2 September 2003 the President of the Tribunal stated that the issues raised by the correspondence sent to the Tribunal on 28 July 2003 were of concern to the Tribunal, but that the Tribunal did not consider it appropriate to go into the matter further until after the substantive proceedings were concluded. At the same case management conference, the Chapter I case was stayed generally, on the basis that the OFT was reopening its Chapter I investigation following the receipt of further evidence.

28. The substantive judgment was given in the Chapter II case on 2 September 2005: [2005] CAT 30.

29. On 10 November 2005 the Registrar invited the parties to make observations on the matters disclosed in the correspondence of June/July 2003. The Registrar's letter drew

attention to the fact that the meeting in question took place shortly after the entry into force of section 188 of the Enterprise Act 2002, which created a new criminal cartel offence.

Observations of the parties on the meeting of 26 June 2003

30. In a letter to the Tribunal of 25 November 2005 the OFT stated that the matter raised potentially two matters of concern, according to the OFT:

    (i) the indication at the meeting of 26 June 2003 that Wiseman would use a witness statement alleging cartel activity on the part of Express could be construed as "the imposition of inappropriate pressure on Express to abandon ongoing public interest litigation (in order moreover to prevent further matters of public concern from coming to light before the Tribunal)". It was suggested by the OFT that actions which could impede, or created a real risk of impeding, the administration of justice, in particular the making of improper threats, could amount to contempt: see *Attorney-General v Martin* (unreported, 18 April 1986).

    (ii) Secondly, according to the OFT, the suggestion apparently made in Mr. Scott's attendance note to the effect that, when giving reasons for its withdrawal, Express could say that they now saw that "the OFT had done a very thorough job and that, whilst they disagreed with the outcome, it had become apparent to them that ultimately they would not be successful", would have been a misleading basis on which to seek the Tribunal's permission to withdraw the appeal.

31. According to the OFT, the Tribunal's options were to consider referring the matter to the Solicitors' Disciplinary Tribunal, or to the High Court or Court of Session for any further action to be taken.

32. The OFT further submits that whereas in ordinary commercial litigation the parties should have considerable scope to settle the issues between them, there is a public interest in competition issues arising under the 1998 Act being examined and resolved

in order to protect the competitive process and the interests of consumers. Conduct intended to dissuade a litigant from bringing or persisting with an appeal to the Tribunal or claim under the 1998 Act needs to be examined with care.

33. For example, says the OFT, it would be entirely inappropriate for a dominant company to threaten commercial reprisals if the appeal were proceeded with; on the other hand, it would not, according to the OFT, be inappropriate to draw attention to material relevant to an issue in the case tending to weaken or undermine the case being pursued. On the other hand again, to draw attention to some *collateral* matter which, if revealed, would harm the competitor's private or commercial interests, with the intention of inducing the competitor to compromise its claim, could be contempt or inappropriate conduct. The OFT gives the example of two undertakings, each with evidence of infringement by the other, agreeing not to draw those matters to the Tribunal's attention, for their own benefit and the benefit of the industry. One issue in the present case would be whether the matters referred to in the witness statement were genuinely considered by those concerned to be relevant to the issues before the Tribunal.

34. In addition the OFT emphasises that there is an additional public interest in the present case, in that the 1998 Act is there not just, or even primarily, to protect the parties, but to protect the competitive process and consumers. Because of that wider public interest parties need permission to withdraw an appeal under the Tribunal's Rules.

35. Ashurst, in a letter of 25 November 2005, left the matter to the Tribunal while reaffirming that all allegations regarding Express were denied. Ashurst also submit that the latter were independently advised to draw the matter to the attention of the Tribunal having regard to the circumstances including that (a) the approach was made to Mr. Finbow who did not act for Express; (b) the entire witness statement was not disclosed and Mr. Finbow was not permitted to take even an excised copy, even though serious allegations were being made against senior Express personnel; (c) Express was concerned about the discussion relating to presenting a discontinuation proposal to the Tribunal; and (d) the proceedings involved an element of public interest. Neither Express/Claymore nor its solicitors were informed that Herbert Smith had supplied the OFT with the witness statement on 18 July 2003, and that statement has never been

supplied to Express. Ashurst also draw attention to what they say are various inconsistencies in what the witness statement is said to contain.

36. In a letter of 25 November 2005, Herbert Smith stated that a copy of the witness statement in question had been sent to the OFT on 18 July 2003. Apparently, the OFT had then placed the witness statement for safe keeping with its in-house advisers and taken no further action. Further, Herbert Smith stated that on 7 August 2003 the witness statement was also sent to the CC, which at that time was investigating a further and separate matter, namely the proposed merger between Express and Arla, under the Enterprise Act 2002.

