Neutral citation: [2007] CAT 23

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1073/2/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

26 July 2007

Before:

VIVIEN ROSE
(Chairman)
GRAHAM MATHER
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

TERRY BRANNIGAN

Appellant

-v.-

OFFICE OF FAIR TRADING

Respondent

Mr Terry Brannigan appeared in person.

Mr Daniel Beard and Miss Anneli Howard (instructed by the Solicitor, Office of Fair Trading) appeared for the respondent.

Heard at Victoria House on 14 May 2007

JUDGMENT

I INTRODUCTION

1. This is the judgment of the Tribunal on an appeal brought by Mr Terry Brannigan against a decision of the respondent ("the OFT").

2. Mr Brannigan was a proprietor of two local newspapers in the East Sussex area. He claims that he was forced out of the market by the anti-competitive conduct of two rival publishers of local newspapers: Newsquest plc ("Newsquest") and Johnston Press plc ("Johnston").

3. Mr Brannigan complained to the OFT that both publishers had engaged in exclusionary practices in breach of the prohibitions imposed by sections 2 and 18 of the Competition Act 1998 ("the Act"). It is common ground that this is not a case which engages Article 81 or 82 of the EC Treaty.

4. The history of the OFT's handling of Mr Brannigan's complaint is described in the Tribunal's judgment delivered on 15 November 2006 [2006] CAT 28. In that judgment, the Tribunal rejected the OFT's application under Rule 10 of the Competition Appeal Tribunal Rules 2003 S.I. 2003 No. 1372 ("the Tribunal's Rules") to dismiss the appeal. That judgment also considers the issue of admissibility raised at that stage by the OFT. In this judgment we set out the factual background, the history of the handling of the complaint and the previous proceedings before the Tribunal only so far as is necessary to resolve the issues which were before us at the substantive hearing. At this point, it suffices to say that, following a Tribunal hearing held in private on 28 April 2006, Mr Brannigan submitted a revised complaint to the OFT dated 31 May 2006 in which he set out his complaint against Newsquest in line with the OFT's statutory guidelines issued to complainants and third parties: Guidelines on *Involving Third Parties in Competition Act investigations* (OFT 451, April 2006). We refer to the document submitted by Mr Brannigan as the "Revised Complaint".

5. The OFT decision currently under appeal was issued on 9 June 2006 in the form of an annex to a letter sent to Mr Brannigan of that date. The relevant Annex ("the Decision") is headed:

> "Whether, in the Complaint by Brannigan Publishing against Newsquest and also Johnston Press Case (CE/3651-03), there were reasonable grounds to suspect an infringement of competition law under section 25 of the Competition Act 1998 (The 'Act')."

6. The text of the Decision is available on the Tribunal's website[1] and for the purposes of the main hearing before us it was treated by the parties as comprising the non-infringement decision which is the subject of this appeal. In the Decision the OFT concluded that there was no clear evidence that either Newsquest or Johnston was dominant, either individually or collectively, in the market for advertising space in free and paid-for regional and local newspapers in East Sussex or that there were agreements which could have an appreciable adverse effect upon competition. The OFT also found that much of the behaviour complained of "can be justified as a vigorous competitive response" and was "of too short a duration to pose a threat to serious competition". As a result the Decision concludes that "the grounds for the OFT to have a reasonable suspicion that the Act had been infringed are weak."

7. As well as the Decision, there was another Annex which assessed Mr Brannigan's complaint against the OFT's criteria for investigation. That Annex concluded that the OFT rejected the complaint "on the basis of its administrative priorities".

8. Mr Brannigan appeals to the Tribunal contesting the conclusions reached by the OFT in its Decision. His grounds are set out in his Revised Notice of Appeal dated 23 November 2006. A copy of that document is available on the Tribunal's website.[2] At the case management conference held on 23 January 2007, the Tribunal indicated that certain of the matters raised in the Revised Notice of Appeal should not form part of the appeal since they did not

[1] http://www.catribunal.org.uk/documents/App1073Bran090606.pdf.
[2] http://www.catribunal.org.uk/documents/Note1073Bran090107.pdf.

form part of either the original complaint or the Revised Complaint and were not therefore part of the Decision.

9. The OFT served a defence to that Revised Notice of Appeal on 16 February 2007. We refer to that document as "the OFT's Defence".

10. In accordance with paragraph 3(1) of Schedule 8 to the Act it is now for the Tribunal to determine the appeal "on the merits by reference to the grounds of appeal set out in the notice of appeal".

11. In paragraph 4 of the Revised Notice of Appeal, Mr Brannigan requested the Tribunal to set aside the Decision, and/or to substitute an infringement decision for the OFT's non-infringement decision and/or remit the matter to the OFT for further investigation and decision. At the hearing, however, Mr Brannigan quite rightly recognised that there was insufficient material before the Tribunal for it to consider substituting a finding of infringement. His position was that the Decision should be set aside and the matter remitted to the OFT under paragraph 3(2)(a) of Schedule 8 to the Act.

12. At the hearing which took place on 14 May 2007, the evidence adduced was limited to that of Mr Brannigan confirming the truth of the matters which were set out in his Revised Notice of Appeal. The OFT did not challenge that evidence and did not adduce any evidence of its own. Neither Newsquest nor Johnston had been involved in any way in the OFT's handling of the complaint and neither applied to intervene in the Tribunal's proceedings. In those circumstances the Tribunal did not consider it was appropriate to undertake a substantial evidence gathering exercise on its own initiative, using its powers under Rule 19 of the Tribunal's Rules. The Tribunal must therefore decide this case in the context of the facts placed before us and verified by Mr Brannigan.

II FACTUAL BACKGROUND

Market overview

13. This case concerns competition among local newspapers in the East Sussex area and in particular in the two towns of Lewes and Uckfield. Newspaper publishers generate revenues from their newspapers through sales to both readers and advertisers. Newspapers are of many different kinds varying according to price (a newspaper may be sold or given away free to readers); frequency (daily or weekly); circulation area (in local areas, across regions or nationwide); time of publication (daily newspapers are often published in the morning or evenings); means of distribution (sold via newsagents, home delivery, left in stacks at stations) and editorial coverage.

14. As to the structure of the newspaper industry, Mr Brannigan's evidence was that:

> "… there are 1,300 regional and local newspapers in the UK today, including 25 mornings (19 paid-for and 6 free), 75 evenings, 21 Sundays, 529 paid-for weeklies, and 650 free weekly newspapers."

15. It is common ground that prior to the launch of Mr Brannigan's newspapers the *Uckfield Life* and the *Lewes Life* in March 2003, Newsquest, Johnston and Daily Mail & General Trust ("DMGT") distributed the main local newspapers in East Sussex.

16. According to the Revised Complaint, Newsquest plc is the second largest publisher of regional and local newspapers in the United Kingdom. Included in its newspaper portfolio across East Sussex are the following weekly free titles: *Brighton and Hove Leader*, *Mid-Sussex Leader*, *South Coast Leader* and the *Uckfield Leader* as well as the daily paid for title *The Argus*. Newsquest (Sussex) is said to have the only newspaper printing press in East Sussex.

17. Johnston offers the following weekly, paid for titles in East Sussex: *Sussex Express*, *Bexhill Observer*, *Eastbourne Gazette*, *Eastbourne Herald*, *Hastings Observer*, *Rye and Battle Observer* and *West Sussex Gazette*. Johnston also

offers a weekly free title in that area known as the *Eastbourne Advertiser*. According to the Revised Complaint, the Johnston titles are printed in Portsmouth (at paragraph 54).

18. Before the events which give rise to this appeal, the local newspapers available in Uckfield were Johnston's weekly paid-for *Sussex Express,* Newsquest's daily paid-for *Argus* and two weekly paid for titles the *Kent and Sussex Courier* and *East Grinstead Courier* sold by Northcliffe which is part of DMGT.

19. In Lewes, prior to Mr Brannigan's entrance in to the market, Johnston distributed its paid-for weekly title, *The Sussex Express*, and Newsquest, through *The Argus*, a daily paid-for daily title. No other titles appear to be published in that vicinity.

The background to Brannigan Publishing

20. From 1996 to November 2002 Mr Brannigan was employed by Johnston. He worked in the advertising department of the *Sussex Express* which, as described above, was a paid for newspaper distributed across the East Sussex area including the towns of Lewes and Uckfield. After leaving Johnston, Mr Brannigan decided to become a sole trader and set up his own newspaper business. His intention was to create a 'community business', whose ethos would be 'life is local'. He sold his house and 'put every penny' into making his business – trading as "Brannigan Publishing" – a success. In March of 2003, he launched two local, free newspapers in Lewes and Uckfield. They were called *Lewes Life* and *Uckfield Life*. Those titles depended on advertisements for their revenue.

21. To print those titles, Mr Brannigan needed access to a printing press. Initially he had an agreement with Newsquest (Sussex) to print the papers at 2 am on Friday mornings. Later this arrangement was cancelled at short notice and instead the newspapers were printed by presses operated by Newsquest (Essex) in Colchester. The circumstances in which the arrangement was

cancelled form one of the alleged abuses by Newsquest and is considered in more detail below.

22. The change of printing arrangements had several consequences. The print slot had to take place earlier than planned. It also meant Brannigan Publishing incurred additional expense: on transport and on computers that would work with the Colchester printing press.

The launch of the Uckfield Life and Lewes Life newspapers

23. In March 2003 publication and circulation of *Uckfield Life* and *Lewes Life* began. Both titles were distributed to almost all the households in their local areas.

24. It appears that the first three months of trading by Brannigan Publishing went well. Feedback from advertisers in *Uckfield Life* and *Lewes Life* was generally positive. If his newspapers continued to prosper, Mr Brannigan expected a turnover in excess of £250,000 in the first year of trading. Indeed, from 28 March 2003 to 13 June 2003 Brannigan Publishing is said to have generated a turnover of around £50,000. Thereafter, however, Brannigan Publishing began to run into difficulties. Again, these difficulties form the basis of Mr Brannigan's complaint that the statutory prohibitions were infringed so the facts are set out in greater detail below. Briefly, Newsquest claimed that a number of newspapers that they published in the East Sussex area used the word "Life" in their title and that Mr Brannigan was thereby attempting to "pass off" his newspapers as Newsquest titles. Although no formal steps were taken by Newsquest to stop Mr Brannigan using the name, Mr Brannigan states that the continued threat of litigation, which was never formally retracted, caused him upset and expense.

