

## Office of Fair Trading v D

[2003] EWHC 1042 [2003] 2 All E.R. (Comm) 183 [2003] U.K.C.L.R. 765 [\[2004\] I.C.R. 105](#) Times, June 4, 2003 [2003 WL 21162226](#) 2003 WL 21162226

Summary: OFT applied without notice for search and enter warrants under the [Competition Act 1998 s. 28\(1\)\(b\)](#). Subsequent to D announcing price rises, OFT had become suspicious that D had engaged in unlawful price fixing with its competitors. OFT contended that there were reasonable grounds for this suspicion and that they required a search and enter warrant to obtain documents from D's premises for investigative purposes. It was argued that D was likely to take steps to conceal or destroy the documents sought. An issue arose as to whether the application involved an infringement of the Human Rights Act 1998 Sch. 1 Part I Art. 6 and Art. 8. Held, granting the application, that there were reasonable grounds for suspecting that D had engaged in price fixing and had documents relating to their unlawful conduct which they might conceal or destroy. The legislative rights conferred on OFT were regarded as proportionate in pursuit of a legitimate aim, and they did not offend the rights under Art. 6 of the Human Rights Act, [Roquette Freres SA v Directeur General de la Concurrence, de la Consommation et de la Repression des Fraudes \(C94/00\)](#) [\[2003\] All E.R. \(EC\) 920](#) and [Orkem SA \(formerly CdF Chimie SA\) v Commission of the European Communities \(C374/87\)](#) [\[1989\] E.C.R. 3355](#), considered. Further, there was no reason to conclude that any of D's rights under Art. 8 of the Human Rights Act would be unlawfully infringed. The aim of the Competition Act was to avoid price cartels and OFT had to be able to carry out justified investigations. Removal of the power to enter premises pursuant to a warrant would emasculate OFT's statutory functions. Further safeguards, such as applying to have the order discharged and seeking appropriate relief in the event that OFT abused power, were in place to protect the defendants.

### **2003 WL 21162226**

The Office of Fair Trading v. [Not Named ... High Court of Justice Queens Bench Division ... Hearing date: 30th April 2003, Wednesday 14th ...

### **Representation**

Mr George Peretz (instructed by the Legal Director, Office of Fair Trading) for the Claimant.

### **JUDGMENT**

1. This is an application by the Office of Fair Trading [OFT] for warrants under the Competition Act 1998 [the Act]. The application is made without notice,

and, therefore, I have heard no submissions from the defendants. Nonetheless, the application raises Human Rights issues, which need to be addressed, and a judgment on these issues seems to me to be appropriate.

**2.** By virtue of [sections 1 and 2 of the Enterprise Act 2002](#), which came into force on April 1 of this year, the OFT have taken over functions which were up to then carried out by the Director General of Fair Trading. Pursuant to paragraph 12 of Schedule 1 to the Enterprise Act the OFT have authorised its Chairman to exercise all the OFT's functions in relation to the present application.

**3.** The application arises out of a suspicion which the OFT have that the Defendants, whose names are not revealed in this judgment, have been engaged in price fixing; that is, they have put their heads together about prices. It would be unlawful if such conduct had occurred and an overt or express agreement between the defendants is not required to be proved. There are a small number of manufacturers of the products within the UK. The infringement, which is suspected in this case, relates to a series of price rises announced by the defendants. I am satisfied that what is summarised in paragraph 15 of counsel's skeleton argument, justifies me in concluding that there are presently reasonable grounds for suspecting that the defendants have been engaged in unlawful conduct, namely an infringement of what is called Chapter 1 prohibition.

**4.** I must be satisfied under [section 28\(1\)\(b\)](#) of the Act, first, that there are reasonable grounds for suspecting that there are, on identified premises, documents which the OFT have power to have produced to them in the course of the investigation which they have commenced under [section 25](#) of the Act. Second, there must be reasonable grounds for suspecting that the documents required to be produced would not be produced but would be concealed, removed, tampered with or destroyed.

**5.** On the basis of paragraphs 50-54 inclusive of the first affidavit of Edward Francis Lennon, a Principal Investigation Officer in the Cartel Investigations Branch of the Competition Enforcement Division of the OFT, I am satisfied that there are reasonable grounds for suspecting that there are, on the premises named in the warrants, documents which the OFT are entitled to see in the course of their investigation. As to the second requirement, the evidence shows that a 'warning shot across the defendants' bows' has already been fired by the Director General of Fair Trading. The target companies, if they have been doing what the OFT suspect, are likely to have taken steps to make detection difficult and to be continuing so to act. The stakes are high, since the penalties if guilt is established are likely to be high. The entities being investigated include one of a substantial size, and whose reputation, apart from its financial position, may be damaged if incriminating material is found. There is, therefore, a strong inducement or motive for hiding the truth. The material which the OFT are

most interested to see is relatively easy to conceal, given advance notice. For these reasons, I am satisfied that there are reasonable grounds for suspecting that the written material would be concealed or destroyed. It is in the public interest that if there has been wrongdoing it is uncovered and revealed.