37. According to Herbert Smith, since Express had, in the proceedings before the Tribunal, subsequently indicated that it simply sought a review of the OFT's decision, and no longer invited the Tribunal to decide whether Wiseman's conduct was indeed an abuse of a dominant position, Wiseman had concluded that the witness statement was no longer relevant in the proceedings before the Tribunal (footnote 2 to Wiseman's statement of intervention of 7 May 2004).

38. Herbert Smith further emphasised that the events referred to in the witness statement all took place before 1 March 2000, when the 1998 Act came into force, and that the witness statement was disclosed to the relevant competition authorities on 18 July and 7 August 2003. Wiseman had earlier sought to provide the evidence, to the CC during the *Scottish Milk* inquiry and to the OFT in response to the OFT's interim measures notice of 13 July 2001, but at that stage the witness had insisted on anonymity. According to Herbert Smith, the approach to Ashurst on 26 June 2003 was not improper, in that Wiseman reasonably believed that its actions in Scotland had to be understood against the background of Express' alleged anti-competitive activities, and that Express' complaints had to be seen in that light. By mid-2003 neither the CC nor the OFT investigations had resulted in any action being taken against Wiseman. Even if, which was denied, Mr. Scott's approach could be construed as an attempt to put pressure on Express to withdraw or compromise its appeal, any such conduct was "fair, reasonable and moderate" within the meaning of *Attorney-General v Times Newspapers* [1974] AC 273, referred to in the *Martin* case, cited above.

39. In a further letter to the Tribunal of 6 December 2005, Herbert Smith made the following additional points:

(i) it is generally lawful to attempt to persuade a party not to proceed with litigation, provided that the means are not improper. The means here were not improper: the witness statement was focussed on what could have been a key issue in the appeal;

(ii) Wiseman and Express were keen commercial rivals;

(iii) Mr Scott's concern was to forewarn Express as to the nature of the evidence to be adduced by Wiseman (which contained allegations of the involvement of Express' CEO) which was for Express' benefit and for the benefit of the dairy industry in general. This was entirely reasonable, given the absence of a procedure for early disclosure before the Tribunal.

40. As to Mr Scott's remarks at the end of the meeting, Herbert Smith submitted that he had no intention to mislead the Tribunal. According to Herbert Smith's letter of 6 December 2005:

> "(a) This part of the exchange between Mr Scott and Mr Finbow was wholly unprepared and "unscripted"; it was not at all a feature in what Mr Scott had intended to say to Mr Finbow – this can be seen from an examination of Mr Scott's speaking note.
>
> (b) Mr Scott's answer was instigated by a question from Mr Finbow.
>
> (c) Mr Scott's reply was in the nature of a "throw-away" remark, which had not been carefully calculated as the basis for any action which Express might choose to take.
>
> (d) It is perhaps an indication of Mr Scott's state of mind that in his minute of the meeting he recorded the exchange more fully than Mr Finbow – he clearly did not regard what he had said as something which needed to be covered up.
>
> (e) The response acknowledges the practice of commercial litigation, that the parties must regularly review their case as and when evidence becomes available.
>
> In the event, Express took no action to withdraw its appeal, and there is no question that the Tribunal was in fact misled.

> Following the meeting and subsequent correspondence between solicitors, Wiseman (through us) voluntarily provided the witness statement to the OFT/Treasury Solicitor and Competition Commission on 18 July 2003 and 7 August 2003 respectively. It was these authorities (rather than the Tribunal) which could have taken action in relation to any anti-competitive matters evidenced by the statement. Accordingly, to the extent that the statement contained matters of public concern, these were brought to light before the appropriate authorities. That said, to the best of our knowledge, no action was ever taken by the authorities based upon the contents of the statement. It is therefore unclear to us what is intended by the reference in the Treasury Solicitor's letter to "…the public interest in…bringing to light of anti-competitive practices…".
>
> In the light of views which have subsequently been expressed, Mr Scott accepts that his response could have been phrased with greater care and not in language which could have been interpreted in the way suggested by the Treasury Solicitor. As we indicated in our last letter, no disrespect to the Tribunal was intended and Mr Scott, and we, have expressed regret if any was caused."

41. It was in those circumstances that the Tribunal considered that it ought to hold a hearing on this matter, which took place on 17 January 2006.

42. Herbert Smith, in written submissions developed more fully in argument by Mr. Farrer QC, stated first that Mr. Scott and Herbert Smith greatly regretted that concerns have arisen as a result of what took place at the meeting on 26 June 2003, and hoped that the Tribunal would give guidance as to the approach to be followed in circumstances such as these. It was accepted that the word "inappropriate" was apt to describe the suggestion, apparently made at the end of the meeting, to the effect that a less than full explanation could be given to the Tribunal, were Express/Claymore to seek permission to withdraw the appeal under the Tribunal's Rules. The words used "were at least unfortunate and would have been better left unsaid".