Conduct in Uckfield

25. The main plank of Mr Brannigan's case with regards to the alleged breach of the Act arises from the launch of a free weekly title by Newsquest (Sussex)

known as the *Uckfield Leader* a few months after the launch of Mr Brannigan's papers.

26. According to Mr Brannigan, the *Uckfield Leader* was a 'market spoiler'. In his opinion, the *Uckfield Leader* was a "fighting title" used by Newsquest to defend the revenue of its paid for title, *The Argus*, against competition from Brannigan Publishing. It is suggested that the launch of the *Uckfield Leader* was timed to forestall Mr Brannigan's fledgling newspapers. Mr Brannigan also alleges that that Newsquest offered below cost rates for advertising to businesses that placed advertisements in the *Uckfield Leader* if those advertisers also promised not to advertise in his newspapers. This was done with a view to driving the *Uckfield Life* out of the market.

27. Newsquest and Johnston allegedly made things difficult for Mr Brannigan in other ways too. Members of staff at both publishers are said to have made defamatory remarks and belittled Mr Brannigan's publications. Mr Brannigan also asserts that Newsquest targeted the methods of distributing *Uckfield Life*.

28. The intensity of Newsquest's competition took its toll. According to Mr Brannigan, the resulting flight of advertisers from *Uckfield Life* caused him to fall into serious financial difficulties.

29. In Lewes, Johnston owns and publishes the leading newspaper, the *Sussex Express*. *The Argus*, a Newsquest title, is also present. Unlike Uckfield, there was no allegation of a "spoiler paper" or predatory behaviour on the part of Johnston. Rather, Mr Brannigan suspects that Johnston and Newsquest operated a tacit agreement that neither of them would launch a free newspaper in Lewes. That agreement explained, according to Mr Brannigan, why Newsquest retaliated against Mr Brannigan's titles only in Uckfield.

30. In September 2003, Mr Brannigan was declared bankrupt. He had debts of over £150,000. Brannigan Publishing had an estimated readership of some 45,000 households at the time. As Mr Brannigan put it in his Revised Complaint:

"The whole ethos of my company was to be an integral part of local life and to add a sense of community. We employed local people; we ran community interest stories and campaigns and were making a real difference to people's lives. This strategy could work on a nationwide basis with the cost effective nature of desktop publishing nowadays. Unfortunately the newspaper market seems to be a closed market nowadays with the majority of publications being owned by just a few large companies."

III STATUTORY FRAMEWORK

31. Section 2 of the Act ("the Chapter I prohibition") prohibits anti-competitive agreements. Subject to various exclusions and exemptions, section 2 provides, so far as material:

> "2 Agreements … preventing, restricting or distorting competition
>
> (1) … agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which –
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts …"

32. Section 18 of the Act imposes the Chapter II prohibition. Subject to certain excluded cases, section 18 provides:

> "18 Abuse of dominant position
>
> (1) … any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in –
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3) In this section –
>
> "dominant position" means a dominant position within the United Kingdom; and "the United Kingdom" means the United Kingdom or any part of it."

33. The Chapter I and II prohibitions are closely modelled on the corresponding provisions of Articles 81 and 82 of the Treaty establishing the European Community. Section 60 of the Act provides that, broadly speaking, questions arising under Part I of the Act in relation to competition within the United Kingdom are to be dealt with, so far as possible, and "having regard to any relevant differences", in a manner consistent with European Community law. Under section 60(2) of the Act we must ensure there is no inconsistency between the principles we apply, and the decisions we reach, and the principles laid down by the Treaty or the European Court, and any relevant decisions of that Court, in determining "any corresponding question arising in Community law".

34. Under Chapter III of the Act, entitled Investigation and Enforcement, the OFT is given powers to investigate and enforce the prohibitions of Chapters I and II. These include powers to conduct investigations (section 25), obtain documents and information (section 26), and enter premises with or without a warrant (sections 27 to 29). Section 25 provides that the OFT may conduct an investigation where there are "reasonable grounds for suspecting" that there is or has been an infringement of the Chapter I or Chapter II prohibitions.

35. The provisions governing appeals to this Tribunal are set out in sections 46 to 48 of the Act. Not every decision of the OFT can be challenged before the Tribunal. Section 46 lists a number of "appealable decisions". So far as is relevant to this case, those decisions include a decision of the OFT as to whether the Chapter I or Chapter II prohibitions have been infringed. A decision by the OFT not to carry out an investigation under section 25 or to reject a complaint otherwise than on the grounds that there has been no infringement is not a decision which can be challenged in the Tribunal: see *Cityhook Ltd v Office of Fair Trading* [2007] CAT 18, paragraphs 231-237.

36. By the time of the substantive hearing in this case, it was common ground between the parties that the Tribunal had jurisdiction in this case because the OFT had decided on the evidence before it that there had been no infringement of the Chapter I or II prohibitions. Further, it was not disputed that Mr Brannigan has a "sufficient interest" within the meaning of section 47(2) and was therefore entitled to bring this appeal against the Decision.

37. The Tribunal's powers on appeal are set out in paragraph 3 of Schedule 8 of the Act, which provides:

> "Decisions of the Tribunal
>
> 3.– (1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
>
> (a) remit the matter to the OFT,

(b) impose or revoke, or vary the amount of, a penalty,

(c) …

(d) give such directions, or take such other steps, as the OFT could itself have given or taken, or

(e) make any other decision which the OFT could itself have made.

(3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.

(4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

IV THE REVISED NOTICE OF APPEAL

38. There are a number of grounds of appeal set out in the Revised Notice of Appeal. In accordance with the Tribunal's Order made on 23 January 2007, this judgment deals with the following grounds:

(1) The OFT failed to comply with its own procedural rules by not providing Mr Brannigan with a draft of the decision of 9 June 2006 so that he could submit comments before they adopted the Decision.

(2) In relation to its finding that there had been no infringement of the Chapter II Prohibition, the OFT erred:

(a) in its definition of the relevant geographic market. Mr Brannigan alleges that the OFT wrongly failed to consider the relevant local markets of Lewes and Uckfield, and that, in Lewes, Johnston held a dominant position;

(b) in finding that neither Newsquest nor Johnston was individually dominant in East Sussex;

(c) in finding that Newsquest and Johnston did not hold a collective dominant position; and

(d) in concluding that the practices set forth in the revised complaint were not abuses of a dominant position, contrary to the Chapter II prohibition.

(3) In relation to its finding that there had been no infringement of the Chapter I prohibition, the OFT wrongly concluded that there were no agreements entered into by Newsquest and Johnston in breach of the Chapter I prohibition.

V THE TEST WHICH THE TRIBUNAL MUST APPLY

39. The parties did not agree as to the grounds on which the OFT's Decision can be challenged before the Tribunal. The OFT took issue with the way in which Mr Brannigan characterised the question which the Tribunal has to resolve. In his written outline observations submitted for the hearing of 14 May 2007, Mr Brannigan submitted that:

> "9. My understanding of the position now reached is that the OFT has concluded that there are no reasonable ground[s] for suspecting a breach of the competition rules. They say in their letter of 9 June that
>
> "… we have assessed whether, on the information available to us, there are reasonable grounds to suspect an infringement of competition law under section 25 of the Act. … I regret to say that, on the basis of the evidence that you provided to us, we consider that the grounds for suspecting an infringement are weak"
>
> 10. This is the essence of this appeal. Did the OFT have reasonable grounds to suspect that there had been an infringement of the prohibitions in the Act. If the Tribunal concludes that they did have reasonable grounds for suspicion then I must succeed in this appeal.
> …
>
> 14. The matter which the Tribunal must decide was whether the OFT was wrong to conclude, on the evidence before it, that the test set out in s 25 of the Act had not been met."

40. Mr Brannigan referred to the Tribunal's ruling in *The Association of Convenience Stores v the Office of Fair Trading* [2005] CAT 36 where the Tribunal considered whether the OFT had reasonable grounds for suspecting that a market exhibited features which prevents, restricts or distorts competition for the purpose of making a market investigation reference to the Competition Commission ("the CC") under section 131 of the Enterprise Act 2002.

41. The OFT contended that this was not the correct test. Counsel for the OFT emphasised that the OFT's decision not to start an investigation under section 25 of the Act is not an appealable decision for the purposes of section 46. The OFT characterised the task for the Tribunal in the following way:

> "9. The correct issue for the Tribunal to determine in this appeal is whether the OFT was wrong in its conclusion in the Decision that, based upon the evidence before it, there was insufficient evidence to justify making an infringement decision because, in summary there was no clear evidence of whether:
>
> 9.1 Newsquest or Johnston, individually or collectively, occupied a dominant position in a relevant market for advertising space in free and paid for regional and local newspapers in East Sussex and neither had committed any abuse contrary to the Chapter II prohibition; and/or
>
> 9.2 [there was] an agreement, whether vertical or horizontal, which could prevent, restrict or distort competition contrary to the Chapter I prohibition.
>
> 10. In determining that question, the Tribunal should assess the evidence by reference to the *Napp* standard of proof…"

42. The OFT rejected the analogy drawn by Mr Brannigan with the *Association of Convenience Stores* case because that case concerned a different statutory regime in which the Tribunal's jurisdiction is clearly intended by the legislation to be by way of judicial review of an OFT decision to refer or not to refer a market for investigation rather than by way of a fresh hearing.

43. Given the heading of the Annex which comprises the Decision, one can understand why Mr Brannigan thought that the question for the Tribunal was

whether there had been reasonable grounds justifying the launch of an investigation under section 25. But the Tribunal finds that this is not in fact the right question. The Tribunal is not tasked with considering whether the OFT was right or wrong in deciding not to exercise its powers under section 25 because it had no reasonable grounds to suspect that there had been an infringement of the prohibitions in the Act. That does not mean that the OFT has an entirely unfettered discretion in the decision whether or not to exercise those statutory powers. But any challenge to the reasonableness of the exercise of its discretion in that regard must be brought in the Administrative Court by way of judicial review rather than by an appeal to this Tribunal.