## **Human Rights Act**

**6.** I turn to the question whether this application involves an infringement of the Human Rights Act, and the Convention which it applies. It seems to me that there are two potential rights involved: first, those conferred by Article 6 and, second, those conferred by Article 8. It would appear that breach of competition laws leading to substantial financial penalties are regarded by the European Court as criminal rather than civil in nature: see the decision of that Court in *Montecatini v Commission* [1999] ECR I-4539 paragraphs 175 & 176; the opinion of Advocate General Leger in *Baustahlgewebe v Commission* [1998] ECR I-8417 at paragraph 31. This was also the view of the [Competition Commission Appeal Tribunal in \*Napp Pharmaceutical Holdings Ltd v DGFT\* \[2002\] Comp. AR 13](#) at paragraph 98. It is also the view of the [European Commission of Human Rights: see \*Société Stenuit v France\* \[1992\] 14 EHRR 509](#), a case which never reached the Court in Strasbourg. So far as Article 6 rights are concerned, there is one over-riding relevant right, namely the right to a fair trial, of which one component is the right against self-incrimination, to which there are two aspects. The first aspect relates to the legal duty upon a person served with a warrant to permit the investigation team to take documentary material and thereafter use it in the course of the investigation. The material may well help the OFT to establish a breach of the Chapter 1 prohibition. Does this infringe the presumption of innocence and the onus of proof required by Article 6.2? The second relates to questions asked about those documents, which the warrant entitles the warrant holder to require answers to.

**7.** As to the first, the Strasbourg/Luxembourg learning does not appear to be entirely consistent. In *Orkem v The Commission* [1989] ECR 3283, the ECJ held that whilst Community law recognised a privilege against self-incrimination where the answer to a request for information by the Commission "might involve an admission on its part of the infringement which it is incumbent on the Commission to prove" a general right to refuse to answer questions which might lead to evidence establishing guilt and which does not involve an admission of an infringement would be an unjustified hindrance to the Commission's task of ensuring respect for Community competition rules. However, in [Funke v France \[1993\] 1 CMLR 897](#) M. Funke successfully challenged his conviction for failing to provide documents which the customs authorities had demanded of him, on the grounds that his rights under Article 6 had been infringed. At paragraphs 68 & 69 of the Strasbourg Court's judgment in [Saunders v UK \[1997\] 23 EHRR 313](#), the Court said: "The Court recalls that, although not specifically mentioned in Article 6 of the

Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing. ..."

The dissenting judgment in *Saunders* explicitly recognised that the majority decision of the Court was implicitly overruling its decision in *Funke* "and has essentially converted to the more restricted doctrine adopted inter alia by the Court of Justice". Furthermore, the Court effectively left unanswered the question whether the 'implied' rights to silence and against self incrimination are absolute or not. In [Brown v Scott \(Procurator Fiscal, Dumfermline\) and another \[2001\] 2 WLR 817](#), the question at issue was whether the requirement on an owner of a motor vehicle to say who was driving it at a particular time infringed the implied right against self incrimination in Article 6. Their Lordships were of the view that the implied rights are not themselves absolute [Lord Bingham at 836B; Lord Steyn at page 841B; Lord Hope at page 853F; Lord Clyde at 859G; The Rt Hon Ian Kirkwood at page 862A] and the court must examine whether the legislative provision in question was designed to achieve a legitimate aim and whether the means employed were proportionate.

**8.** In the context of competition legislation, it seems to me clear that the legislative rights conferred on the OFT are to be regarded as in the pursuit of a legitimate aim and are proportionate and, therefore, do not offend the implied Article 6 rights. The reason why I take this view is primarily based upon the Council's and ECJ's perception of the powers conferred on the Commission. Council Regulation No 17 dated 6 February, 1962, was designed to implement [what were then numbered] Articles 85 & 86 of the Treaty, the principal competition Articles. Article 14 of that Regulation empowers officials of the Commission to examine books and other documents and take copies of them, to "ask for oral explanations on the spot" and "to enter any premises, land and means of transport of undertakings". According to their decision in Case C-

94/00 Roquette Freres SA [2003] 4CMLR 1, the ECJ has concluded that the powers of the Commission "are designed to enable it to perform its task of ensuring that the competition rules are applied in the common market" and to prevent the distortion of those rules "thereby ensuring economic well-being in the Community". The rights of the Commission are subject to a "range of guarantees" and are circumscribed. There is a right to legal representation and to retain the privilege that emanates from a lawyer/client relationship. There is a legal right to challenge the lawfulness of the Commission's decision to hold an investigation.