43. It was also accepted by Herbert Smith that the meeting constituted pressure on Express to withdraw, but it was contended that such pressure was fair, proper, reasonable, and moderate in the circumstances. The witness statement was intended to explain Mr. Alan Wiseman's evidence to the CC that Express was not a "legitimate" competitor in Scotland. The minority in the report on *Scottish Milk* had accepted the relevance of Express' actions in England to Wiseman's conduct in Scotland, and no action had ever

been taken against Wiseman as a result of that report, or the subsequent OFT investigation under the 1998 Act.

44. According to Herbert Smith, Wiseman had earlier been attempting to draw this evidence to the attention of authorities, but could not do so during the *Scottish Milk* inquiry in 1999 because the witness was insisting on anonymity. Reference, on an anonymous basis, had also been made to the allegations in Wiseman's response to the OFT's notice of proposed interim measures of 13 July 2001. The problem of anonymity was not resolved until 2003 when the witness statement was supplied to the OFT, and to the CC in its Express/Arla inquiry.

45. Moreover, the proceedings were taking place in the context of a bitter commercial dispute between Wiseman and Express. Wiseman was concerned that the public disclosure of its allegations would do huge damage to the industry as a whole.

The Tribunal's general approach

46. In our view, this matter may be considered either from the point of view of the law on contempt of court, or from the point of view of whether the conduct in question was appropriate conduct by the professional advisers concerned.

47. As is well known, the law of contempt is founded on public policy and in broad terms exists in order to sanction conduct which impedes or interferes with the administration of justice, or which creates a substantial risk that the course of justice may be seriously impeded or prejudiced. Contempt may also occur where there is disobedience to an order of the court, but contempt of that kind is not an issue here.

48. In Scots law, according to Erskine, one of the foremost institutional writers and thus an authoritative source of law in the absence of any contrary indication:

> "every judge, however limited his jurisdiction may be, is vested with all the powers necessary either for supporting his jurisdiction and maintaining the authority of the court, or for the execution of his decrees." (Institute I, 2, 8)

49. In *HM Advocate v. Airs* 1975 JC 64 the High Court of Justiciary said at p. 69:

> "The offence of contempt of court is an offence *sui generis* and, where it occurs, it is peculiarly within the province of the court itself, civil or criminal as the case may be, to punish it under its power which arises from the inherent and necessary jurisdiction to take effective action to vindicate its authority and preserve the due and impartial administration of justice."

50. In *Beggs v. Scottish Ministers* (2005) SC 342 it was said:

> "It is clear that, in order to constitute contempt of court, conduct requires to be wilful and to show lack of respect or disregard for the court. It would not qualify as contempt if the conduct complained of was unintentional or accidental. What should be held to establish contempt plainly depends upon the nature of the case."

51. If matters which may amount to a contempt are drawn to its attention, in our view it is generally appropriate for a court to investigate whether a contempt has been committed, and if so what action to take. In our view, in English law the administration of justice before this Tribunal enjoys the protection of the law of contempt: see the definition of "court" in section 19 of the Contempt of Court Act 1981 and *Peach Grey & Co v Summers* [1995] 2 All ER 513, 519-520.

52. In the absence at present of an express statutory provision, it may be that, as regards proceedings in England and Wales, the correct procedure to follow in the event of a contempt before the Tribunal would be for the matter to be dealt with by the High Court under RSC Order 52 r.1 (2) (iii), but we leave that point open.

53. As regards proceedings in Scotland, the Contempt of Court Act 1981 applies to Scotland, and the Tribunal is a "court" for the purposes of that Act. The OFT submitted that neither the Inner House of the Court of Session nor the Tribunal would have any power to deal with a contempt before the Tribunal, but that in our respectful opinion is a highly doubtful proposition, as a matter of Scots law. While we are grateful for the OFT's assistance in that regard, it is perhaps unfortunate that Herbert Smith did not feel it necessary to deal with the matter under Scots law, but instead relied on the OFT. The OFT in turn relied on advice from the office of the Solicitor to the Advocate General of Scotland. That advice, although helpful, was in our opinion only partially reasoned. We take this opportunity to stress that it is important for the

Tribunal to have submissions from those versed in Scots law when issues of Scots law arise.

54. However, in this case it is unnecessary for the Tribunal to decide exactly what its powers are in relation to contempt under either Scots or English law. In our view, the better approach in this case is to consider whether the conduct in question was appropriate conduct in the circumstances. In particular, it seems to us relevant to consider whether anything that occurred in this case could be such as to merit further inquiry by any professional disciplinary body, and if so whether the Tribunal should take any, and if so what, action in that regard.

55. It seems to us that, in considering whether the conduct here in question was appropriate, the decided cases on the law of contempt are good indicators as to what conduct is appropriate in contexts such as the present. We therefore take account of those cases by analogy.

