

Abuse of Dominance by Excessive Prices: How Much is too Much?

Attheraces Limited v. The British Horseracing Board Limited
[2007] EWCA Civ 38

By Alan Bates
5th February 2007

Excessive pricing, discriminatory pricing and refusal to supply are among the three most difficult areas of competition law. In a landmark judgment on Article 82 and the Chapter 2 prohibition delivered on 2 February 2007, the Court of Appeal had to consider all three. Moreover, the issues arose as regards the supply of an intangible product: so-called “pre-race data” about British horseraces.

The Appellants were the British Horseracing Board and a subsidiary company, BHB Enterprises Plc (together, ‘BHB’). The BHB had responsibilities for the improvement, funding and promotion of British racing, of which it was the administrator and governing body. Pursuant to the Orders and Rules of Racing issued by the BHB and the Jockey Club, race organisers and others involved in British racing were required to submit, in advance of any race, certain pre-race information to “Weatherbys”, a company engaged by the BHB to collate that information and to distribute it to persons authorised by the BHB to receive it. This “pre-race data” included the details of each race, the names of the horses entered and each declared runner together with its saddlecloth and stall number, age, weight, official rating, jockey, owner and trainer. The pre-race data supplied by Weatherbys was the authoritative source of such information, which it was essential for bookmakers to provide in betting shops to punters.

One of the challenges facing the BHB was the impending abolition of the horserace betting levy, which since its introduction in the mid-1960s had provided funding for aspects of British horseracing by way of a 10 percent levy on the gross profits of UK bookmakers and the Tote. The Government’s proposal to abolish the levy made it necessary for the BHB to identify ways for better exploiting media and other rights with a view to replacing the funds which British racing had historically derived from the levy. One of rights which the BHB sought to exploit commercially was the right to receive the pre-race data, but this became complicated after the surprising ruling by the European Court of Justice in November 2004 that BHB did not have database rights in the pre-race data.¹ The right which the BHB was exploiting was, therefore, the right to be supplied with the data by Weatherbys, and then to make use of that data for certain agreed purposes.

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¹ See *British Horseracing Board Ltd v William Hill Organisation Ltd* [2005] EWCA Civ 863, [2005] RPC 883, [2005] All ER (D) 149 (Jul).

The Respondents ("ATR") essentially supplied a website, television channels and other audio-visual media relating to British racing which were used by bookmakers and punters around the world. ATR was party to commercial arrangements with the BHB to be supplied with pre-race data for the purposes of a website and satellite TV channel aimed at viewers in the UK and Republic of Ireland. Until March 2004, ATR also obtained pre-race data under an agreement with the BHB for supply in connection with broadcasts of British racing to overseas bookmakers, but that arrangement (whereby ATR could offset the price paid to the BHB against its payment to the racecourses for the picture rights) came to an end when ATR underwent a restructuring. The dispute arose over the new arrangement which ATR and the BHB sought to negotiate when ATR recommenced broadcasting in June 2004, and then introduced a new audio-visual service specifically for those countries that allowed only pari-mutuel (tote) betting. These negotiations did not result in agreement, essentially because the BHB sought a price for the supply of pre-race data corresponding to a 50 percent share of ATR's profits from those services; although that was the same rate as BHB had charged under the former arrangements, the charge was no longer subject to an offset and ATR therefore regarded this demand as grossly excessive. The matter came to a head when the BHB threatened ATR that unless payment was made, it would instruct its suppliers to cease providing ATR with the pre-race data, which prompted ATR to obtain an interim injunction in the Chancery Division. ATR's unhappiness with the BHB's demands was compounded when it learnt in those interim proceedings that the BHB had agreed to provide pre-race data to another broadcaster to overseas bookmakers ("Phumelela") in return for a profit share of only 30 percent (though ATR regarded even this percentage as excessive).

In its claim, ATR alleged that the BHB had infringed Article 82 EC and the Chapter 2 prohibition of the Competition Act 1998 by abusing its dominant position in the market for the supply of pre-race data concerning British races. The allegedly abusive conduct to which ATR pointed consisted of (i) an unreasonable refusal to supply the data to ATR, (ii) excessive and unfair pricing of that data, and (iii) discriminatory pricing of that data.