**9.** All these matters apply with similar force under the domestic legislation. The OFT is the guardian of free competition in this Member State, and the statutory provisions are designed to ensure that it can fulfil that role: the powers to carry out an investigation are an essential feature of its functions. Its powers to enter premises, search and ask questions about documents are no more extensive than are available to the Commission. And the exercise of those powers are subject to extensive "guarantees". In the first place, the OFT is required by the Act to come to a High Court Judge to obtain a warrant. It must satisfy the Court that there are reasonable grounds for the OFT's suspicion that competition is being unlawfully distorted and that there are likely to be found relevant documents [my words], and that a warrant is necessary to avoid the suppression of documents. The OFT must comply with the formalities specified in the relevant Practice direction. Where a Member State is asked to provide assistance to the Commission in carrying out any investigation, the domestic Court's role is relatively circumscribed. It fulfils a supervisory function but there is an overriding duty on the Member State to ensure that the Commission's action is effective whilst respecting "various principles of Community law". The contrast between the function of this Court when assisting the Commission and when fulfilling its duties under the domestic competition legislation is marked. In the former case, the Court is not entitled to see the material upon which the Commission has reached its decision to investigate [see paragraph 62 of the Roquette judgment]; whereas here the court was provided with a full affidavit and accompanying documents to enable it to be satisfied that the OFT were not abusing their power in starting the investigation and seeking a warrant and were not acting in a disproportionate manner.

**10.** Here, the rights of the defendants are protected: their rights under Community law have been fully respected. The defendants may apply to the Court for relief; they have a right to legal representation and are encouraged to seek legal advice; the privilege in client lawyer communications is protected; the Orkem principle is accepted by the OFT.

**11.** The same reasoning applies to the second aspect of Article 6. It seems to me perfectly reasonable that the OFT should, just as the Commission does, have power to ask questions about the material which they turn up during

their search. There may well be codes or technical notes which require elucidation so that the investigation may properly proceed. In *Mannesmann v Commission* case T-112/98, the Court of First instance had to consider whether the Commission's rights to ask question during an investigation process offended Article 6. It re-iterated the *Orkem* principle and stated that an unrestricted right to silence would have the effect of going beyond what is necessary to preserve the undertakings' rights of the defence and would constitute an unjustified hindrance to the accomplishment by the Commission of its task of ensuring respect for the competition rules in the Community. The aim of the legislation in relation to questions by the OFT is to make it possible for the OFT to carry out its obligations without undue hindrance. The means adopted do not offend the *Orkem* principle and there are protections for the individual or undertaking; in other words, the means adopted are proportionate and avoid an abuse of power. Thus, if a person refused to answer a legitimate question he is exposed to the risk of a prosecution. But if the criminal court considered that the question that he refused to answer offended the rule against self-incrimination, then he would be acquitted. He could not be convicted of failing to answer a question if he had a right not to answer it. Conversely, if a question were improperly asked, for example 'do you admit that you have been guilty of price fixing?' and the answer 'yes' was given, then the defendants would be entitled to seek relief from the courts to prevent the OFT from relying on that answer in making their determination. Answering and not answering questions does not deprive the defendants of legal redress if the questions asked extend beyond "purely factual" matters. Thus, the rights of the defendants are fully protected in the event of any abuse of the power to ask questions. The aim of the requirement is to facilitate the investigation; the rights against self-incrimination are not offended; and the defendants' position is fully protected by law. In my judgment, if there is an Article 6 implied right, [which I doubt because of the limits imposed by the OFT itself on the type of questions that may be asked], there is no breach of such a right.

**12.** What about Article 8? I accept that Article 8 may come into play even though the premises concerned are business rather than personal households. The right to enter and search is potentially an interference with a person's right to be protected against arbitrary interference by a public authority. How far this goes is uncertain. This is not the occasion to try and interpret the limited jurisprudence on this topic. But it seems clear that the wider the Strasbourg Court interprets the words 'private life' and 'home' in Article 8(1) the wider it will interpret the justification provision in Article 8(2), in the sense that the test of what 'is necessary in a democratic society in the interests of the well being of the country' will more easily be satisfied where the premises are business rather than personal [see paragraph 29 of the ECJ's decision in *Roquette*]. I can see no reason for concluding that any rights which the defendants may have under Article 8 will be unlawfully infringed. Again, the aim of the legislation is to avoid price cartels and for this purpose the OFT must carry out an investigation where that is justified, as here. Not to have the power to enter

premises pursuant to a warrant would effectively emasculate the OFT's statutory functions. The safeguards are in place to protect the defendants. They can apply to have the order discharged and to seek appropriate relief in the event that the power is abused during the execution of the warrants. Access to the domestic court is quicker and more effective than access to the ECJ, for example. I conclude that the interference with any right under Article 8 is justified and proportionate.

**13.** Finally, I am satisfied that all the matters referred to in the Practice Direction have been complied with. The only order made which is other than routine relates to the identification of certain premises which have been done both by using the postal address but also by annexing the defendant's own plan of the premises, which comprise different blocks of building, for greater certainty. I am grateful to Mr Peretz for his most helpful submissions.

**14.** This judgment is being handed down after the OFT have executed the warrants. There is a fear in the OFT that the defendants would or might be able to identify themselves as the targets from what is said in this judgment. I made the Orders requested and signed the warrants on 30 April 2003.

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