56. We make it clear, however, that we make no finding of contempt, expressly or by implication, against anyone here concerned. Had we thought it necessary to consider making such a finding, we would have had, among other things, to apply the criminal standard of proof, to consider the issue of intention, and to consider what procedure the Tribunal should follow.

Relevant law on the issue of pressure

57. As we have said, the law of contempt in our view throws light on what is appropriate conduct in the circumstances under consideration. The leading authority is *Attorney General v Times Newspapers* [1974] AC 273 which is highly persuasive although not, strictly speaking, binding in Scots law. That case concerned the publication by the Sunday Times of an article about the drug Thalidomide in circumstances where litigation against the distributors of the drug, Distillers, was pending, it being contended by the Attorney General that the publication in question amounted to improper pressure on Distillers to induce them to settle the case. That case is largely concerned with the question of the balance between bringing public pressures on a litigant to settle and the risks inherent in "trial by media", on the one hand, and the principle of free speech on

the other hand. However, there is some discussion of the extent to which it is permissible to put private pressure on a litigant to withdraw or compromise an action, as distinct from other overt action such as the intimidation of witnesses. On the issue of "private" pressure, among other observations we note the following:

Lord Reid said at p. 294D:

> "The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."

At the bottom of page 297 Lord Reid said:

> "So I would hold that as a general rule where the only matter to be considered is pressure put on a litigant, fair and temperate criticism is legitimate, but anything which goes beyond that may well involve contempt of court. But in a case involving witnesses, jury or magistrates, other considerations are involved; there even fair and temperate criticism might be likely to affect the minds of some of them so as to involve contempt."

Finally Lord Reid said at p. 299B:

> "The crucial question on this point of the case is whether it can ever be permissible to urge a party to a litigation to forego his legal rights in whole or in part. The Attorney-General argues that it cannot and I think that the Divisional Court has accepted that view. In my view it is permissible so long as it is done in a fair and temperate way and without any oblique motive".

Lord Diplock said at p.313B:

> "In my opinion, a distinction is to be drawn between private persuasion of a party not to insist on relying in pending litigation on claims or defences to which he is entitled under the existing law, and public abuse of him for doing so. The former, so long as it is unaccompanied by unlawful threats, is not, in my opinion, contempt of court; the latter is at least a technical contempt, and this whether or not the abuse is likely to have any effect upon the conduct of that particular litigation by the party publicly abused."

Lord Simon of Glaisdale said at p.318A:

> "Private pressure to interfere with the due course of justice will only be acceptable within narrow limits. If there is a public interest recognised by law that disputes should without interference be settled according to law in due process of law (whether by trial or by settlement on the basis of the law which would be applied at the trial), in my view it is not only immaterial whether the interference is physical or moral, but also whether the moral interference is, on the one hand, by holding the tribunal or litigant or witness up to public detestation or, on the other, by bringing private pressure to bear (unless such pressure can be justified). It is the fact of interference, not the particular form that it may take, that infringes the public interest."

58. In the English case of *Attorney General v Martin* (unreported, 18 April 1986) Mr Ashton, a barrister who lived on the South Bank of the Thames, had brought a private prosecution against a helicopter company and its chief pilot, the allegation being that the company had been infringing statutory regulations by operating low flying helicopters from a barge in the river. The respondent, Mr Martin, was the solicitor acting for the helicopter company. In the course of correspondence Mr Martin apparently stated (i) that if Mr Ashton did not desist from his private prosecution, the matter would be reported to the Inner Temple authorities and (ii) that, if the private prosecution were not withdrawn, his client would consider bringing an action for malicious prosecution.

59. Glidewell LJ, giving the judgment of the Court, said (at p. 14 of the transcript)

> "Lord Diplock in a passage I have read in *Att Gen v Times Newspapers* used the words "private persuasion…so long as it is unaccompanied by unlawful threats is not in my opinion contempt of court". Mr Littman submits that this means that it will only be contempt of court if the threat is to do something which is unlawful, that is to say illegal. Nothing less, he submits, will suffice. If Lord Diplock did mean this then he was alone amongst their Lordships in *Att Gen v Times Newspapers* decision in that opinion. With respect to him and since in other respects he was in agreement with the remainder of their Lordships' House it seems to us that he is not to be understood as meaning that but as using the words 'unlawful threats' as meaning improper threats.
>
> The problem for us therefore is to decide were the steps taken by Mr. Martin, were the threats made by Mr. Martin, proper,

> fair, reasonable or moderate? There is no complaint about another threat that he made; that is to say, that if the prosecution failed his clients would seek to be awarded their costs against Mr. Ashton and that since the defence would involve a number of witnesses of considerable expertise those costs would be considerable. It is accepted that in litigation or in a private prosecution to make the point with firmness to your opponent that he is likely to lose and that if he does lose you will be seeking costs from him is a perfectly proper means of persuading him to withdraw the proceedings that he has commenced."

