COMPETITION ALERT
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RUSSELL McVEAGH

DANGEROUS LIAISONS: UK SUPPLIERS FACILITATE RETAIL PRICE FIXING

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The recent "Toys and Games" (and "Football Shirts") judgment by the UK Court of Appeal[1] *reveals that a retailer providing its supplier with pricing information in circumstances where it is foreseeable that the information will be passed on to another retailer can form the basis for a finding of price fixing between the three parties. The judgment also illustrates how those taking part in a cartel can expose themselves to a leniency lotto in that the party able to benefit from leniency is not necessarily the least blameworthy. This Alert considers lessons the "Toys and Games" case teaches and its implications for New Zealand.*

Conduct in question

In May 2000, Hasbro (a leading global manufacturer of toys) formed the view that its retailers were unhappy with their profit margins. It approached two influential retailers, Argos and Littlewoods, and sought to improve their adherence to Hasbros' recommended retail prices ("**RRPs**") in respect of particular products.

Both retailers sold their products through catalogues which were published twice a year only. This meant that once either Argos or Littlewoods had published its prices they were effectively locked in place for the season and could not easily be changed in response to being undercut by the other party.

Of the two retailers, Argos was generally regarded as the price setter, but the Court found that it would have been unlikely to enter into any arrangement with Hasbro unless it was able to be reassured that its prices would not be undercut by Littlewoods. Hasbro took the view that it was necessary for the success of the initiative for it to be in a position to reassure Argos that Littlewoods was also committed to follow the same prices.

Various meetings were held between Hasbro and Argos on the one hand, and between Hasbro and Littlewoods, on the other. Significantly, there was no evidence of any direct communication occurring between Argos and Littlewoods.

In the course of the various meetings between Hasbro and the retailers, it was alleged that Hasbro indicated that it would attempt to ensure that other retailers sold at the RRP, and in return Argos and Littlewoods each individually indicated to Hasbro that they would price at the RRP. No formal agreement was concluded to this effect, however, parallel pricing behaviour was subsequently observed in Argos' and Littlewoods' 1999, 2000 and 2001 catalogues.

Indirect price fixing

The UK Office of Fair Trading ("**OFT**") investigated and fined all three companies involved in the "Toys and Games" arrangement (although Hasbro had its penalty reduced to zero). Argos and Littlewoods appealed to the UK Competition Appeals Tribunal ("**CCAT**"), and then to the UK Court of Appeal. The primary contentious issue on appeal concerned the alleged existence of a tripartite "concerted practice" between Argos, Littlewoods and Hasbro, on the basis of the conduct described above.

1. *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318 (19 October 2006). In the same judgment, the Court also dealt with an indirect price fixing arrangement for replica football kit; the "Football Shirts" case . In that case, JJB (the major UK retailer of sporting equipment) was found to have placed pressure on Umbro (a supplier of sporting equipment) to coerce Sports Soccer (a retailer competing with JJB) to raise its prices for replica England football kit during the Euro 2000. This Alert deals with issues arising from the "Toys and Games" aspect of the judgment only; although the Football Shirts scenario is also an example of an indirect price fixing arrangement.

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The case is yet another illustration of why businesses should take particular care when discussing pricing strategies for products. Complaining about a competitor to a party at a different vertical level in the supply chain (e.g. to a supplier when you are a retailer) is not risk-free, as it may be taken to be a request to the other party to take some form of anticompetitive action against the competitor.

While Argos and Littlewoods accepted that it may be possible for multilateral concerted practices to be entered into via communications relayed through an intermediary, they argued that, on the basis of the exchanges that actually took place, there was no "concurrence of wills" between the three parties. "Concurrence of wills", they said, was a necessary element for a "concerted practice", according to *Bayer v Commission* [2000] ECR II-3383. There were only non binding exchanges of pricing information without subjective consensus between all parties, therefore no "concerted practice".

The Court of Appeal rejected the argument put forward by the retailers and found it "impossible to avoid the conclusion that Hasbro's pricing initiative was acceptable to both Argos and Littlewoods." The Court observed:

> To adopt and adapt the observation of the Court of Justice in *Bayer* "the **manifestation of the wish of one of the contracting parties** [Argos or Littlewoods] to achieve an anti-competitive goal - **[when made known to the other, through the initiative of Hasbro] - constitute[d] an invitation to the other party**, whether express or implied, **to fulfil that goal jointly**."
> (emphasis added)

Leniency lotto

Another interesting aspect of the "Toys and Games" case was the fact that Argos and Littlewoods complained that Hasbro had had its £15.59 million penalty (approximately NZ$ 45 million) reduced to zero under the OFT's leniency regime, as it was the first party to give the OFT the evidence it needed to prosecute. In contrast, Argos was left having to pay a £15 million penalty (the original penalty handed down by the OFT was £17.28 million but reduced on appeal) and Littlewoods was left with a £4.5 million penalty (originally £4.95 million).

Argos and Littlewoods argued that, as Hasbro was the instigator of the cartel, it should not have been permitted to more than a 50% reduction in penalty under the leniency policy. As the OFT had gone further than granting a 50% reduction in penalty to Hasbro, Argos and Littlewoods argued that their penalties should be reduced by 50% under the principle of equal treatment so that they received, in effect, equal treatment to Hasbro.

The Court of Appeal was troubled by the OFT's decision to grant Hasbro full immunity from any penalty. It also noted that OFT had at one stage commenced a review of its decision to grant Hasbro full immunity and then abandoned that review. However, as the Court ultimately could not penetrate the OFT's reasoning for the grant of leniency in the first instance (because the OFT did not provide reasons), the Court was unable to conclude that Argos and Littlewoods had been subjected to unequal treatment. Consequently, Argos' and Littlewoods' penalties were not reduced.

Issues to consider

The case is yet another illustration of why businesses should take particular care when discussing pricing strategies for products. Complaining about a competitor to a party at a different vertical level in the supply chain (e.g. to a supplier when you are a retailer) is not risk-free, as it may be taken to be a request to the other party to take some form of anticompetitive action against the competitor. As the Court of Appeal observed:

> ….there is a risk that discussions about possible prices, or about historic prices, can tend toward discussion of future prices, and agreement about what they should be. Any party to such discussions on a vertical basis needs to be aware of the risk and avoid it…

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