44. The Tribunal further does not consider that the *Association of Convenience Stores* case assists Mr Brannigan since that ruling arose from a very different statutory regime.

45. The Tribunal takes as its starting point the test set out in the judgment in *Freeserve.com plc v Director General of Fair Trading* ("*Freeserve.com*") [2003] CAT 5. There the Tribunal stated as follows:

> "101. In our view, at this early stage in the development of the 1998 Act, it is neither desirable nor possible to lay down hard and fast rules as to the Tribunal's approach in appeals brought by complainants in a case where the Director has declined to find that the conduct in question amounts to an abuse of a dominant position within the meaning of the Chapter II prohibition. Apart from anything else, there is an infinite variety of circumstances in which such appeals may arise in future cases. We think, however, it is useful to clarify certain matters, in deference to the submissions that have been made, even though it is not strictly necessary for us to do so in order to reach a decision in this particular case. …
>
> 106. It seems to us that the reference to an appeal "on the merits" in paragraph 3(1) of Schedule 8 means, first, that the Tribunal's function is not limited to the judicial review of administrative action according to the principles of judicial review applied in the civil courts of the United Kingdom: contrast, in this respect, sections 120 and 179 of the Enterprise Act 2002. Nor is the Tribunal limited to the heads of review set out in Article 230 of the EC Treaty, which are applicable to the Court of First Instance. Nor do we see, in a case such as the

present, more than a distant analogy between the functions of the Court of Appeal under CPR 52.11 and those of the Tribunal under the 1998 Act. In our view, the position of the Tribunal is as follows.

107. In appeals where there has been a finding of infringement, it is clear that the Tribunal has a full jurisdiction to find facts, make its own appraisals of economic issues, apply the law to those facts and appraisals, and determine the amount of any penalty. The Tribunal exercised such a jurisdiction in *Napp Pharmaceuticals v Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 13. Where, however, the justice of the case so requires, the Tribunal will not determine the matter of infringement itself, but remit to the Director: see *Aberdeen Journals v Director General of Fair Trading* [2002] CAT 4, [2002] CompAR 167, at [177].

108. The 1998 Act does not distinguish between an "infringement" and a "non-infringement" decision. The Tribunal's powers in Schedule 8, paragraphs 3(1) and 3(2) of the 1998 Act apply equally, whether it is a decision of non-infringement, or a decision of infringement. Similarly, the Tribunal's powers under its Rules, for example to order disclosure of documents or examine witnesses, do not distinguish between "infringement" and "non-infringement" decisions. Indeed, in some cases, a decision by the Director of "non-infringement" may well be as lengthy and detailed, and may have involved as complex an investigation, as a decision of infringement.

109. For these reasons, we do not think that, as a matter of law, the legal scope of the Tribunal's statutory jurisdiction under the 1998 Act differs according to whether the decision in question is one of "infringement" or "non-infringement". To give one example, even where the Director has taken a decision of "non-infringement", it may be open to the Tribunal in an appropriate case to substitute a decision of "infringement", rather than remit the matter to the Director, provided that the Tribunal has all the necessary material before it, and the rights to be heard of all parties have been fully respected: that was the course followed by the Tribunal in *IIB and ABTA v Director General of Fair Trading* ("the *GISC* case") [2001] CAT 4, [2001] CompAR 62.

110. It follows, in our view, that whether it is an infringement or a non-infringement decision, the Tribunal has, in principle, jurisdiction to hear an appeal on the merits, that is to say to decide whether the Director has made an error of fact or law, or an error of appraisal or of procedure, or whether the matter has been sufficiently investigated. That conclusion is

> not, it seems to us affected by section 58 of the Act: see *Claymore Dairies Limited v Director General of Fair Trading*, [2003] CAT 3, at [176]. …
>
> 114. We add that, in our view, in accordance with general principles, in complainants' appeals the onus is on the complainant to persuade the Tribunal that the relevant decision should be set aside. In that respect, we recognise that many complainants will face the difficulty that the Director will normally have much greater access to the facts than they do. That is particularly true of the specialist regulators, such as the Director in this case. In addition, some complainants may be small- and medium-sized enterprises, without access to legal advice and only a rudimentary knowledge of the sometimes complex issues of competition law. What, it seems to us, a complainant needs to do is to persuade the Tribunal 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 undertaken; or (v) the procedure followed.
>
> 115. In order to persuade the Tribunal that the decision is incorrect or insufficient on an issue of fact or appraisal, complainants should normally seek to produce evidence, rather than relying on unsupported assertion. This applies particularly to sophisticated complainants with the resources to present a properly supported case. For a complainant who lacks resources, it should normally be possible at least to explain in plain business terms how a particular course of conduct adversely affects the complainant's own ability to compete in the market, with supporting information about its own business, without necessarily embarking on any complex legal analysis."

This approach was also adopted by the Tribunal in *Claymore v Office of Fair Trading* [2005] CAT 30, paragraphs 167-170 and in *Albion Water Limited v Water Services Regulation Authority (Dŵr Cymru/Shotton Paper)* [2006] CAT 23, paragraphs 287-291.

46. As the Tribunal recognised in *Freeserve.com* although the grounds of appeal are the same whether the Tribunal is considering an infringement or a non-infringement decision, the nature of the Tribunal's task will depend on the "infinite variety" of circumstances. The grounds listed in *Freeserve.com* may be straightforward to apply in the case of an infringement decision. In the case of a non-infringement decision, the nature of the Tribunal's task will depend on why the OFT concluded in a particular case that there had been no

infringement and on the extent of any investigation that the OFT had undertaken before coming to that conclusion.

47. In Mr Brannigan's case the OFT undertook no investigation – it came to its non-infringement decision on its assessment of the evidence that Mr Brannigan placed before it bringing to bear, as counsel for the OFT put it, its experience and its breadth of knowledge. Mr Brannigan has repeatedly requested the OFT to follow up the lines of inquiry that he has suggested and indeed it may well be that even a limited degree of engagement by the OFT in pursuing Mr Brannigan's complaint could have gone a long way either to establishing the existence of an abuse or alternatively to exonerating Newsquest or Johnston. But counsel for the OFT pointed out that the OFT is dealing not only with a plethora of cases but also with a wide range of matters other than enforcement. As counsel for the OFT put it during the course of argument:

> "Furthermore, when it comes to the practicality of dealing with cases it is not simply a matter of saying, "We will make one or two phone calls". We have to maintain a case team in order to deal with these matters, we have to think about what the outcome of any phone calls are going to be. Are we going to scrutinise them further? What are we actually going to do in relation to the planning of our process of our going forward? That is why we have the process and the threshold of dealing with investigations formally under section 25, where we look at matters and we decide whether or not we are going to proceed to a full investigation and commit the necessary resources. We recognise there may be meritorious competition cases out there that are not getting full investigation. That must be a possibility. No regulator could possibly suggest otherwise, but that is not the test." (Transcript, 14 May 2007, pp. 18-19)

48. In considering how the Tribunal should approach the grounds listed in the *Freeserve.com* decision in this case, error of law or error of procedure present no difficulties. But where there has been virtually no investigation of the facts, the task of the Tribunal in determining whether the OFT has made a material error of fact or a material error of appraisal or has failed to investigate the matter sufficiently is more problematic. Counsel for the OFT accepted that even where no investigation has been carried out, it was possible to

envisage "an extreme example of an error of fact that could undermine a non-infringement decision" for example where it was apparent that the OFT had got something "fundamentally wrong" the Tribunal would be entitled to overturn the decision (Transcript, 14 May 2007, pp. 14-15). But he argued that in considering whether there has been an error of appraisal or insufficient investigation, it is more difficult to see how that can properly be a reasonable ground of challenge in a case such as this, without the Tribunal straying into a review of the OFT's refusal to investigate the matter further.

49. Counsel for the OFT referred us to passages in the judgments of the Tribunal in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* ("*Napp*") [2002] CAT 1 and *JJB Sports Plc and Allsports v Office of Fair Trading* ("*JJB*") [2004] CAT 17 concerning the standard of proof for the finding of an infringement of the Chapter I and II prohibitions. The Tribunal accepts that in order to find an infringement of the Chapter II prohibition, the OFT must be satisfied on the balance of probabilities that each of the elements referred to in section 18 of the Act is established. However, we did not find reference to the discussion of the civil standard of proof in *Napp* and *JJB* helpful in deciding how to approach the Tribunal's task in this appeal. Clearly, the burden of establishing that one of the grounds listed in *Freeserve.com* exists lies on Mr Brannigan. But the Tribunal did not, in the *Freeserve.com* judgment, place any particularly high standard of proof on an appellant who brings an appeal against a non-infringement decision and we do not see that there is any justification for imposing such a burden.

50. We therefore approach this appeal on the basis that the grounds of challenge are as set out in paragraph 110 of the *Freeserve.com* judgment and that the Tribunal's task is to consider whether, on the basis of the facts available to the Tribunal, Mr Brannigan has established that one of the grounds listed in *Freeserve.com* is made out.

VI THE GROUNDS OF APPEAL

(1) Failure to consult Mr Brannigan before adopting the Decision

51. The background to the adoption by the OFT of the Decision is described in the Tribunal's earlier judgment in this case, [2006] CAT 28. At the private hearing which took place before the Tribunal on 28 April 2006, the argument focused on whether there was an appealable decision before the Tribunal in respect of which the Tribunal had jurisdiction under section 47 of the Act. That hearing was attended by Mr Vincent Smith, then Director of Competition Enforcement at the OFT. In the course of the hearing, (see Transcript of the hearing, page 28) Mr Smith gave an undertaking to the Tribunal that he would have Mr Brannigan's complaint revisited and that the OFT would reach a view on "whether or not at the very least there is reasonable ground to suspect an infringement as a result of the material that Mr Brannigan has put to us".