60. On the facts of the case, the Court held that the threat to report the matter to the Inner Temple authorities (with the implication that Mr Ashton as litigant was guilty of professional misconduct as a barrister and should be subject to disciplinary proceedings) was a serious matter, extraneous to the proceedings and "wholly improper, unfair and immoderate". A contempt in that respect was found proved. As regards the threat to bring an action for malicious prosecution, it was held that this was "near the boundary between what is and what is not a proper pressure", but that the matter was not proved to the requisite standard of proof, i.e. the criminal standard. We have no reason to suppose that the approach in Scots law would be materially different from the approach of the Court of Appeal in *Martin's* case.

61. In these circumstances it seems to us that putting pressure on a litigant to compromise or withdraw pending proceedings may amount to contempt if improper (but not necessarily unlawful) pressure is used, or if the pressure in question is not fair, reasonable and moderate, provided that there was a real risk of prejudice to the proceedings. As Glidewell LJ points out in *Martin's* case, if the attempted object is to have the proceedings withdrawn or terminated, "it must be the case that the conduct of the proceedings would be prejudiced if the pressure achieved its objective" (transcript, p.17).

The Tribunal's views on the issue of pressure

62. Applying the test set out in the above cases, the question for us is whether pressure was applied to Express to withdraw its appeals to the Tribunal, and if so whether such pressure was proper, fair, reasonable, and moderate. In our view these different words convey, with a slightly different nuance in each case, the general principle that any

pressure brought to bear on a litigant to settle must be reasonable and within appropriate and proper limits. For the purposes of this judgment it is in our view relevant to consider primarily the question whether the pressure in question was "proper". Pressure that was not "proper" would not in our view be "fair, reasonable and moderate" either.

63. In considering the propriety of what took place, we have asked ourselves (i) what was the nature of the allegations made; (ii) did those allegations amount to pressure to compromise either or both of the appeals; (iii) were the allegations material to the issues in the appeals; and (iv) was the conduct appropriate in the circumstances?

64. As to (i), the nature of the allegations made, we have not sought production of the witness statement in question, so cannot make any definite findings. However, on the basis of the matters set out in the attendance notes, the allegation – strongly denied by Express – is that Express was party to cartel-like activity in England, aimed among other things at preventing or limiting incursions by Wiseman into the English market until "at least the late 1990s", although Mr. Finbow found it impossible to tell when it was alleged that the activities ceased. We were told on instructions by Mr. Farrer that the allegations covered the period 1994 to 1997.

65. The alleged activities, if true, would at that time have potentially given rise to an unregistered but registerable agreement or arrangement, falling within section 6(1) of the Restrictive Trade Practices Act 1976. By virtue of section 10 of that Act, such activities would have been contrary to the public interest and it would have been unlawful to participate in such activities by virtue of section 35(1)(b) of the Act, leaving aside the position at common law.

66. In our view, at the very least Wiseman's allegation was that Express, and its senior executives, had been engaged in unlawful and reprehensible anti-competitive conduct in the liquid milk market in England during the 1990s. That was clearly a serious allegation to make, particularly given the national importance of the market and Express' prominence in that market.

67. As to (ii), whether the allegations amounted to pressure, it is conceded that Herbert Smith's approach to Mr. Finbow amounted to putting pressure on Express to compromise the proceedings before the Tribunal. It seems to us that Wiseman's hope was that Express would realise that it was running a high risk of serious allegations as to its conduct coming out in court, and that in those circumstances it was in its own best interests and those of the industry to settle. At the very least, in our view it was a foreseeable result of the pressure being brought to bear that Express would seek to withdraw the proceedings. Even on the hypothesis, strongly maintained by Express, that the allegations made by Wiseman were unfounded, the prospect of such allegations being made in open court would in our view have put Express under pressure to settle.

68. As to (iii), the issue of materiality, it is relevant in favour of those concerned that the pressure we are considering here was to reveal something in open court in the course of proceedings, as distinct from, for example, a threat to publish something in the press (as in *Times Newspapers*) or to take some step extraneous to the proceedings (as in *Martin*). However, there would be a strong case of inappropriate conduct in the case of a threat to reveal something that was not material to the proceedings.

69. We accept that the question of Wiseman's intention was a relevant issue in the Chapter II case, and that it was being argued by Express that Mr. Alan Wiseman's remark about Express not being a "legitimate" purchaser in relation to its acquisition of Claymore was relevant to establishing Wiseman's intention in the context of the Chapter II case (see [2005] CAT 30 at paragraphs 269 to 283, especially paragraph 275). It is also apparent from the attendance notes that Herbert Smith considered that the witness statement was relevant to the proceedings, in order to put Mr. Wiseman's remark into context and to explain the commercial background.