Trial in the Chancery Division²

At first instance, Etherton J accepted ATR's submissions that the relevant market was the non-UK or worldwide market "for the supply of UK pre-race data to those in the horse racing industry that require such information for the services they provide their customers (in particular, bookmakers and producers of TV channels or internet sites relating to horse racing)", and that the BHB was dominant in that market.

In a long judgment, Etherton J then went on to find that the BHB had abused its dominance by, *inter alia*, the threatened withholding of supply of the pre-race data to ATR, both because the data was an "essential facility" and because ATR was to be regarded as an existing customer, since BHB sought payment from ATR as an agent for the overseas bookmakers when, the judge held, there was no agency in fact or in law. The judge also found, as an independent head of abuse, that the BHB was seeking to charge "excessive and unfair" prices. Etherton J held that the price sought was far in excess of the "competitive price" which, in turn, he found to be represented by a reasonable allocation to ATR of the BHB's costs of collating and distributing the data, together with a reasonable return on those costs. It followed, the judge held, that the BHB had sought to insist on prices which bore "no reasonable relation to the economic value of the product" (*United Brands* [1978] ECR 207, para 250), the "economic value" having to be assessed without regard to the costs of producing the "positive externality" of British racing (i.e. the general costs of providing those aspects of British racing that made it an attractive subject matter for broadcast and betting). Furthermore, Etherton J held that the prices demanded by the BHB infringed competition law for the additional reason that they were discriminatory, there being no objective justification for demanding substantially higher fees from ATR than from Phumelela and other broadcasters.

The BHB's grounds of appeal

The BHB appealed to the Court of Appeal on a number of grounds, but most significantly on the ground that the judge had erred in his approach and conclusion as to whether the prices demanded

² *Attheraces Limited v British Horseracing Board Limited* [2005] EWHC 3015 (Ch), judgment of 21 December 2005.

were “excessive and unfair”. No issue was taken as to the correctness of the judge’s definition of the relevant market or his finding that the BHB was dominant. However, the BHB did submit that it was not wholly unconstrained in the prices which it could charge in that market, since the BHB was not itself engaged in supply to overseas bookmakers and was dependent upon supply to ATR if it was to derive revenue from that source: whereas ATR would only acquire the pre-race data at a price which left it sufficient margin to make worthwhile profits for itself within the competitive overseas markets in which it supplied its audiovisual services to bookmakers.

In the BHB’s submission, the judge had been wrong to regard the “competitive price” of a product as necessarily being represented by the costs of producing or providing it plus a reasonable return (“the cost+ formula”). Even companies which provided products on a competitive market could often obtain prices which exceeded any figure produced by that formula. That was because a competitive price reflected not merely the cost of production, but also the value of the product to the purchaser.³ A successful broadcaster such as ATR could, for example, hope to make profits within competitive markets that exceeded a reasonable rate of return on its costs. The area for price negotiation between ATR and the BHB was in relation to how such profits should be shared as between the broadcaster (who bore the risks associated with the development and provision of the broadcasted services) and the BHB (which had responsibility for and/or funded various activities which contributed to the attractiveness and integrity of British racing; benefits which, in turn, were fundamental to the true economic value comprised in both the pre-race data itself and the broadcast services which ATR provided).

Further, even if the BHB’s prices did exceed the “competitive price”, it did not follow that those prices bore “no reasonable relation to the economic value of the product”, which value could certainly not be automatically equated with the product of the cost+ formula. In particular that was the case for an intangible product such as broadcasting rights or data rights to sports events, for which the direct cost of supply would often be very substantially less than the revenue that could be earned by a broadcaster in the downstream market. It was clear from *United Brands* that the critical test was whether a price could be held to bear “no reasonable relation to the economic value of the product” and not simply whether it was substantially in excess of the costs of production on the supply side. The judge had erred by conflating these two questions. Moreover, he had failed to take account of the BHB’s role in making possible the kind of British horseracing which punters around the world wanted to bet on. The BHB’s performance of that role produced obvious benefits for ATR and, in that context, the prices demanded were not “unfair”.

