

Competition Act 1998

Decision of the OFT

Harwood Park Crematorium Limited: decision of the Office of Fair Trading pursuant to Section 47(5)

9 April 2003
(Case CA98/0503)

I INTRODUCTION

1. JJ Burgess & Sons Funeral Directors (JJ Burgess) made an application on 6 June 2002 (the Application) under section 47(1) of the Competition Act 1998 (the Act) for the Office of Fair Trading (the OFT)¹ to vary the decision of 28 February 2002 (the Relevant Decision, copy at Annexe 1) regarding Harwood Park Crematorium Limited (Harwood). Harwood is a wholly owned subsidiary of WH Austins (Stevenage) Limited (Austins), a firm of funeral directors. The Relevant Decision was that Harwood had not infringed the prohibition imposed by section 18 (the Chapter II prohibition) of the Act. The Relevant Decision was made in response to a complaint by JJ Burgess that Harwood had refused to supply it with access to the Harwood Park Crematorium (the Crematorium), which Harwood operates.
2. Having considered the Application, and in the light of information provided by JJ Burgess in addition to that on which the Relevant Decision was based, the OFT proposed to withdraw the Relevant Decision. In accordance with rule 28(6) of the Director's rules², the OFT was required to consult Harwood about this proposal. A consultation notice was issued to Harwood on 11 February 2003 (the Consultation Notice). Harwood replied on 4 March 2003. The OFT has

¹ The functions of the Director General of Fair Trading (the Director) are described in this document as the functions of the OFT. As from 1 April 2003, the Enterprise Act 2002 has replaced the office of the Director with the OFT, to which have been transferred the Director's functions.

² The Competition Act 1998 (Director's rules) Order 2000 (SI 2000 No 293). As from 1 April 2003, the OFT will apply the Director's rules.

considered Harwood's response to the Consultation Notice. It has concluded that there are reasonable grounds for suspecting that Harwood has infringed the Chapter II prohibition of the Act. In addition, the OFT believes that there are reasonable grounds for suspecting that Austins has infringed the Chapter II prohibition of the Act.

3. Pursuant to section 47(5) of the Act and rule 28 of the Director's rules the OFT has decided to withdraw the Relevant Decision so that it might investigate whether or not Harwood's refusal to supply JJ Burgess with access to the Crematorium infringes the Chapter II prohibition of the Act.

II SUFFICIENT INTEREST IN THE RELEVANT DECISION

4. The OFT is satisfied that JJ Burgess has sufficient interest in the Relevant Decision to make an application under section 47(1) of the Act. JJ Burgess is the original complainant and was also a recipient of the Relevant Decision.

III FACTS

The parties

5. JJ Burgess is a firm of funeral directors with branches in Knebworth, Welwyn Garden City (WGC) and Hatfield in Hertfordshire. JJ Burgess had access to the Crematorium until it was informed by letter of 16 January 2002 from Harwood that access to the Crematorium would be denied in respect of all new bookings after 18 January 2002.
6. Austins is also a firm of funeral directors, with branches in Stevenage, Hitchin, Buntingford, Hertford and Welwyn in Hertfordshire. As set out above, Austins owns Harwood. Harwood operates the Crematorium, which is located between Stevenage and Knebworth.

The complaint

7. The OFT received a complaint from JJ Burgess on 21 January 2002 (the Complaint) concerning a refusal to allow it access to the Crematorium. The OFT subsequently conducted preliminary enquiries into the Complaint under the Chapter II prohibition and informed JJ Burgess by letter of 28 February 2002 of its view that Harwood was not dominant in the relevant market for crematoria

services³ and so had not infringed the Chapter II prohibition.⁴ In the light of the judgment of the Competition Commission Appeal Tribunal (CCAT) of 26 March 2002 on admissibility in *BetterCare Group Limited v the Director General of Fair Trading*⁵, the OFT subsequently concluded that the views put forward in this letter amounted to a decision that the Chapter II prohibition had not been infringed in accordance with section 46(3) of the Act.

The Application

8. The Application asked the OFT to vary the Relevant Decision, arguing that:

- (i) an infringement of the Chapter II prohibition does not depend on a conclusion that Harwood is an “essential facility”⁶ where there is a refusal to supply an existing customer;
- (ii) the relevant product market for the supply of crematoria services has been defined incorrectly in the Relevant Decision, i.e. from the perspective of funeral directors rather than that of consumers;
- (iii) the relevant geographic market for crematoria services has been defined too widely;
- (iv) the importance of barriers to entry in defining the relevant market for crematoria services and assessing Harwood’s dominance has been overlooked; and
- (v) the alleged conduct of Harwood should be considered not only as an abuse of a dominant position in the market for crematoria services, but also, or alternatively, as an abuse resulting from dominance in the related market for funeral directing services.