70. On the other hand, it is accepted that the witness statement was not relevant to the Chapter I case, which is also referred to in the attendance notes as being a matter particularly "galling" to Wiseman. We were also a little surprised to be told that the period covered by the witness statement was 1994 to 1997, relating to events in England, whereas the focus of the Chapter II case was on the period 2000 to 2002, relating primarily to events in the Highlands of Scotland. However, we accept that

Wiseman's alleged anti-competitive activities in the Highlands began following Express' acquisition of a stake in Claymore in late 1998.

71. In those circumstances we cannot find that the allegations apparently made in the witness statement were immaterial, as regards at least one aspect of the proceedings. We are also prepared to accept that whether, objectively speaking, the allegations in the witness statement were relevant to the Chapter II case or not, those advising Wiseman honestly believed that they were. We cannot say, on the evidence before us, that there were no reasonable grounds for that belief.

72. Against that background, we come to (iv), which is the central issue in the case: was the pressure in question proper or appropriate in the circumstances? What should be done in such a situation?

73. Thus far in the analysis we have, in effect, a statement made in private by a legal adviser to one party to a legal adviser to another party of the intention to make allegations in open court, supported by a witness statement, of unlawful and reprehensible conduct on the part of an appellant before the Tribunal, it being honestly believed by the legal adviser in question, on reasonable grounds, that the allegations were material to at least one issue in the case, the object, or at least the effect, of making the statement being to put pressure on the appellant to settle.

74. We do not need to decide which side of the *Times Newspapers* line such facts would fall in the ordinary civil context, applying either Scots or English law. The proceedings before the Tribunal concerning appeals from decisions by the OFT under sections 46 or 47 of the Act are not ordinary civil litigation. In our view, in dealing with this issue we need to focus on the public interest dimension involved in such appeals.

75. The Chapter I prohibition provides:

> "2 (1) …agreements between undertakings, decisions by associations of undertakings or concerted practices which—
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which—

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

76. The Chapter II prohibition provides:

"18(1) …any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in—

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts."

77. Those two prohibitions are not imposed primarily to protect the interests of private parties, although private parties may also seek to enforce them. Those prohibitions are imposed in the public interest, in order to protect the competitive process and, ultimately, consumers. For that reason, the enforcement of the Chapter I and Chapter II

prohibitions is placed primarily in the hands of a public body, the OFT, with wide powers of investigation and sanction under sections 25 to 44 of the Act, albeit that private parties may also bring civil proceedings. Thus, when an investigation is commenced by the OFT under section 25 of the Act, or enforcement action is taken under sections 32 to 38, the OFT is acting in the public interest, not in the narrow interests of the parties, notwithstanding that, as the Tribunal has pointed out, the protection of competition may sometimes involve the protection of individual competitors: see *Burgess v. OFT* [2005] CAT 25 at paragraph 322; *Albion Water v. Director General of Water Services* [2005] CAT 40 at paragraph 262.

78. Appeals against, or with respect to, decisions taken by the OFT under the Chapter I and Chapter II prohibitions lie to the Tribunal under sections 46 and 47 of the Act. Section 46 provides that an appeal may be brought by parties to the relevant agreement (section 45(1)) or persons whose conduct is in question (section 46(2)) as regards the decisions set out in section 46(3). Section 47 provides for equivalent appeals by third parties who have a sufficient interest in the decision in respect to which the appeal is made, or who represent persons who have such an interest (section 47(2) as currently in force: the decisions under appeal in this case were brought under the equivalent provisions of a previous version of section 47).

79. In appeals before the Tribunal under sections 46 and 47, by virtue of Schedule 8, paragraph 3 of the 1998 Act:

> "(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—
>
> (a) remit the matter to the OFT,
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) . . .
>
> (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or(e) make any other decision which the OFT could itself have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.

> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

80. When an appeal under sections 46 or 47 is brought before the Tribunal, the Tribunal is concerned among other things with whether the OFT's public powers have been properly and fairly exercised, and if not whether the Tribunal should itself exercise the powers conferred upon it under Schedule 8, paragraph 3 of the 1998 Act. In approaching those questions, the Tribunal is itself concerned with the upholding of the 1998 Act in the public interest, and not just with the private interests of the parties. It is also to be noted that, because the proceedings before the OFT are not in the public domain, an appeal before the Tribunal is the first and only occasion in which the parties can ventilate their arguments in a public and transparent forum.