52. In the light of that undertaking given by Mr Smith, the Tribunal adjourned the matter for 28 days to enable Mr Smith's undertaking to be implemented. The OFT also undertook to update the Tribunal on progress by 19 May 2006. On 2 May 2006, Edwin Coe, a firm of solicitors at that time providing advice to Mr Brannigan (but not solicitors on the record) wrote to the OFT stating:

> "On our part our client is to collate additional material, put it in an appropriate form and submit it to the Office. As was made clear and recorded in the transcript, we do not foresee that this is going to look radically different from the submission already made".

53. The OFT wrote to the Tribunal on 18 May 2006 stating that it had not yet received the Revised Complaint from Mr Brannigan but that they understood it was in the course of being prepared by him. The Registrar of the Tribunal asked that the parties should update the Tribunal as to the current state of progress with the OFT's reinvestigation by 5 pm on 9 June 2006. The Tribunal thus "somewhat reluctantly" agreed to a three week extension of the adjournment stating that "As is clear from the face of the transcript of the private hearing on 28 April 2006, the Tribunal envisaged that the time period of 21 days to review the situation and the adjournment of the hearing for 28

days would be sufficient … and that the OFT would give this investigation fresh impetus." Pending receipt of Mr Brannigan's revised complaint, the Tribunal saw no reason why the OFT's case team could not reconsider the material previously submitted.

54. In the event, the Revised Complaint was sent to the OFT on 31 May 2006 and the Decision was issued on 9 June 2006.

The parties' submissions

55. Mr Brannigan submits that the OFT failed to give him the opportunity to comment on its findings before issuing the Decision, contrary to the principles laid down by the Tribunal's judgment in *Pernod Ricard & Others v Office of Fair Trading* ("*Pernod*") [2004] CAT 10. There, the Tribunal held that, in the circumstances of that case, the complainant should have been afforded a structured opportunity to be heard by the OFT before certain decisions were taken, in particular when it decided to discontinue its examination of the complaint. Relying on *Pernod*, Mr Brannigan submits that, under section 60 of the Act and as a matter of domestic administrative law, there ought to be "an implied obligation on the OFT to consult the complainant of its decision not to proceed on a complaint and the OFT's assertions unless there are exceptional circumstances."

56. Mr Brannigan also refers to the right of a complainant at Community level to be consulted before the Commission rejects a complaint: see Article 7 of Commission Regulation (EC) no. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 OJ [2004] 123/18, ("Regulation 773/2004"). Mr Brannigan submits the position should be the same in the United Kingdom. The circumstances in which the Decision was adopted are, Mr Brannigan argues, irrelevant since the Decision still affects his interests. This fact alone should "trigger the safeguards offered by administrative law".

57. Mr Brannigan also takes issue with paragraph 28 of the OFT's Defence which he considers indicates that the value of consultation only applies to commenting on evidence submitted by others. In his view, the right to be consulted also exists to provide an opportunity to correct mistaken inferences the OFT may have drawn from evidence submitted by the complainant or to provide further evidence where possible.

58. The OFT's primary submission was that there was no unfairness in the procedure or prejudice suffered by Mr Brannigan but also that there was in any event no duty to consult Mr Brannigan, given the particular circumstances of this case.

59. The OFT submits that the manner and circumstances in which the decision was taken did not give rise to an obligation to consult Mr Brannigan. The Decision was taken in the context of proceedings before the Tribunal and as a result of Mr Smith's undertaking to the Tribunal at the hearing on 28 April 2006. The OFT understood that the Tribunal expected it to review the material put forward and set out its views on the merits of the case by 9 June 2006, which it duly did. There was no suggestion at any point during the proceedings before the Tribunal that there would be any form of consultation prior to a decision. Further, the correspondence between the Tribunal and the OFT seeking an extension of the adjournment did not indicate that it was expected that there would be a consultation stage after receipt of Mr Brannigan's Revised Complaint. Consultation on the proposed decision would not have been feasible within the time available.

60. So far as domestic procedure is concerned, it is the OFT's case that there is no statutory requirement on it to consult a third party before taking its decision. The procedural requirements in this regard are set out in section 31 of the Act and in Rule 4 of the OFT's Rules Order 2004, S.I. 2004 No. 2751. The OFT submits that its Guidelines on *Involving Third Parties in Competition Act investigations* (OFT 451, April 2006) do not apply in this case as the Decision was adopted in the context of proceedings before the Tribunal. The OFT submits that general principles of domestic administrative law do not require

the OFT to have consulted Mr Brannigan before adopting the decision. There is, moreover, no allegation that the OFT breached any legitimate expectations on the part of Mr Brannigan.

61. From a European law perspective, it is true that under Article 7 of Regulation 773/2004 complainants are to be given an opportunity to make their views known to the European Commission in writing before their complaint is rejected. The relevance of the position in Community law to domestic competition law is governed by section 60 of the Act, but section 60 was not intended to import purely procedural principles so the Tribunal should not read across the rules contained in Article 7 into the domestic procedure. Even if the position in the Community were relevant (which is strenuously denied), the OFT submits that the comparable situation to this case would be if the European Commission had given a similar undertaking to reconsider a complaint in the course of proceedings in the Court of First Instance. In such circumstances, it is not clear that the Commission would be under a duty to consult the relevant complainant.

62. The OFT also submits that, even if Mr Brannigan should have been given an opportunity to comment upon a draft of the decision, he has suffered no prejudice as a result of the alleged failure to consult; see *Apex Asphalt & Paving Co Ltd v Office of Fair Trading* [2005] CAT 4. Nothing in the OFT's procedure has compromised the fairness and transparency of the consideration of Mr Brannigan's complaint. The appellant is in exactly the same position as he would have been in had the OFT been aware that it was required to consult before adopting the contested decision. Mr Brannigan has not set out how or in what ways the procedure was unfair or resulted in any prejudice to him, i.e. in what way his submissions might have been different if he had been given an opportunity to comment on a draft of the Decision. The OFT submits that Mr Brannigan has had a number of opportunities to put forward any information which would have had a bearing on the reconsideration of his complaint. In those circumstances, even if a draft of the Decision had been provided there is no reason to consider that Mr Brannigan would have provided any relevant or

persuasive material had such a consultation been afforded which would have changed the OFT's view on the merits.

The Tribunal's Analysis

63. It is common ground that, in the present case, Mr Brannigan was not given the opportunity to submit his views to the OFT between the time that he submitted his Revised Complaint and the time the Decision was adopted. Whether or not a duty to consult the complainant arose in the present case, the Tribunal considers it appropriate first to look at the consequences allegedly flowing from this failure.

64. The relevant law on procedural irregularities in the context of administrative procedures was considered by this Tribunal in *Apex*. The *Apex* case concerned alleged defects in the notice that the OFT was required to serve on the parties alleged to have infringed the Act, setting out the allegations made against them. Under the OFT Rules in force at the time the notice in *Apex* had been served, the notice required was referred to as a "Rule 14 Notice" but this was subsequently replaced by a requirement for a Statement of Objections. At paragraph 100 the Tribunal, after reviewing the case law of the Community Courts (particularly Case T-48/00 *Corus UK Ltd v Commission* [2004] ECR II-2325) and English law (*R v Immigration Appeal Tribunal, ex p Jeyeanthan* [2000] 1 WLR 354), set out the principles that apply to a breach of the right to be heard (omitting authorities):

> "… (f) however, it is not appropriate for the Tribunal to annul a decision on the basis of omissions in a preparatory document such as a Statement of Objections/Rule 14 Notice which have no repercussions on the defence of the undertaking concerned. The crucial question is whether the defence was affected by the defect;
> (g) it is relevant to ascertain in what way the conduct of the administrative procedure and the content of the contested decision might have been different were it not for the defect;
> (h) if the arguments put forward before the Court are substantially the same as those appearing in the reply to the Statement of Objections/Rule 14 Notice, the likely

> conclusion is that the conduct of that administrative procedure would not have been different.
> (i) essentially, the question is whether the defect can be cured fairly: the Tribunal's task is to seek to do what is just in all the circumstances."

65. It follows from this case-law that a decision is unlawful by reason of a procedural irregularity only in so far as the irregularity has an adverse effect on a party's ability to defend his interests. Failure to consult can vitiate the administrative procedure only if it is shown that the procedure could have had a different outcome if the rules had been observed.

66. Mr Brannigan submitted in his outline observations of 13 April 2007 that he was prejudiced in the manner in which he was able to put forward his case. However, in the specific circumstances of the present case we are unable to find that Mr Brannigan has in fact been caused any prejudice. We do not consider that it is sufficient for Mr Brannigan merely to say that the Decision affects his interests or that he lost an opportunity to make representations without indicating what difference that opportunity could have made to his responses had he been consulted. It was apparent to the parties following the adjournment of the hearing on 28 April 2006 that the opportunity then being given to Mr Brannigan to submit a revised complaint for the OFT to consider pursuant to Mr Smith's undertaking was intended to enable him to put forward any information and argument that he wanted the OFT to consider. The Revised Complaint sent to the OFT on 31 May 2006 was a fully argued document, supported by such evidence as Mr Brannigan was able to provide. We therefore reject Mr Brannigan's submissions on this ground.

67. Accordingly, it is not necessary for the Tribunal to consider the application of the principle established in *Pernod* or the possible application of section 60 of the Act to the procedural principles to be applied in the application and enforcement of the competition rules.

(2) Infringement of the Chapter II Prohibition

(a) Definition of the relevant market

68. The first step in determining whether there has been an infringement of the Chapter II prohibition is to define the relevant market in which the existence of dominance is to be assessed. There was no significant disagreement between the parties over the definition of the relevant product market in this case. The OFT concluded in its Decision (paragraph 8) that "the most probable product market …. is advertising space in free and paid-for regional and local newspapers". This was not challenged in the Revised Notice of Appeal.

69. There was some disagreement, however, about the definition of the geographic market. The geographic market can be defined as the territory in which all traders operate under the same conditions of competition in so far as concerns the relevant products. It is not necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are the same or sufficiently homogeneous: see Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraphs 44 and 53.

