

JJ Burgess v OFT ~ the CAT reviews the law on refusal to supply by a dominant undertaking

By Heriot Currie QC ¹
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On 6 July 2005 the Competition Appeal Tribunal ("CAT") issued its judgment on the appeal by JJ Burgess ("Burgess") against the decision of the OFT that W Austin & Sons (Stevenage) Limited ("Austins") were not in breach of the Chapter II prohibition, introduced by section 18 of the Competition Act 1998 ("the Act"), in refusing to allow JJ Burgess access to Harwood Park Crematorium ("Harwood Park"), its wholly owned subsidiary.

Background

Austins and Burgess are both family firms of funeral directors. Austins has branches in Stevenage, Hitchin, Hertford, Buntingford, Welwyn and Welwyn Garden City. Austins also owns Harwood Park, which is located near to Stevenage and Knebworth. Burgess has branches in Knebworth, Welwyn Garden City and Hatfield.

In January 2002 Burgess was refused access to Harwood Park. Between then and March 2004 it was able to obtain access by arrangement with another funeral director; thereafter all access was prevented.

The Application to the OFT

Burgess complained to the OFT that Austins:

- had a dominant position in the supply of crematoria services, and also in the supply of funeral directing services where both were in competition
- abused its dominant position by refusing to supply Burgess customers with crematoria services at Harwood Park and by adopting other measures to similar effect.

The OFT held that the relevant markets were the supply of funeral directing services ("the downstream market") and the supply of crematoria services ("the upstream market"). The geographic market for the latter comprised all crematoria within a 30km radius of Stevenage and Knebworth.

The OFT decided that the main issue concerned Austins' behaviour in the upstream market.

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The OFT found that Austins' share of the market for crematoria services was 15.6%. In the absence of other evidence of dominance, the OFT relied on its general view that an undertaking is unlikely to be dominant with a market share of less than 40%. It, however, proceeded to examine the issue of abuse on the assumption that Austins was dominant.

In assessing the matter of abuse, the OFT applied the following approach in law: refusal to supply is not necessarily abusive; refusal to supply can be considered abusive where the refusal risks eliminating all competition or creates substantial harm to competition; only in exceptional circumstances should competition law deprive an undertaking of the freedom to determine its trading partners.

In applying these principles to the facts the OFT found that the origins of the dispute were not competition related; Burgess used other crematoria; the number of funerals conducted by Burgess since refused access to Harwood Park had increased; Burgess' market share in Stevenage and Knebworth had increased and that there was no evidence that Burgess was likely to exit the market.

The OFT concluded that it did not have before it strong and compelling evidence that Austins' refusal to allow JJ Burgess access to Harwood Park would eliminate or cause substantial harm to competition in a relevant market.

The Appeal to the CAT

Burgess appealed to the CAT. For the first time in proceedings before the CAT, the Consumers' Association (CA) intervened and did so to support the appeal.

The CAT allowed the appeal. In doing so it held that the OFT's analysis of the relevant geographic market for crematoria services and of the issue of abuse were unsupported by the evidence and contained errors of fact and law and, further, should be set aside for procedural reasons. The CAT decided to take its own decision rather than to remit the matter to the OFT and held that Austin had abused its dominant position in the Stevenage/Knebworth area in respect of the supply of crematoria services and funeral directing services.

In its decision the CAT made a number of interesting observations on evidential and procedural issues and on the substantive law relating to definition of geographic market and abuse.

Evidential issue

Austins was immune from penalty in terms of section 40 of the Act. The CAT held that in a case not involving penalty, the civil standard of balance of probabilities was applicable.

Procedural Issues

The CAT deliberated whether it should remit the matter to the OFT under paragraph 3(2)(a) of Schedule 8 of the Act or whether it should make any other decision which the OFT itself could have made under 3(2)(e). Referring to an earlier decision of the tribunal, *Freeserve v Director General of Telecommunications*², the CAT concluded that an appeal against a non-infringement decision was an appeal on the merits. The complainant would, as in *Freeserve*, need to persuade the CAT "that the decision is incorrect or, at the least, insufficient from the point of view of (i) the reasons given; (ii) the facts and analysis relied on; (iii) the law applied; (iv) the investigation; or (v) the procedure followed." Because the CAT's jurisdiction was a merits jurisdiction, it was wider than a judicial review jurisdiction. The CAT held that it should, if necessary take its own decision rather than remit if (i) it has or can obtain all the necessary material (ii) the requirements of procedural fairness are respected and (iii) the course the CAT proposes to take is desirable from the point of view of the need for expedition

² [2003] CAT 5

and saving costs. Applying these criteria, the CAT decided to proceed to take its own decision.

The other procedural issue related to the OFT's failure to give Burgess the opportunity to comment before it closed its file. The CAT would, following *Pernod-Ricard* [2004] CAT 10, have allowed the appeal on that ground alone.

