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BHB Database Prices Not Excessive, says Court of Appeal

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Having lost out to Attheraces Ltd (ATR) at first instance,[1] the British Horseracing Board (BHB) has recently been successful before the Court of Appeal in an argument as to how to exploit its racing database.[2] While agreeing with the finding of dominance established at High Court level, the Court of Appeal judges held that the lower court had applied the wrong test in assessing whether the prices charged by BHB were excessive.

A REMINDER OF THE FACTS

The facts of the dispute may be well-known, but there is merit in providing a brief sketch of the main features. The BHB is the governing body of horseracing within the United Kingdom. It is in the business of creating databases of horses, jockeys etc. that are taking part in horse races all over the UK, and it sells the right to use this valuable information to a variety of customers, such as newspapers, TV stations and, of course, bookmakers on the morning preceding the respective races.

One of these customers is ATR which is in the business of providing websites, TV channels and related coverage with horse races that were staged on British racecourses. For this purpose it used its own website, dedicated TV channel, as well as bookmaker services which were run by another company. Effectively, British horse races were shown *via* these media, and punters were invited to place their bets on individual races via the services ATR offered. ATR's argument was that BHB enjoyed a dominant position in the market place for pre-race horseracing information and that the price charged by BHB for the database was excessive, constituting an abuse of that dominance. This, in turn, is contrary to both UK and EU competition law.

The High Court agreed with ATR that the price of the information had to be assessed by considering the cost of its creation and by adding to that amount a reasonable profit margin. This, so the High Court, constituted abusive behaviour by dominant BHB contrary to Article 82 EC and s. 18 of the Competition Act 1998.

THE COURT OF APPEAL DECISION

Having confirmed that BHB was indeed to be regarded as being in a dominant position in pre-race data, the Court of Appeal went on to examine whether the High Court's assessment of whether the prices charged by BHB were excessive was correct.

BHB argued that Etherton J failed to apply the correct test for determining the issue of excessive and unfair pricing. The appellants criticised that the judge had only taken into account the cost of creating the database to BHB plus a reasonable return, termed "cost+", while the correct

approach should have been to also consider the value of the information to ATR. The information supplied by BHB allowed ATR to generate huge profits, all of which could be kept by ATR on the basis of Etherton's allegedly flawed analysis. The economic value of the database was not to be equated to its production costs to BHB.

The Court of Appeal reiterated the test of excessive pricing being that such a price has no reasonable relation to the economic value of the product supplied, as formulated in *United Brands.*[3] The Court agreed that this test involves a comparison between price and cost of production, but as far as the assessment of economic value of the product was concerned, this could only be a first step. Other cases since *United Brands,* such as *Scandlines* have showed that cost of production could not, in itself be conclusive in the assessment. In the European Commission decision in *Scandlines*[4] it was confirmed that it was relevant to consider what the purchaser is prepared to pay for and what profit the purchaser can make using the product.

The Court of Appeal agreed with BHB that the High Court judge had not considered the critical issue of economic value satisfactorily:

"The judge correctly stated the law as laid down in *United Brands* (cited above) that a fair price is one which represents or reflects the economic value of the product supplied. A price which significantly exceeds that will be *prima facie* excessive and unfair. But the formulation begs a fundamental question: what constitutes economic value?
On the one hand, the economic value of a product in market terms is what it will fetch. This cannot, however, be what Article 82 and section 18 envisage, because the premise is that the seller has a dominant position enabling it to distort the market in which it operates. On the other hand, it does not follow that whatever price a seller in a dominant position exacts or seeks to exact is an abuse of his dominant position."[5]

Reiterating the decision in *Scandlines,* the Court of Appeal concurred that the profit made by ATR needed to be taken into account in order to evaluate the existence of an excessive, and therefore abusive, pricing strategy:

"... the Commission's decision in Scandlines supports the view that the exercise under Article 82, while it starts from a corn parison of the cost of production with the price charged, is not determined by the comparison. This in itself is sufficient to exclude a cost + test as definitive of abuse.... As the expert witnesses in the present case agreed, economic theory recognises the relevance of externalities to price. The judge rejected BHB's argument that the benefit of the system to overseas bookmakers was a relevant externality. But it was incontestable that the overseas bookmakers were paying ATR, in a competitive market, amounts which afforded it a handsome profit which it wanted, so far as possible, to keep. The facts found by the judge do not suggest that anybody is going to go out of business as a result of the alleged abuse of dominant position. Despite its elaborate legal and economic arguments and the high levels of moral indignation, the case is about who is going to get their hands on ATR's revenues from over seas bookmakers. There is no need to classify the benefit derived by the bookmakers from the deployment of part of BHB's products as a "positive externality" in order to recognise that it has a bearing on whether their pricing is excessive."

In short, the analysis by Etherton J as to whether the prices charged by BHB had been excessive was held to have been too narrow, in particular in respect of the meaning of 'economic value'.

Once this part of ATR's case had collapsed, the Court of Appeal also upheld appeals by BHB to overrule findings of discriminatory pricing and threats of refusal to supply.
With regard to the latter, the Court of Appeal briefly considered the issue of database rights which, as we now know, BHB did not have as to the pre-race lists of information.[6] The Court criticised the acceptance by Etherton J of the argument by ATR that BHB had abused its dominant position to insist on an IP licence in the absence of IP rights, as the judge then had not offered an explanation as to why such insistence was anti-competitive. Consequently, it was held that "a party which has information which is of commercial value to others is entitled, even if it does not have the added protection of intellectual property rights, to impose contractual restrictions when it enters into an agreement under which a given third party is to acquire the information for use in a particular way." The Court regarded it as entirely legitimate to permit BHB the granting of a licence to ATR to use the pre-race data in particular terms, as long as these had the objective to stop the licensee from using that data for on-supply to other third parties as effectively a rival database. In short, the Court of Appeal confirmed that while a company may not have particular IP rights in certain information, it still retains the right to embark on commercial exploitation of that information without such action being regarded as an abuse of a dominant position contrary to competition law.

Footnotes

1 *Attheraces Ltd v British Horseracing Board* [2006] F.S.R. 20 ; see "No horseplay: Attheraces Ltd wins competition law case against BHB", 2006 SLG 7.
2 *Attheraces Ltd & Another v The British Horseracing Board Ltd & Another* [2007] EWCA Civ 38, judgment available at: http://www.bailii.org/ew/cases/ EWCA/Civ /2007/38.html
3 Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para. 250.
4 *Scandlines* [2006] 4 CMLR 23.
5 paras. 2004 - 206 of the Court of Appeal decision.
6 See *British Horseracing Board Ltd v William Hill Organisation Ltd* [2005] R.P.C. 35 where the English Court of Appeal (Civil Division) applied the prelimina1y reference provided by the European Court of Justice in Case C- 203/02) *British Horseracing Board Ltd v William Hill Organisation Ltd* [2005] 1 C.M.L.R. 15, whereby BHB did not have database rights in pre-race data.