70. In the Decision the OFT came to the following conclusion:

> "9 The narrowest geographic markets would be one centred on Uckfield and the other on Lewes but wider ones such as East Sussex may be appropriate.
>
> 10 In Uckfield, the main competition for Brannigan's Uckfield Life appeared to have been from the paid-for titles of Johnston's Sussex Express, Northcliffe's Kent and Sussex Courier, Newsquest's Argus as well as Newsquest's free Uckfield Leader.
>
> 11 In Lewes the competition for Brannigan's Lewes Life appeared to have been from the paid-for titles of Johnston's Sussex Express and Newsquest's Argus.
>
> 12 It is unclear how much of the advertising content of the newspaper titles in these towns, other than the Uckfield Leader and Uckfield Life and Lewes Life, were specifically geared towards the residents. But, as already mentioned, there must

> have been sufficient competition for the content for Johnston, which appeared to have had the most readership in both towns prior to the appearance of the free newspapers, to be as concerned as Newsquest about the Uckfield Life and Lewes Life. The ability of advertisers to switch between the regional and the local publications in both towns would suggest that the regional newspapers might have been acting as competitive constraints on local prices for advertising. More generally, regional newspapers also had overlapping readership areas enabling advertisers to switch between them and, because of this, they also acted as price constraints on each other. The net result is that there is likely to have been a chain of substitution covering all regional and local newspapers throughout East Sussex if not further afield making the geographic market at least as wide as East Sussex (if not wider). Brannigan appeared to have supported this definition in his allegation that the main aim of Newsquest (Sussex) was to foreclose the East Sussex market.
>
> 13 The possibility of price discrimination against truly local advertisers, which might support the narrower market definitions, is not ruled out. However, it would be difficult to partition publications in this way in any economic analysis. Also, whether or not the geographic market may have been narrow or wide is unlikely to have changed any findings on dominance.
>
> 5.1.3 Conclusions on Relevant Market
>
> 14 The relevant market was advertising space in free and paid-for regional and local newspapers in East Sussex".

71. The Revised Notice of Appeal challenged this on the basis that the OFT should have considered that the relevant markets were the local markets of Lewes and Uckfield.

72. The Tribunal has not identified any material error of fact or law in the OFT's approach to the definition of the relevant geographic market. In any event, since both parties went on to analyse the facts of the case on the basis either that the relevant geographic market was East Sussex or that it was the individual towns of Lewes and Uckfield, this is not a matter on which the Tribunal needs to come to a definite conclusion.

(b) Single firm dominance

73. The classic definition of dominance is that it is:

> "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 of its consumers" (see Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 65)

74. An undertaking will not be dominant unless it has substantial market power and market power is more likely to exist if an undertaking (or group of undertakings) has persistently high market shares.

75. In the market for local newspapers, market share is generally calculated on the basis of each publisher's share of advertising revenue generated by the relevant products in the relevant geographic areas. Figures for advertising revenue for individual titles are, generally, considered confidential by publishers and are not in the public domain. Because the OFT has not investigated either Mr Brannigan's original complaint or his Revised Complaint, it has not asked Newsquest, Johnston or the other publishers active in the relevant markets to provide advertising revenue figures for their newspapers in the East Sussex, Lewes or Uckfield areas.

76. Three separate bases have been put forward in this case as possible indicators of market power: readership figures, share of titles published in the area and Mr Brannigan's estimates of advertising revenue derived from published sources. We shall address the merits of each such basis in turn.

(i) Readership figures

77. In the Decision the OFT stated:

> "18 There were no reliable figures available for advertising revenue which would have provided a more accurate estimate than readership of any market share relating to a product involving advertising space, particularly where free publications are involved. With free publications actual readership may be quite low, despite claims of total coverage in an area, because a significant number of recipients would treat

> the publication as unwanted junk mail. Nevertheless, readership figures can act as rough proxy for share of advertising revenue, on the basis that publications which have the best distribution attract proportionately higher revenue …"

78. The readership figures on which the OFT relied in the Decision were those provided by Mr Brannigan in his Revised Complaint. Mr Brannigan told us that the figures he supplied were "widely available through the market": see Transcript, 14 May 2007, p.2. For a paid-for newspaper the readership figure is derived by expressing the number of papers sold as a percentage of the total population of the relevant area. For free newspapers, the readership figure comprises the percentage of the population to which the newspaper is delivered. The readership figures Mr Brannigan sets out in the Revised Complaint were as follows:

(a) In East Sussex, Newsquest publishes five papers and readership figures are available for four of those five. If one adds up the readership figures for those four newspapers, one arrives at an overall readership figure for Newsquest's papers of 35.73%. Johnston's readership figure compiled in a similar way is put at 37%.

(b) In Lewes where Newsquest's *Argus* is the only daily paid-for title available, the daily average readership figure for the paper is 25.01% of adults. Johnston publishes the only other local newspaper, the weekly paid for title *Sussex Express*. This has a readership of 70%.

(c) In Uckfield, Mr Brannigan states that the average readership of the Newsquest *Argus* is 7.06% with Johnston's *Sussex Express* having a readership figure of 30.6% and the other two newspapers, *Kent & Sussex Courier* and *East Grinstead Courier* having a readership of 14.03% and 1.12% respectively.

79. The OFT's conclusion on dominance, on the assumption that the two towns constituted separate relevant markets, was that based on readership, it was Johnston rather than Newsquest which appeared to have the biggest readership by far in both towns prior to the entry of the free newspapers (that is Mr Brannigan's two papers and Newsquest's *Uckfield Leader*). Newsquest was in

fact the smallest of the main players in both towns, particularly Uckfield, and therefore it is unlikely to have had any local dominance.

80. The OFT concluded that local dominance of Newsquest in either Uckfield or Lewes "is therefore not plausible".

81. With regard to Johnston's readership figure of 70 per cent in Lewes, the Decision stated that it was "unclear" whether Johnston was able to act independently of its competitors or customers. The OFT stated as follows (footnotes and cross reference omitted).

> "20 … In Lewes, Johnston had a readership of 70% with only one other competitor, Newsquest, having a readership of 35%. The fact that both newspapers were regional would suggest that, as advertising vehicles, they could only ever have a limited impact in the town and that they might represent poor value for advertisers wishing to target their advertisements solely at the residents of the town. Due to overlapping readership areas of different publications, it is likely that advertisers interested in regional advertising would have prices in the overlapping publications constrained as a result of chains of substitution. However, as mentioned above … prices for truly local advertisers would not be constrained and Johnston would be able to price discriminate against such advertisers because its newspaper would be the main vehicle for advertising unless Newsquest was able to act as a competitive constraint.
>
> 21 Readership data suggested that, in Lewes, Newsquest was in a relatively weak position. Nevertheless, Brannigan had not alleged anywhere in his complaint that either Newsquest or Johnston were earning supra-normal profits and that Brannigan entered the market in Lewes to provide advertisers with a more competitive alternative. Indeed, Mr Brannigan the owner indicated that when he worked for Johnston, between 1996 and 2002, he worked hard to become sales person of the year and build up a profitable area for the company. This suggests that Johnston's advertising operations in Lewes and surrounding East Sussex (Mr Brannigan's sales area) were not that profitable when Mr Brannigan joined, that it had to compete with rival publications to win customers and, as a result, was not making supra-normal profits because of its market position.
>
> 22 Such a picture does not indicate markets occupied by dominant companies. In contrast it is characteristic of normal competitive markets. As a result, it is doubtful that Johnston

> was dominant in either town despite its leading market shares for readership."

82. On the alternative basis that the relevant geographic market was East Sussex rather than the two towns, the OFT concluded as follows:

> "23 If a wider geographic market definition is adopted, such as East Sussex, the picture does not become any clearer. Brannigan's estimates of readership figures for Newsquest's publications were 36% and for Johnston's 37% which suggests a more evenly balanced situation than that in the local towns and that neither is likely to have been dominant. The increase in Newsquest's readership as the market is widened, and the corresponding reduction of any local market power that Johnston might have, is to be expected because nationally Newsquest has a slightly larger readership than Johnston. Also, as the geographic market is widened bigger players in the national market, such as Northcliffe (DMGT), come into the frame and would have reduced any market power that either Newsquest or Johnston might have had in more local markets. Brannigan had not provided any readership figures for the DMGT in East Sussex. The only conclusion that can be drawn on the basis of the readership figures provided is that as before Johnston, rather than Newsquest, is probably the market leader in the wider geographic market of East Sussex. This suggests that it would be difficult to reach a conclusion that Newsquest was dominant in East Sussex."

83. The OFT went on to consider the other factors relevant to whether market power exists. It found that the ability of major advertisers to switch between rival publications suggested that prices would be constrained and no publisher could have market power.

84. Having regard to the limited information available to the OFT, there are no grounds on which the Tribunal can determine that the decision that there was no individual dominance was flawed by an error of law or of fact or of appraisal. In the Uckfield market, neither Newsquest nor Johnston's readership figures approach the levels which are characteristic of dominance.

85. In the Lewes market, Johnston's readership figure of 70 per cent is substantially greater than Newsquest's readership. When considering this 70 per cent figure, it is important to recognise the limitations of regarding readership figures as a proxy for market share figures and hence as a means of

establishing the existence of significant market power. Readership figures in a particular area may well add up to more than 100 per cent; even calculating a publisher's aggregate readership figures may overstate the position since residents may read or receive through their door more than one paper from the same publisher. One cannot, therefore, simply treat readership figures as akin to market share and apply the principles derived from the Community case law on dominance to those figures. The OFT concluded that this readership figure did not establish that Johnston was dominant in either town despite its leading market shares for readership, for the reasons set out in paragraphs 20 – 22 of the Decision (see paragraph 81, above). The Tribunal accepts that the 70 per cent readership figure was not sufficient, in itself to establish a position of significant market power on the part of Johnston.

(ii) Share of titles

86. In addition to readership figures, the Revised Complaint relied on a figure which represents the percentage of titles available in the relevant geographic market produced by the particular publisher. Thus, within East Sussex, Mr Brannigan states that Johnston and Newsquest have a joint market share of 72.22 per cent because they control 13 titles of the 18 available across East Sussex. The Tribunal does not regard figures based on simple share of titles as giving any indication of market power.