9. The Application requested that if the OFT granted the Application and found that Harwood or Austins held a dominant position, it should consider whether

³ In this context the term “crematoria services” means services provided to the bereaved at a crematorium, although a crematorium will usually deal with a funeral director who acts on behalf of the bereaved.

⁴ It was found in the Relevant Decision that Harwood competed in a market at least as wide as to include crematoria based in Garston on the edge of Watford (the West Hertfordshire crematorium), Stopsley on the edge of Luton (the Vale crematorium), Enfield (the Enfield crematorium), East Finchley (the St Marylebone crematorium) and Harlow (the Parndon Wood crematorium).

⁵ CCAT Case No. 1006/2/1/01, 26 March 2002; OFT Decision No CA/98/11/2002, Case CP/08290-01.

⁶ The OFT Guideline 414, *Assessment of Individual Agreements and Conduct*, September 1999, states at footnote 34 that “A facility can be viewed as essential if access to it is indispensable in order to compete in a related market; and duplication is impossible or extremely difficult

Harwood or Austins has infringed the Chapter II prohibition by abusing such dominance.

The Consultation Notice

10. After considering the Application and further information supplied by JJ Burgess on 13 and 28 November 2002, the OFT sent Harwood the Consultation Notice setting out its proposal to withdraw the Relevant Decision.
11. The Consultation Notice stated that, following further consideration, and in the light of information supplied by JJ Burgess in addition to that on which the Relevant Decision was based, the OFT had reasonable grounds for suspecting that:
 - '(i) Austins may be dominant in a local market for the provision of funeral directing services in the Stevenage/Knebworth area and may be abusing that position by refusing JJ Burgess access to its wholly owned subsidiary, Harwood; and that
 - (ii) Harwood may be dominant in a market for the supply of crematoria services to customers in the Stevenage/Knebworth area and may be abusing that position by refusing JJ Burgess access [to the Crematorium]'

Response to the Consultation Notice

12. Harwood replied to the Consultation Notice by letter dated 4 March 2003.
13. The response did not attempt to address the issue of whether Harwood might hold a dominant position in a market for crematoria services. Harwood did comment however that a crematorium "could not viably survive if not exclusive within its 'catchment area'".
14. Similarly, while it did not suggest any relevant geographic market for funeral directing services, Harwood argued that Stevenage and Knebworth, which were treated in the Consultation Notice as comprising part of a single geographic market, should be considered individually as they comprised "separate communities". Harwood stated that Austins has a "majority market share" for the provision of funeral directing services in Stevenage but that it nevertheless faced effective competition from the Cooperative Funeral Service. Further,

owing to physical, geographic, or legal constraints (or is highly undesirable for reasons of public policy)".

Harwood stated that there was the potential for new entrants to establish themselves in Stevenage.

15. Harwood said that some residents of Knebworth might purchase funeral directing services from firms in Stevenage, including Austins itself, or from WGC. Harwood argued that because JJ Burgess was the only funeral director operating in Knebworth, it followed that JJ Burgess was dominant in Knebworth.
16. The response explained that the decision to exclude JJ Burgess from the Crematorium resulted from grievances relating to JJ Burgess's "attitude and lack of cooperation towards the management and operation of Harwood Park", including the alleged "antagonistic and disruptive attitude to the staff and operational function of Harwood Park". Harwood indicated that the decision to exclude JJ Burgess had not been taken lightly, and that the effect of the action on Harwood's revenue stream and on bereaved families wishing to use the services of JJ Burgess and the Crematorium had both been carefully considered. Harwood also explained that Austins had "not increased its market share in any of its trading areas as a result of the exclusion".

IV GROUNDS FOR WITHDRAWAL

17. After carefully considering the information supplied by JJ Burgess and Harwood, the OFT believes that there are sufficient grounds for the Relevant Decision to be withdrawn.
18. The OFT considers, in the light of the Application, additional information provided by JJ Burgess, and comments received in response to the Consultation Notice, that there are reasonable grounds for suspecting that the refusal to supply JJ Burgess with access to the Crematorium could amount to the abuse of a dominant position.

(i) Crematoria services

THE MARKET

19. In assessing whether an undertaking holds a dominant position the OFT will consider whether, and to what extent, it will face constraints on its ability to behave independently within a relevant market. Before dominance can be established, it is therefore necessary to define the relevant market.⁷
20. In the Relevant Decision, the relevant market was considered to be at least as wide as to include crematoria based in Garston on the edge of Watford (the West Hertfordshire crematorium), Stopsley on the edge of Luton (the Vale crematorium), Enfield (the Enfield crematorium), East Finchley (the St Marylebone crematorium) and Harlow (the Parndon Wood crematorium). However, information supplied by JJ Burgess in the Application suggests that, in practice, the majority of residents in the Stevenage/Knebworth area are unwilling to use the services of another crematorium and will instead wish to arrange a cremation at the Crematorium. The OFT has reasonable grounds for suspecting that a market for crematoria services exists in respect of customers located very near to Harwood, in the Stevenage/Knebworth area.