81. The public interest aspect of the proceedings before the Tribunal is in our view emphasised by the wide powers given to the Tribunal under the Tribunal's Rules (currently SI 2003/1372) and in particular the provisions which govern the withdrawal of proceedings and consent orders, currently to be found in Rules 12 and 57. At the material time, the equivalent provisions were Rules 10 and 28 of the previous version of the Tribunal's Rules (SI 2000/261), which provided as follows:

> "**Withdrawal of application**
>
> **10.** - (1) The applicant may withdraw his application only with the permission of the tribunal, or if the application has not yet proceeded to a hearing, the President.
>
> (2) Where the tribunal gives permission under paragraph (1) it may:-
>
> (a) do so on such terms as it thinks fit; and
>
> (b) instruct the Registrar to publish notice of the withdrawal in one issue of the London, Edinburgh and Belfast Gazettes and in such other manner as the tribunal may direct.
>
> (3) Where an application is withdrawn:-
>
> (a) any interim order made under rule 32, other than an order made in respect of costs, shall immediately cease to have effect; and
>
> (b) a fresh application may not be brought by the applicant in relation to the decision which was the subject of the application withdrawn."

“**Consent orders**

28. - (1) If all the parties agree the terms on which to settle all or any part of the proceedings, they may request the tribunal to make a consent order.

(2) A request for a consent order shall be made by sending to the Registrar:-

(a) a draft consent order;

(b) a consent order impact statement; and

(c) a statement signed by all the parties to the proceedings or their legal representatives requesting that an order be made in the form of the draft.

(3) A consent order impact statement shall provide an explanation of the draft consent order, including an explanation of the circumstances giving rise to the draft order, the relief to be obtained if the order is made and the anticipated effects on competition of that relief.

(4) If the tribunal considers that a proposed consent order may have a significant effect on competition, it shall direct the Registrar as soon as practicable following receipt of the request to publish a notice in one issue of the London, Edinburgh and Belfast Gazettes and in such other manner as the tribunal may direct.

(5) The notice referred to in paragraph (4) above shall state:-

(a) that a request for a consent order has been received;

(b) the name of each of the parties to the proceedings;

(c) the particulars of the relief sought by those parties; and

(d) that the draft consent order and consent order impact statement may be inspected at the Tribunal address for service or such other place as may be mentioned in the notice and

shall exclude any information of a confidential nature.

(6) Any person may send his comments upon a request for a consent order to the Registrar within one month of the date upon which the notice was published in accordance with paragraph (4) above.

(7) comments supplied in accordance with paragraph (6) above shall be in writing, signed by the commentator and shall state the title of the proceedings to which the comments relate and the name and address of the commentator.

(8) The Registrar shall send all comments received in accordance with paragraph (6) above to all parties to the proceedings. Any party to the proceedings may within 14 days of receipt of the comments send a response to the comments to the Registrar.

(9) In respect of any request for a consent order the tribunal may, as it thinks fit, after hearing the parties and considering the comments of third parties:-

(a) make the order in the terms requested;

(b) invite the parties to vary the terms; or

(c) refuse to make any order."

82. It is therefore clear that, once the Tribunal is seized of an appeal, that appeal can be withdrawn or settled only with the permission of the Tribunal, publicly given: see also *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading* [2001] CAT 1, at paragraph 60. The common sense behind those provisions is in our view self-evident. For example, it would not be right for an appeal to be withdrawn on the basis of a settlement that allowed the parties, in effect to "carve up the market", or on some other basis which was antithetical to the purpose of the 1998 Act: that would simply defeat the object of the legislation. Moreover, as we have already said, the need to obtain permission enables the Tribunal to uphold the wider interest, and notably the interests of consumers, if necessary by invoking the detailed provisions of Rule 28 (now Rule 57).

83. In the present case there is no doubt in our minds that, as at 26 June 2003, the two appeals pending before the Tribunal in the Chapter I and Chapter II cases involved matters of significant public interest. The allegation in the Chapter I case of the existence of a cartel in the supply of liquid milk in the Central Belt of Scotland was a matter in our view of important public interest, supported as it was by witness evidence lodged by Express (but, we emphasise, denied by Wiseman). Whether the OFT had adequately investigated that matter, or applied a correct legal test to the evidence before it, was also in our view a matter of public importance, going beyond the private interests of the parties. Similarly the Chapter II case involved allegations of anti-

competitive conduct threatening the survival of Claymore's dairy in Nairn, the only dairy (apart from Wiseman's dairy in Aberdeen) situated in the Highlands. Clearly, the survival of an effective competitive structure in the supply of liquid milk in the large but sparsely populated region of the Highlands and Islands was also a matter of public importance, as shown by the CC's consideration of the public interest in the *Scottish Milk* report, and the OFT's subsequent lengthy investigation between 2000 and 2002.

84. Against that background we do not accept that the present matter can be considered merely as a private "commercial dispute" between Wiseman and Express. Many cases arising under the Chapter I and Chapter II prohibitions will in some sense involve "commercial disputes" whether they concern, for example, the regulation of the insurance industry, as in the *GISC* case [2001] CAT 3, predatory conduct against a rival as in *Aberdeen Journals* [2002] CAT 4 and [2003] CAT 11, a refusal to offer reasonable terms to an ex-distributor as in *Genzyme* [2004] CAT 4, and so on. Those cases all had a public interest dimension. In the present case, for the reasons already given, the public interest was in our view firmly engaged by the two appeals by Express/Claymore pending before the Tribunal.