(iii) Estimates of advertising revenue

87. Finally in the Revised Notice of Appeal, Mr Brannigan sets out his estimates of advertising revenue. These revenue and resulting market share figures are taken from a draft letter written but not sent to the OFT in October 2006 and attached to the Revised Notice of Appeal. This letter was first seen by the OFT only after the adoption of the Decision. Mr Brannigan states that although figures for Newsquest (Sussex) are not available, he calculates that the papers that Newsquest (Sussex) produces generate an annual advertising revenue of £10,530,000 (54%), those of Johnston £5,278,000 (27%); those of Northcliffe £2,600,000 (13%) and that of Trinity £1,040,000 (5%). In that draft letter Mr Brannigan describes how he has compiled the figures:

> "… Although I am now thoroughly on the outside of the industry having lost everything I had worked for over several years of experience, I have tried to come to some safe assumptions based on industry figures and my experience to help the OFT and the CAT glean that there could be the basis of presuming market dominance by Newsquest (Sussex) in my case for anti-competitive behaviour under Chapter Two of the act. All figures are based on the lowest assumptions of figures I know were being achieved during my time at Johnston Press up to 2002 and our regular use of market share figures at that time and are used as a safe guideline, though it is highly likely if not probable that the actual figures would be drastically higher on full investigation by the OFT ..."

88. At the hearing the Tribunal asked Mr Brannigan about the discrepancy between the relative readership figures in East Sussex (Newsquest 36% and Johnston 37%) and the advertising revenue market share figures (Newsquest 54% and Johnston 27%). Mr Brannigan explained that this could be because Newsquest charged higher rates for advertising in their newspapers than Johnston because the Sussex Express was in fact five titles split up over the region. Further, Newsquest's is a daily paper whereas Johnston's titles are weekly.

89. The OFT's response to these figures based on advertising revenue was that the material does not provide persuasive evidence to undermine the conclusions in the Decision and that they were not reliable figures upon which the OFT could base a change in the approach it had previously taken. The OFT point out that the information is Mr Brannigan's personal estimate based on his assumptions and knowledge of the industry and that they are not reliable figures.

90. Further the OFT claims that the estimates contradict previous estimates given; in a letter from Mr Brannigan's then solicitors to the OFT in March 2004 he gave the annual advertising revenue for Newsquest in East Sussex as £7,280,000 and for Johnston as £8,320,000. Part of this difference may be explained by the inclusion in the 30 October 2006 figures of revenue from papers which are purely advertising publications without any editorial comment such as Newsquest's "Scoop" although Mr Brannigan accepted

during the course of the hearing that these publications do not form part of the relevant product market in this case.

91. Finally, even if the new information could be accepted, the OFT argued that whilst it might suggest that Newsquest had greater market power in East Sussex than Johnston, it does not show that Newsquest satisfied the test for dominance.

92. The Tribunal agrees with the conclusions of the OFT in relation to the advertising revenue figures. This does not in any sense reflect badly on Mr Brannigan who, we are sure, made every effort to produce useful information to the OFT gleaned from sources available to him and based on his own experience in the industry. However, accurate advertising revenue figures for the different newspapers distributed in the possible relevant markets could only properly be gathered by the OFT exercising its powers to request information and that the OFT has declined to do. The OFT's stance in relation to this complaint means that there are no figures derived from the companies themselves so that the Tribunal is not in a position to make its own assessment of the facts. Reliable market share figures simply cannot be calculated in this case.

93. The OFT went on in the Decision to consider whether there were other factors which indicated that Newsquest or Johnston either did or did not enjoy a position of market power. There was no evidence that the publishers were earning supra-competitive profits; there had been successful market entry or expansion by Newsquest in the region and major advertisers may be able to exercise countervailing buyer power by playing one publisher off against another.

Conclusion on single firm dominance

94. If the OFT had undertaken an investigation, there are many factors which could have been explored to arrive at a more complete assessment of market power. For example, the OFT could have explored the fact that it appears that the incumbent publishers control the supply of printing services for new entrants. But on the basis of the information before it, the OFT correctly

distinguished the markets in Uckfield and Lewes from the market in the *Aberdeen Journals* case where Aberdeen Journals had a virtual monopoly with other players having a combined market share of around 6 per cent: see *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11. The position in the local markets in Mr Brannigan's case was not clear cut. It follows that the Tribunal finds that Mr Brannigan has not shown that the OFT's Decision is flawed by a material error of law, fact or appraisal. This ground of appeal must therefore be rejected.

(c) Collective dominance

95. The Revised Notice of Appeal asserts that the OFT wrongly failed to consider whether Johnston and Newsquest occupied a position of collective dominance in East Sussex.

96. The allegations of collective dominance were put forward by Mr Brannigan in order to overcome two difficulties that his case otherwise faced. The first was that, looking at the East Sussex market, Newsquest and Johnston's readership figures were roughly the same (33% and 37% respectively) making it difficult for him to argue that they were individually dominant. The second was that looking at the Uckfield and Lewes markets separately, it was Johnston which clearly had the higher readership figures but the main allegations of abusive conduct (such as the launch of the *Uckfield Leader*) were allegations against Newsquest rather than Johnston. Mr Brannigan suggested that the reason why the "market spoiler" *Uckfield Leader* was launched by Newsquest in Uckfield rather than Johnston taking advantage of its larger market share in Lewes to launch a free newspaper there itself was that Newsquest and Johnston operated a tacit agreement that they would not launch free newspapers in areas where they both distributed paid-for papers.

97. The Chapter II prohibition refers to "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market". It is well established in the case law of the Community Courts that an abuse of dominance can be committed by several undertakings which together hold a dominant position, without each being dominant individually. Such a situation

can arise where two companies present themselves, or act together, on a particular market as a collective entity. This may be the result of an agreement among them which restricts how they supply their goods or services to the market, for example in the case of a shipping conference. In the absence of such overt or formal links, it is necessary to consider whether the market in which the allegedly dominant undertakings are active exhibits the characteristics which enable a position of collective dominance to become established.

98. In Case T-342/99 *Airtours v Commission* ("*Airtours*") [2002] ECR II-2585, paragraph 62, the Court of First Instance ("the CFI") set out three characteristics which must be exhibited by a relevant market in order for it to be possible to conclude that participants in that market occupy a collectively dominant position:

(1) The market must be transparent. This means that each undertaking alleged to be part of the dominant collective entity must be able to know whether or not the other undertakings are adopting and maintaining the common policy which it is alleged that the collective entity pursues.

(2) There must be mechanisms in the market to deter undertakings from departing from the alleged common policy. This means that it must be possible for one undertaking within the collective entity to retaliate against an undertaking which deviates from the common policy in a way which means that the latter undertaking will not benefit from its deviation.

(3) It must be impossible for competitors and consumers to erode the advantages which accrue to the collective entity from the common policy.

99. Applying these *Airtours* criteria in the Decision, the OFT stated (footnotes omitted):

> "34 Although the newspaper advertising market is transparent in that both Newsquest and Johnston would have known the advertisers in their respective publications there is no evidence to suggest that, in general, they would have known the prices and, as a result, it would be difficult to monitor pricing behaviour. Second, it is likely a co-ordinated market outcome would only be sustainable in Lewes. In Uckfield, Northcliffe would have to be involved, particularly as Newsquest is a minor player, and there is no evidence of this. Third, the ability of bigger newspapers publishers, such as Northcliffe or even Trinity Mirror, or the more prestigious advertisers who seem to have some buyer power, to upset the arrangements appears to be a constraint on tacit collusion.
>
> 35 The existence of Newsquest's Lewes and South Coast Leader, although no longer targeted at Lewes but just the South Coast, also appears to shed doubt on tacit collusion in Lewes between Newsquest and Johnston. Moreover, the continued expansion of Newsquest's free newspaper portfolio, and in particular the Uckfield Leader into the Uckfield and Heathfield Leader (after Brannigan's exit) would suggest that there is no co-ordinated market outcome more generally. Finally, no evidence was provided to support tacit collusion.
>
> 36 The dynamic nature of the market(s) would suggest that Newsquest and Johnston were in fact competing against each other not only in Uckfield but also in Lewes and more generally in East Sussex and that a co-ordinated market outcome was not possible. In the absence of evidence to the contrary the conclusion is that collective dominance was unlikely."

100. In challenging the OFT's rejection of collective dominance, the Revised Notice of Appeal refers to three reports of the CC on mergers involving Johnston and Newsquest.[3] Mr Brannigan criticises the OFT's reference to the market(s) as "dynamic" asserting that the OFT failed to consider the increasing concentration of local newspapers and the indications that the market may not be fully competitive. According to the Revised Notice of Appeal there were various factors which the OFT should have taken into account:

[3] See CC Reports in *Johnston Press plc / Trinity Mirror plc* Cm 5495 (May 2002); *Gannett UK Ltd / SMG plc* Cm 5782 (March 2003); and *Newsquest (London) Ltd / Independent News and Media plc* Cm 5951 (October 2003).

(a) the relevance of the practice of "clustering", that is the tendency for publishers to focus their operations on particular geographic areas when launching new titles or acquiring titles from other publishers;

(b) a policy of "live and let live" whereby publishers tacitly share the market on a geographic basis so that there is only muted competition where they are present in the same areas;

(c) the difficulty of entry into the market faced by small scale entrepreneurs including the risk of a "robust response" by incumbents;

(d) the fact that a reporter had told Mr Brannigan that Johnston intended to exclude him from the market although the exclusionary conduct was conduct by Newsquest and that "there is at least tacit (if not agreed) adherence to a policy of 'live and let live' as between Newsquest and Johnston as regards geographical areas in which their titles compete."

101. Further, Mr Brannigan submits that the OFT applied the *Airtours* criteria wrongly or too narrowly. He contends that:

(a) there is transparency in advertising prices because it is an important part of the sales teams' work to know the rates charged by other newspapers to individual customers and those customers are generally willing to provide that information; and

(b) the OFT was wrong to assume that retaliation from the other local publishers would be likely since there was no evidence of this in circumstances where evidence would have been expected.

102. Finally Mr Brannigan argues that although the OFT correctly relied on the effect of *Aberdeen Journals* as ruling out eliminatory behaviour by an obviously dominant firm in a local market, it failed to consider whether, in the case of collective dominance, it was not therefore an obvious and necessary strategy to allow a party with a small local market share, not expressly covered by *Aberdeen Journals* to launch the "spoiler" newspaper.