DOMINANCE

21. In the light of the further information available, the OFT has reasonable grounds for suspecting that Harwood holds a dominant position in the market for crematoria services centred on the Stevenage/Knebworth area. As set out above, information supplied by JJ Burgess suggests that customers situated in these areas are unwilling to use the services of other crematoria. The information supplied by Harwood in the response to the Consultation Notice also suggests that a crematorium will be unable to survive unless it occupies an exclusive catchment area.

ABUSE

22. The OFT has reasonable grounds for suspecting that Harwood's decision to refuse JJ Burgess access to the Crematorium may amount to the abuse of a dominant position.

⁷ The OFT's approach to market definition is set out in OFT Guideline 403, *Market Definition*, March 1999. Details of the OFT's approach to assessing dominance can be found in OFT Guideline 402, *The Chapter II Prohibition*, March 1999.

(ii) Funeral directing services

THE MARKET

23. The OFT has considered the arguments put forward by Harwood that Stevenage and Knebworth should be considered individually as they comprised “separate communities”. The OFT nevertheless has reasonable grounds for suspecting that Stevenage and Knebworth constitute a single geographic market in which JJ Burgess and Austins both compete.
24. The OFT believes that competition for funeral directing services takes place in local markets,⁸ and, further, that Stevenage and Knebworth together constitute a local market for funeral directing services. Estimates supplied by JJ Burgess indicate that Austins carries out a significant number of funerals for residents of areas outside Stevenage town from its Stevenage branch. As Knebworth is situated approximately one mile from Stevenage it therefore seems reasonable to assume that some funerals conducted through Austins’ Stevenage branch will have been arranged by Knebworth residents. This is also consistent with Harwood’s comments that some residents in Knebworth may select a funeral director in Stevenage itself.

DOMINANCE

25. The OFT believes that there are reasonable grounds for suspecting that Austins holds a dominant position in the relevant geographic market for funeral directing services.
26. An estimate supplied by JJ Burgess suggests that Austins carries out a very high percentage of funerals in the Stevenage/Knebworth area relative to the percentage carried out by JJ Burgess and other companies. This estimate appears to be supported by an article which appeared in the November 2002 issue of *Funeral Service Journal*, which suggests that a high proportion of funerals arranged each year in the Stevenage/Knebworth area is handled by Austins at Stevenage. The OFT considers, in the light of this new information, that there are reasonable grounds for suspecting that Austins holds a dominant position in the supply of funeral directing services in Stevenage/Knebworth.

⁸ In reaching this view, the OFT has taken into account the findings of the Monopolies and Mergers Commission (MMC) in its investigation in 1995 into the merger situation between Service Corporation International and Plantsbrook Group Plc. The MMC concluded that “... the most appropriate market definition [for funeral directing services] is in terms of the local areas within which most customers currently look for services” (Cm 2880, paragraph 2.25).

ABUSE

27. Austins and JJ Burgess appear to compete as funeral directors in the Stevenage/Knebworth area, and customers in these areas may have a strong preference to use the Crematorium. As JJ Burgess is being denied access to the Crematorium, this would appear to reduce JJ Burgess' ability to compete with Austins for customers.
28. The OFT believes that Austins and its wholly owned subsidiary, Harwood, are likely to constitute a single undertaking for the purposes of the Act. While the OFT notes Harwood's argument that Austins has not increased its market share in any of its trading areas as a result of the refusal to supply JJ Burgess, the OFT nevertheless has reasonable grounds for suspecting that the refusal to allow JJ Burgess access to the Crematorium might amount to the abuse of a dominant position held by Austins.

VI CONCLUSION

29. For the reasons set out above, pursuant to section 47(5) of the Act and rule 28 of the Director's rules, the OFT withdraws the Relevant Decision so that it may investigate whether or not the refusal to supply JJ Burgess with access to the Crematorium infringes the Chapter II prohibition of the Act.
30. For the avoidance of doubt, it should be noted that the OFT has not reached any conclusions on whether or not Austins or Harwood either holds a dominant position, or has engaged in conduct which might amount to the abuse of a dominant position.