Judgment of the Court of Appeal

The Court of Appeal (Mummery, Sedley and Lloyd LJ) unanimously allowed the BHB’s appeal. The Court held that the critical issue in the case was whether the price sought by the BHB was abusive. The issue of refusal to supply had to be considered in that context, since the BHB had been willing to supply ATR at that price, and abuse was an objective concept.

In determining whether an undertaking had abused its dominant position by charging excessive prices, the starting point was the principles set out by the ECJ in paragraphs 250-252 of its judgment in *United Brands*:

“In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be ... an abuse.

This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; ...

The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.”

³ In that regard, the BHB relied on the EC Commission’s decision in *Scandlines Svergie AB v Port of Helsingborg* [2006] 4 CMLR 23, as well as para 48 of the judgment of Laddie J in *BHB Enterprises Plc v Victor Chandler (International) Limited* [2005] EWHC 1074 (Ch), [2005] All ER (D) 445 (May).

This passage had to be read and applied with care, and in fact posed two questions which had both to be answered affirmatively for a price to be found to bear “no reasonable relation to the economic value of the product supplied” and thus abusive:

(1) Was the difference between the costs incurred and the price charged excessive?

(2) If so, was the price unfair in itself or when compared with competing products?

Notably, the ECJ did not say that the economic value of a product was always to be ascertained by reference to the cost+ formula, or that a price which was higher than that produced by the formula was necessarily excessive and an abuse (albeit that a price which did not exceed cost+ could never be abusive). Further, the law on abuse of dominance was about preventing distortions of competition and safeguarding the interests of consumers, not about prohibiting suppliers from making “excessive profits” by charging other undertakings prices yielding more than a reasonable return on the costs of production.⁴

Accordingly, in grappling with the difficult question of whether the difference between the costs incurred by the BHB in compiling and distributing the pre-race data, and the prices which it sought to charge for that data, were “excessive”, the Court had to look beyond ATR’s immediate interests to the market which it served. While it might be thought unfair that the BHB was asking for a 50 percent share of profits even though all the risks of the relevant broadcasting ventures were being carried by ATR, this could not in itself amount to an abuse of dominance. It was incontestable that overseas bookmakers, who were making commercial use of the services supplied to them by ATR, were paying ATR, in a competitive market, prices in respect of those services which afforded it a handsome profit; and there was little, if any, evidence that competition in that market was being distorted by the price demands made of ATR by the BHB. In that context, the judge below had been wrong in holding that the economic value of the data was represented by the cost+ formula.

The Court of Appeal then rejected a number of arguments which ATR had put forward as showing the BHB’s refusal to supply to have been unreasonable even if the price demanded had not, in fact, exceeded the economic value of the product. More significantly, the Court also rejected an argument that the BHB had abused its dominant position by discriminating against ATR in the prices charged to different broadcasters. Here the Court again relied on the purposes behind Article 82, which were reflected in the reference in that Article to “applying dissimilar conditions to equivalent transactions with other trading parties, *thereby placing them at a competitive disadvantage*”. The charging of different prices to different customers for equivalent transactions was not prohibited *per se*, but only where it gave rise to an actual or potential distortion of competition between those customers. There was no evidence of such a distortion in this case: the taking by the BHB of a higher proportion of the profits of ATR than, for example, those of Phumelela, did not of itself demonstrate such a distortion.

Comment

In this highly significant judgment, the Court of Appeal has grappled with a question which has long been a source of considerable difficulty for competition lawyers: when do prices charged by a dominant undertaking cross the threshold of being so excessive as to constitute an abuse? The CA’s approach to that question is firmly rooted, in line with modern trends in competition jurisprudence, in the purposes of competition law: to protect competition and consumers. The BHB’s prices were not found to be excessive because there was no evidence that they were undermining competition in downstream markets. A similar approach was taken to the question of whether the BHB was guilty of abuse by price discrimination. The Court’s judgment also suggests that, even if the BHB’s prices had been found to be “excessive”, it is likely that, in view of the BHB’s role in administering and funding aspects of British racing, those excessive prices would have nevertheless escaped a finding of abuse.

Peter Roth QC of Monckton Chambers acted for the BHB on the appeal.

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⁴ In that regard, the CA referred to the Opinion of AG Jacobs in *Bronner v Mediaprint* [1998] ECR I-7791 at 7811, para 58.