103. Mr Brannigan's case therefore was that Newsquest and Johnston occupied a position of collective dominance in the market for East Sussex and adopted a joint policy of not publishing a free newspaper in that area. In response to the launch of Mr Brannigan's free newspaper in Uckfield, there was a tacit agreement between Newsquest and Johnston that the former rather than the latter would launch a spoiler newspaper since if Johnston, with its larger market share did so, this was more likely to be regarded as behaviour akin to that condemned in *Aberdeen Journals*.

The Tribunal's Analysis

104. With regard to the application of the *Airtours* criteria in this case, there is insufficient evidence for the Tribunal to conclude that the market is transparent in terms of the prices charged for advertising by the different publishers. It is clear from Mr Brannigan's description of how the market works, that special rates and deals are commonly negotiated by publishers with important customers. It may or may not be in the interests of such customers for accurate details of such deals to become widely known. We cannot be satisfied that the OFT erred in its assessment of the transparency of the market or that publishers in this market are sufficiently aware of the prices their rivals charge to be able to anticipate one another's behaviour and align their conduct.

105. The question arises, however, whether transparency as to price is a necessary ingredient of the first criterion in *Airtours* in a case where the allegation is not that the collectively dominant undertakings adopted a common pricing policy but rather that they pursued a common policy of not launching a free newspaper. Clearly this aspect of their market behaviour is entirely transparent since the deviation from such a common policy is seen by the competitors as soon as the new title appears on the market. Counsel for the OFT argued, however, that collective dominance cannot be established if only one particular strand of their business is subject to the alleged common policy.

106. The Tribunal is not convinced that it is necessary, in every case of collective dominance, to show that there is price transparency in the market being

considered. Indeed, *Airtours* was itself a case where the tacit co-ordination alleged related not to the prices charged but to the capacity offered by the suppliers. The European Commission accepted that tacit co-ordination on the thousands of different prices charged was not possible but contended that such co-ordination was not necessary to establish a collective dominant position. The issue of market transparency considered by the CFI in its judgment was therefore whether competitors knew the crucial capacity decisions taken by their rivals: see paragraphs 148 *et seq*. However the Tribunal accepts that it is clear from the *Italian Flat Glass* case (Joined Cases T-68/89 etc *Società Italiana Vetro SpA and Others v Commission* [1992] ECR II-1403) to which the OFT referred in its Defence, that something more is needed to establish that two undertakings are collectively dominant than simply an allegation that there is a tacit agreement between them in respect of one aspect of their conduct on the market.

107. As to the second element – the likelihood of retaliation by other market players – the CC Reports on the mergers involving Newsquest and Johnston do not bear out Mr Brannigan's contention that publishers might support, tacitly or otherwise, the elimination of new independent entrants on the basis of showing an example to others.

108. The CC does refer to the publisher adopting a "live and let live" attitude in the sense that there is only "muted competition" between them.[4] But the Reports do not demonstrate that publishers follow a policy of not launching free newspapers in areas where they already distribute a paid-for newspaper. On the contrary, the picture which emerges from the CC reports is that publishers are more likely to launch a second newspaper in an area in which, or close to which, they already distribute papers. That is what leads to "clustering", that is the trend for publishers to focus on particular geographic areas when either launching new newspapers or acquiring titles from other publishers.[5] We do not see, therefore, that the CC Reports help Mr Brannigan having regard to the

[4] See e.g. *Newsquest (London) Ltd / Independent News and Media plc* Cm 5951 (October 2003) paragraph 2.119.
[5] *Gannett UK Ltd / SMG plc* Cm 5782 (March 2003) paragraph 3.7.

facts of this particular market. Mr Brannigan's arguments on this point must therefore be rejected.

(d) Alleged abuses

109. Having come to the conclusions we have on the issues of individual and collective dominance, the Tribunal does not strictly have to consider the issues arising from the allegations of abuse. But in deference to the importance of these issues to Mr Brannigan who lost his livelihood as a result of the events he describes, we have carefully considered all the allegations made by him. A number of different matters were put forward by Mr Brannigan as unlawful conduct which caused the demise of his business:

(i) the threat by Newsquest of litigation concerning Mr Brannigan's use of the word "Life" in the title of his new newspaper;

(ii) the late cancellation of *Uckfield Life's* printing slot by Newsquest (Sussex);

(iii) the launch by Newsquest of its own free newspaper, the *Uckfield Leader*;

(iv) selective price discounting offered to Mr Brannigan's advertising customers in return for exclusivity; and

(v) other conduct which can generally be described as "spoiling tactics" such as discouraging distribution points from stocking the Uckfield Life, denigrating Mr Brannigan's papers and copying his editorial material.

(i) Use of the word "Life" in the title of Mr Brannigan's newspaper

110. In his Revised Complaint Mr Brannigan described what happened as follows:

> "The next major attack from Newsquest (Sussex) was against our newspaper titles – Lewes Life and Uckfield Life. They print a Gatwick Life in West Sussex and a Horley Life in Surrey. Despite the fact that I checked the name use with Companies House etc, had never heard of the other two titles out of our area and that no other newspapers in East Sussex had

> the word 'life' in their title, they absurdly put their top solicitors onto us saying that they owned the right to the word 'life' and that we were trying to pass off our paper as a Newsquest title. Mr Gerritt [a legally qualified friend of Mr Brannigan] informed them that the word life is generic and can be used by anyone. He also pointed out that on every front page of our newspaper we proudly declared that we were a local, independent newspaper. Despite regular contact to and fro between them (and increasing costs for a new, small company such as ourselves), the case has never officially been dropped against me. Mr Gerritt tried several times to get this clarified when we hadn't had any reply, asking them to confirm no further action was being taken, but no confirmation one way or the other was forthcoming."

111. In the Decision the OFT states that it is unclear whether or not Newsquest has a legitimate claim to the use of 'Life' in its publication titles for the region. The OFT noted that Newsquest "does appear to use distinct title themes as with its 'Leader' series and it might be able to argue that readers are genuinely confused". The OFT found that there was no evidence that the threat of litigation was without objective justification and aimed at harassing Mr Brannigan and hence found that no abuse had been established. At the hearing, Counsel for the OFT referred the Tribunal to Case T-111/96 *ITT Promedia v Commission* [1998] ECR II–2937, where the Court of First Instance stated (at paragraph 60) that "[a]s access to the Court is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of an dominant position".

112. It does appear from Mr Brannigan's evidence that Newsquest published two newspapers in the South of England using the word "Life" in the title. Mr Brannigan does not explain how he came to choose that word for the title of his own newspaper but we accept his evidence that he was certainly not trying to pass his papers off as Newsquest publications and in fact made clear on his own papers that they were independent. Nonetheless, the fact that Newsquest was already using the word 'Life' in the titles of two of its newspapers makes it difficult to conclude that the purpose of the threatened action was to harass Mr Brannigan. The Tribunal does not therefore regard the OFT's conclusion on this point as flawed by error of fact or appraisal.

(ii) Cancellation of the print slot

113. Mr Brannigan's unchallenged evidence was that before the launch of his paper in March 2003, he had agreed with Newsquest (Sussex) that they would print his paper. Newsquest's then print manager told Mr Brannigan or his staff that there were plenty of slots available so he could choose any day to go to print. In February 2003, they agreed on a 2 am slot on Friday morning with distribution on Friday morning by 9 am. According to Mr Brannigan, this gave his paper a longer editorial window to get stories out to the public as fresh as Thursday night. The launch of the paper was planned for 28 March 2003.

114. However, one week before the first issue Newsquest (Sussex) cancelled the print slot and informed Mr Brannigan that they had no other print slot at any time of the week. Mr Brannigan described this as "a major problem" that "nearly stopped us before we had even begun".

115. Mr Brannigan managed to persuade another Newsquest printer, Newsquest (Essex) to agree to print the paper. The Revised Complaint described the effect of this change:

> "This change involved many extra concerns and costs, such as transporting the papers from Colchester to the south coast, different technical specifications to the ones we'd set up for with Newsquest (Sussex) and an earlier print slot necessitating reviewing our whole procedures. As well as having to buy extra computers … we also had less time to collate the late breaking stories of importance due to the earlier print slot, losing us ground on our competitors."

116. In May 2003, Mr Brannigan heard that the print manager at Newsquest (Sussex) was sacked for accepting Mr Brannigan's business. Mr Brannigan contacted the print manager in March 2006 and passed his details on to the OFT. The former print manager was reluctant to provide evidence because, we are told, he was party to a confidentiality agreement as the result of the settlement of his unfair dismissal claim. Mr Brannigan believes he would have been prepared to do so in response to a formal request from the OFT but, as the OFT decided not to pursue any investigation, this point has not been

followed up. On that basis, there is no first hand evidence before us as to why the Thursday/Friday night print slot was cancelled and why the Newsquest (Sussex) print manager was sacked, other than Mr Brannigan's supposition and his account of what he heard at the time and of what the print manager told him when Mr Brannigan contacted him in March 2006. We do not know what justification Newsquest (Sussex) would have provided to the OFT or to the Tribunal if they had been asked.

117. Further, since another arm of the Newsquest undertaking, Newsquest (Essex) did in fact carry out the printing, it would be difficult to characterise the refusal Newsquest (Sussex) as abusive, albeit that use of Newsquest (Essex)'s facilities were less favourable to Mr Brannigan than the original deal with Newsquest (Sussex). The arguments put forward by Mr Brannigan to show that the Decision was flawed in this respect are not persuasive.