Justin Coombs
Director, Service Industries
Competition Enforcement Division

Competition Act 1998

Notice of decision of Director General of Fair Trading
No. CA98/13/2002

Harwood Park Crematorium Limited

6 August 2002
(CP/0055-02)

SUMMARY

The Director General of Fair Trading (the Director) has made a decision that Harwood Park Crematorium Limited (Harwood) does not hold a dominant position in a relevant market. Therefore, Harwood has not infringed the Chapter II prohibition of the Competition Act 1998 in this regard.

In the light of the judgement of the Competition Commission Appeals Tribunal of 26 March 2002 on admissibility in the BetterCare case,¹ the Director has concluded that the views put forward in a letter of 28 February 2002 to the solicitors acting for JJ Burgess & Sons, a firm of funeral directors which had made a complaint, amounted to a decision that the Chapter II prohibition had not been infringed.

¹ BetterCare Group Limited v the Director General of Fair Trading – Case: 1006/2/1/01

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Dear Sirs

Competition Act 1998
Harwood Park Crematorium Ltd

Thank you for your letter of 18 February concerning Harwood Park Crematorium Limited (Harwood) addressed to my colleague Keith Davis. I refer also to information received by fax from your clients JJ Burgess & Sons (Burgess) yesterday. You have asked for an update in relation to the matters you have brought to the attention of the Office on behalf of your clients. Mr Davis has recently moved posts and, as his replacement, I am replying in his place.

As I understand it, your clients allege that Harwood, a subsidiary of Austin's Funeral Services, has behaved anti-competitively by refusing it access to its crematoria facilities.

You will recall from Mr Davis' letter of 25 January that we have considered this matter under the Chapter II prohibition of the Competition Act 1998 (the CA98). As Mr Davis set out in his letter, this involves a two stage test. First, it is necessary to demonstrate that the undertaking being complained about is dominant. Secondly, it must be possible to show that it is abusing a dominant position. The Director General has stated that he considers it unlikely that an undertaking will be dominant if it enjoys a market share of less than 40 per cent in a relevant market. It is also worth noting that while refusal to supply goods or services may in certain circumstances constitute abusive conduct, the Chapter II prohibition will nevertheless not be infringed if such a refusal can be objectively justified.

After careful consideration of the facts as set out in your letter and our own research into the local market, we take the view that there are no reasonable grounds for suspecting that the Chapter II prohibition has been infringed. In our view, Harwood is unlikely to be an essential facility, access to which would be indispensable to the competitive process. The Director General has stated, that



'an asset will not be an essential facility if other similar facilities compete within the same geographic market'¹. With this in mind, we note that there are a number of competing crematoriums near to Stevenage. It is therefore unlikely that access to Harwood could be considered to be essential for effective competition.

The European Court has further defined dominance as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers'².

Our research has shown that, of the six crematoria normally used by branches of Burgess, only one is situated more than twenty miles away from Harwood. Research conducted in previous cases suggests that this is not an unreasonable distance to constitute a feasible alternative. As such, we consider that the West Hertfordshire, Enfield, Parndon Wood, St Marylebone and Vale crematoriums are part of the relevant geographical market. Figures provided by the Crematorium Society of Great Britain for 2000 suggest that no one firm is likely to enjoy dominance in a market for cremations defined in these terms. Despite being the busiest operator over this period, West Hertfordshire accounted for only 3226 or 25.5 per cent of the 12640 cremations carried out at the six crematoriums listed above. Harwood itself carried out 1833 cremations over the same period, which equates to a market share of 14.5 per cent. In our view, existing competition from other nearby crematoriums appears likely to act as a constraint on Harwood's ability to act independently of its competitors, customers or consumers.

We also note that Harwood is a relatively new entrant to the market. Before Harwood entered the market consumers would have had no choice but to have use an alternative crematoria facility. While we would not dispute the importance of Harwood to local residents in its immediate catchment area, the fact that cremations can be carried out at a number of alternative locations situated within a 20 mile radius of Harwood suggests that it is not likely to be dominant for the purposes of the Chapter II prohibition.

I should perhaps stress at this point that the purpose of the Competition Act 1998 is to protect the competitive process and not individual firms that may be competing in a particular market sector. Further, the Director General has no powers to intervene in individual contractual disputes where there are no reasonable grounds for suspecting an infringement of either prohibition or in situations that may appear otherwise 'unfair' or 'unreasonable'.

¹ OFT Guideline Assessment of Individual Agreements and Conduct, p25.

² Case 27/76 *United Brands v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429.

To summarise, it is not that the concerns you have raised are unimportant, but that Harwood is not dominant in the relevant market. In the absence of dominance there can be no abuse of a dominant position. As such, we do not have reasonable grounds for suspecting a breach of the Chapter II prohibition. I am sorry to send you what I know will be a disappointing response, but hope that the above is useful in explaining our view.

Yours sincerely

Sean Davies
Competition Enforcement Division 5