85. In our view the allegations of (i) a cartel organised by Wiseman in the Central Belt of Scotland contrary to the Chapter I prohibition (the Chapter I case) and (ii) an abuse of dominance by Wiseman in targeting Claymore in the Highlands (the Chapter II case), raised significant matters of public interest in Scotland. If Express had acquiesced in the pressure brought to bear, the Tribunal would have been deprived of jurisdiction to deal with important allegations of infringement of the Chapter I and Chapter II prohibitions, and the matters canvassed in those appeals would never have been publicly heard. While Wiseman may have seen it as being in the private interests of the parties that such matters (and indeed Wiseman's allegations about a cartel in England) should not be ventilated in open court, the system set up by the 1998 Act is a system of public law. Proceedings before the Tribunal are there also to protect the public interest.

86. In any event, and perhaps more fundamentally, on the hypothesis that the approach to Express had been successful, and that the latter had decided to seek to withdraw the appeals for fear of Wiseman's allegations being made public, we have difficulty in seeing how permission to withdraw could have been sought under Rule 10 without the

risk of holding back from, or misleading, whether intentionally or not, at least by omission, the Tribunal, as to the full reasons for seeking permission to withdraw. An approach which, if it had resulted in compromising the appeals, would seemingly have risked the Tribunal not being told the full story on the application for permission to withdraw, was in our view an approach open to objection.

87. We do not accept the relevance of the argument, advanced by Herbert Smith both in writing and orally, that the approach was seen as being to "the benefit of the industry". While it may well have been, in a narrow sense, to the private benefit of particular undertakings within the industry, in Wiseman's view, for various matters not to be revealed in public, that is not relevant to these proceedings, which are public interest proceedings. Indeed, it is precisely to prevent private deals of various kinds being made between competitors in proceedings before the Tribunal that rules such as Rule 10 (now Rule 12) and Rule 28 (now Rule 57) exist. Since the coming into force of the 1998 Act, such matters cannot be dealt with in private between companies or their respective advisers.

88. We are therefore of the opinion that the pressure here in question was not, objectively speaking, proper, within the meaning of the existing case law, in that (i) such pressure was directed towards compromising proceedings having an important public interest dimension without the OFT or the Tribunal being put in a position to safeguard the public interest, and (ii) such pressure tended towards a situation in which there was or might have been a risk of the Tribunal being given incomplete or even misleading information in the context of an application for permission to withdraw under Rule 10 or Rule 28 of the then Tribunal Rules.

89. As to those principally concerned, however, we are prepared to accept that, at the time, proceedings before the Tribunal were still relatively novel and there was no guidance as to how situations such as these could or should be handled. We also accept that, as was submitted by Mr. Farrer, the question of how and by what mechanism the proceedings before the Tribunal could be withdrawn or compromised was simply not thought through. In those circumstances, having set out our views, we do not propose to take any further action on this aspect of the case.

90. How then is such a situation to be handled in the future? It seems to us, by way of guidance for the future, that if a party wishes to make allegations of improper conduct, including anti-competitive activities, against another party before the Tribunal, then the proper course is to disclose the allegations at the same time to the relevant public authorities, normally the OFT, or to the Tribunal itself. Such disclosure would enable the OFT, or the Tribunal, as the case may be, to see the matter in its proper context and ensure that the public interest dimension was safeguarded.

91. In the present case, the witness statement was notified to the OFT on 18 July 2003, but that was more than three weeks after the meeting of 26 June 2003 and only *after* Herbert Smith had received Browne Jacobson's letter of 11 July 2003 rejecting Herbert Smith's approach and making it clear that both Browne Jacobson and Express considered that approach to be improper.

The Tribunal's views as to the remark made about withdrawal

92. It is self-evident that if permission is sought to withdraw an appeal, or the Tribunal is asked to make a consent order, the Tribunal should not be misled, even by omission, as to the basis on which it is being asked to make an order. Similarly it is axiomatic that no legal adviser could properly lend themselves to the suggestion that a court or tribunal might be misled.

93. It is accepted on behalf of Herbert Smith that the remarks made towards the close of the meeting of 26 June 2003, in answer to Mr. Finbow's question to how the proceedings could be withdrawn, were inappropriate and should not have been said. Regret has been expressed for what is described as an off-the-cuff, unscripted remark in circumstances where the mechanics of withdrawal of the appeals had not been thought through. Again, regret having been expressed, our view in all the circumstances is that it is unnecessary to make any finding, or take any further action. However, it goes without saying that professional advisers need to take care to ensure that they do not put themselves in a position which may risk compromising their duty to the Tribunal.

Christopher Bellamy Peter Clayton Peter Grant-Hutchison

Charles Dhanowa 17 February 2006

Registrar