(iii) The launch of the Uckfield Leader by Newsquest

118. Mr Brannigan has described the free newspaper, the *Uckfield Leader*, launched by Newsquest in around June 2003 as a "market spoiler" designed to eliminate him from the market. By launching this free newspaper and offering free or heavily discounted advertising space to Mr Brannigan's customers in return for them placing no more advertisements with the *Uckfield Life*, Newsquest undermined the viability of Mr Brannigan's Uckfield paper. Mr Brannigan gave the example of Halifax Estate Agency in Uckfield. According to Mr Brannigan, Halifax were delighted with the response from their advertising with him in the initial issues of the *Uckfield Life* and provided a testimonial to the fact which was printed in Mr Brannigan's papers in May 2003. Despite this, within four weeks, Halifax had withdrawn its advertising from Mr Brannigan's titles. When Mr Brannigan or his staff contacted the estate agency they confirmed that they had pre-agreed a run of free advertising with Newsquest (Sussex) as long as they withdrew their advertising from Mr Brannigan's papers:

> "… He told our Uckfield sales person … that Newsquest (Sussex) were targeting the local property market to prevent us extending our revenue reach in East Sussex, based on the fact

> that estate agents tend to follow one another and tend to advertise en masse. This wasn't a late space deal to run an advert Newsquest already had for the Halifax within their production department as often happens within advertising, it was to run newly designed, weekly full-page colour adverts at no cost." (See the Revised Complaint paragraph 18).

119. Mr Brannigan asserts that other companies who had said that they were happy with his product and service "suddenly started to cancel without reason". Mr Brannigan provided the OFT with a statement from a former employee who confirmed his evidence regarding the Halifax estate agency account.

120. The Decision dealt with this complaint as follows:

> "40 Brannigan asserts that 'To launch the Uckfield Leader, targeting a small, rural town with a mere 10,386 households would appear to go against company [Newsquest] ethos and would indicate a change in usual practice, unless launched as a market spoiler' … . In *Aberdeen Journals Decision (2)* [paragraph 108] it is clear that the intention was to use the Herald and Post as a fighting title which was resurrected when the Independent entered the market but would be wound down after it exited. However, at the time of the complaint, Newsquest might well have been able to argue that the launch of the Uckfield Leader was a natural expansion of Newsquest's 'Leader' series of free newspapers and that its launch, although precipitated by the entry of the Uckfield Life, was simply a competitive response.
>
> 41 A response to competition even by a dominant company is not in itself anticompetitive. The opinion of the Advocate General in *Compagnie Maritime Belge*, where 'fighting ships' and price cuts were employed, was that '… competition law should not thus offer less efficient undertakings a safe haven against vigorous competition even from dominant undertakings'. He went on to say that 'Different considerations may, however, apply where an undertaking which enjoys a market position of dominance approaching a monopoly, particularly where price cuts can be implemented with relative autonomy from costs, implements a policy of selective price cutting with demonstrable aim of eliminating all competition'. In *Compagnie Maritime Belge* the liner conference had a market share of over 90%. Aberdeen Journals had a virtual monopoly (Paragraph 19). In Brannigan's case such a situation did not exist. In Uckfield, Newsquest had a readership of just 7% Also, the other main players in the market(s) with potentially more advertising revenue to lose did not behave in a similar way to Newsquest by introducing new titles or

> predating. Moreover, Newsquest would be unlikely to eliminate them from the market since they would probably have been of comparable efficiency and size. In view of this situation it is unlikely that, at the time, the Uckfield Leader could be considered simply as a fighting title to eliminate only Brannigan and protect Newsquest's limited market share in Uckfield, even if Newsquest was dominant in some market covering paid-for and free newspapers (which the OFT does not believe it is), since its entry would affect the other players in the market.
>
> 42 If the product market was simply free newspapers it would seem a pointless exercise for Newsquest to launch a market spoiler in Uckfield where it had no interests to protect. It is not a credible strategy for a publisher to prevent an entrant from entering a market which it has no long term intention of contesting. Thus the only plausible strategy would have been that entry by Newsquest was a genuine response to competition.
>
> 43 With hindsight, this does appear to have been the case. The Uckfield Leader is still around in 2006, almost three years after the events, and has expanded to become the Uckfield and Heathfield Leader. This would suggest that it was not launched purely as a market spoiler to thwart a new entrant."

121. A number of different but connected alleged abuses arise out of the launch of the *Uckfield Leader*. The newspaper itself is described as a "market spoiler". It is alleged that Newsquest engaged in predatory pricing and price discrimination by offering free advertising space to Mr Brannigan's customers and that it was able to do this only by cross subsidising the losses in the *Uckfield Leader* with profits from its other publications. It is further alleged that they offered exclusive deals to advertisers by making the offer of free advertising space conditional on the customer withdrawing its advertisements from the *Uckfield Life*.

122. Mr Brannigan commented that the question of Newsquest's motivation in launching the *Uckfield Leader* might have been resolved if the OFT had asked Newsquest to disclose its contemporaneous documents concerning the launch. These might either have shown that it was launched in response to the appearance of the *Uckfield Life* or equally might have shown that Newsquest had planned the launch before they knew about Mr Brannigan's business plans. If the latter had been demonstrated, this might have gone some way to

dispelling the sense of grievance Mr Brannigan feels about what happened to his business and the OFT's response to his complaint.

123. But as it is, we simply do not know how it came about that Newsquest launched their free newspaper. We also do not know whether Mr Brannigan's assertion that it was particularly his customers who were targeted for the free advertising runs is correct. Newsquest might have been able to show that they offered the same introductory deals to all customers regardless of whether they advertised in the *Uckfield Life* or not. The Tribunal concludes that there is not enough evidence to suggest that the OFT has made a material error of law, fact or appraisal when assessing whether the launch of the *Uckfield Leader* was in fact intended as a "market spoiler".

124. Further it is difficult to see the business logic in Newsquest which had a readership of only 7 per cent in the Uckfield market launching a market spoiler and attempting to impose customer exclusivity where there were already three other competing papers. Since no inquiries were carried out by the OFT there is no contemporaneous evidence either supporting or refuting Mr Brannigan's assertion that this was done in collusion with Johnston.

125. The CC Reports to which Mr Brannigan referred us do not support the contention that the launch of this newspaper by Newsquest was an unusual step for a publisher to take. On the contrary, as discussed earlier, the Reports note that publishers tend to launch new papers in areas where they already have a presence.

126. The OFT was right to regard it as relevant that the *Uckfield Leader* was still being published in 2006 and has expanded to become the *Uckfield and Heathfield Leader*.

127. Although the Revised Complaint alleges that the fact that the *Uckfield Leader* contained advertising from companies based in Haywards Heath and Burgess Hill rather than from Uckfield businesses, the Tribunal does not regard that as necessarily pointing to an unjustified cross-subsidy of the *Uckfield Leader* by other Newsquest papers. It is not surprising that the initial issues of a new

local paper have to include some material gathered from other sources whilst the paper builds its local reputation.

128. With regard to the sale of advertising below cost, it appears to be accepted by Mr Brannigan that the free advertising offered to the *Uckfield Life's* customers was advertising in the new *Uckfield Leader* rather than in the established paid-for *Argus* newspaper. The OFT concluded that abusive conduct has not been established because short run promotions which often involve selling below average variable costs for a limited period are widely used in many markets especially when a new product is introduced to the market. The OFT cites its draft Guidelines on the *Assessment of Conduct* OFT 414a, paragraph 4.12 in support of its conclusion that "the introduction of a new product is a legitimate commercial reason for pricing below [average variable cost] in order to build up a large enough customer base to allow it to achieve and benefit from economies of scale until profitability is reached".

129. The Tribunal leaves open the correctness of the OFT's submissions in this regard.[6] But having regard to the lack of contemporaneous evidence from Newsquest which only the OFT was in a position to gather, the Tribunal cannot conclude that Newsquest's conduct relating to the *Uckfield Leader* constituted an abuse of any of the kinds referred to in paragraph 121, above.

(iv) Other alleged abuses

130. The Revised Complaint raised various other matters:

(a) defamatory remarks made by both Newsquest and Johnston;

(b) targeting by Newsquest's Uckfield Leader of collection points used by Mr Brannigan to distribute the Uckfield Life; and

(c) copying Mr Brannigan's editorial material.

[6] Recent European case law points in a different direction: see Commission's decision of 16 July 2003 relating to a proceeding under Article 82 EC (Case COMP/38.233 − *Wanadoo Interactive*) [2005] 5 CMLR 120, recital 307 and Case T-340/03 *France Télécom SA v Commission*, judgment of 30 January 2007, paragraph 217. The CFI's judgment is on appeal to the European Court of Justice in Case C-202/07 P *France Télécom SA v Commission* (judgment pending).

131. The Tribunal agree with the OFT's conclusion that it did not have sufficient evidence before it to find that any of this conduct went beyond what would be a permissible competitive response to a market entrant.

(3) Infringement of the Chapter I prohibition

132. There were two aspects to the complaint by Mr Brannigan that Newsquest was a party to agreements which infringed the Chapter I prohibition. The first arose from the agreement alleged to have been entered into between Newsquest and some of Mr Brannigan's customers to the effect that they would advertise exclusively with Newsquest's papers, or at least that they would not advertise in the *Uckfield Life*. We agree with the OFT's conclusion that, given Newsquest's low readership in Uckfield it is unlikely that this agreement would fall within the Chapter I prohibition.

133. The second aspect concerned the alleged horizontal arrangement between Newsquest and Johnston. Mr Brannigan stated in the Revised Complaint that Newsquest and Johnston "have been strongly rumoured within the industry to have a private cartel agreement concerning areas along the south coast, which is why no spoiler was launched in Lewes also." In any event, we do not think that it was open to the OFT, without undertaking some level of investigation which they declined to do, to conclude that any horizontal agreement existed between Newsquest and Johnston.

VII CONCLUSION

134. The Tribunal unanimously dismisses Mr Brannigan's appeal. Mr Brannigan in his closing remarks at the hearing before us commented that, having regard to the money that the OFT has spent "basically just defending their right not to look into it", he wonders whether some of that money would have been better spent investigating his claims. Mr Brannigan has pursued his case from October 2004 to the present with courtesy as well as diligence and has done his best to cooperate with the OFT as regards the provision of information and lines of inquiry. We can understand his frustration that he is no further forward now than he was when his newspapers first went out of business.

FOR THE REASONS SET OUT IN THIS JUDGMENT, the Tribunal dismisses the appeal.

Vivien Rose | Graham Mather | Vindelyn Smith-Hillman

Charles Dhanowa
Registrar

26 July 2007