Geographic Market

The critical issue was whether the OFT was wrong to find that the relevant geographic market for crematoria services included the West Herts crematorium and all crematoria within a 30 kilometre radius of Harwood Park.

In its Decision, the OFT identified as the key consideration how funeral directors and end consumers would react if a hypothetical monopolist crematorium in the Knebworth/Stevenage area increased prices by a small but significant amount above competitive prices, (SSNIP analysis). The OFT concluded that if Harwood Park raised prices the majority of funeral directors would be able to switch to alternative crematoria relatively easily.

The CA submitted that the OFT's SSNIP analysis was based on the perception of the funeral director rather than the end consumer. This led to an underestimate of a local crematorium's market power.

The CAT took note of (amongst other things) the OFT's own comprehensive investigation into the funerals industry ("Funerals: A report of the OFT inquiry into the funerals industry", OFT 346, July 2001) and research which concluded that a funeral is a classic "distress" purchase: the relevant purchase is typically made by a person in a distressed state, who has to take a decision quickly and who has little or no experience of making such a purchase. This tended to suggest that the market might not be particularly sensitive to small but significant price increases. The Tribunal considered that the evidence as to prices and ability to switch strongly suggested that Harwood Park was shielded from competition to a material extent by virtue of its location and that of other crematoria and operated in an identifiably separate market from these other crematoria. It also confirmed that consumer "preferences" rather than "choices" were the determining factor.

In relation to the OFT's finding of a lack of discrimination, the OFT argued that if Austins were dominant in the Stevenage and Knebworth area, it would be possible for Austins to charge higher prices in those areas than for customers in other areas; the OFT found no evidence of such discrimination. The Tribunal criticised that approach, stating that "*The fact that a dominant undertaking does not choose to use its market power in a particular way... does not mean that it is impossible to identify a discrete local geographic market*". The Tribunal also found clear evidence of discrimination.

The CAT noted the failure by the OFT to mention the close links between crematoria services and funeral directing services; it considered that the fact that Austins was a vertically integrated enterprise active in both aspects of the service provided to consumers was a highly relevant factor.

Dominance

In analysing the relevant law, the CAT referred to its own recent decision *Genzyme v OFT*³ at paragraphs 188-196.

The CAT found that within the Stevenage/Knebworth area, Harwood Park carried out 90% of cremations. That in itself was indicative of dominance which was also confirmed by other factors. Harwood Park was in a position to determine whether any existing supplier or new

³ [2004] CAT4; [2004] CompAR 358

entrant to the market for funeral services was able to stay in the market. The test for dominance was met.

Abuse

It is worth noting the competing submissions before the CAT on whether refusal to supply constituted abuse.

Burgess submitted that:

- where a vertically integrated undertaking holds a dominant position in a downstream market, it is an abuse of that position for its upstream operation to terminate supply, in the absence of objective justification
- where a dominant undertaking with a reputation valued by consumers terminates a supply of an important service to a long standing customer, that constitutes an abuse, in the absence of objective justification, if it impairs free and undistorted competition in the downstream market
- the OFT misdirected itself in treating a refusal to supply as abusive only if it eliminates all competition or causes substantial harm to competition

The OFT submitted that:

- it was correct in treating a refusal to supply as abusive only if it eliminates all competition or causes substantial harm to competition
- it was important to respect the right to choose one's trading partners
- acts that do not prevent effective competition should not be prohibited

Austins supported the OFT's interpretation of the case law.

The CA characterised the OFT's position as enabling Harwood Park to decide which competitors remained in the market.

The CAT considered that much of the relevant law was summarised in *Genzyme v OFT*, cited above. After reviewing the case law, dealing with refusal to supply in the context of an allegation of abuse of a dominant position, the CAT stated that an abuse of a dominant position may occur:

- if a dominant undertaking, without objective justification, refuses supplies to an established existing customer who abides by regular commercial practice, at least where the refusal of supply is disproportionate and operates to the detriment of consumers
- in particular, if the potential result of the refusal to supply is to eliminate a competitor of the dominant undertaking in a neighbouring (e.g. downstream) market where the dominant undertaking is itself in competition with the undertaking potentially eliminated, at least if the goods and services in question are indispensable for the activities of the latter undertaking and there is a potential effect on consumers
- it is not an abuse to refuse access to facilities that have been developed for the exclusive use of the undertaking that has developed them, at least in the absence of strong evidence that the facilities are indispensable to the service provided, and there is no realistic possibility of creating a potential alternative.

These propositions were not intended to be an exhaustive statement on the issue of refusal to supply.

Against that analysis of the applicable legal principles, the CAT held that there had been infringement of the Chapter II prohibition.

Members of Monckton Chambers represented three out of four parties in this case before the CAT. Peter Roth QC and Jennifer Skilbeck represented JJ Burgess, John Swift QC and Kassie Smith represented the OFT and Andrew Macnab represented the Consumers' Association.