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IN THE COMPETITION

Case No. 1061/1/1/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

22nd May 2006

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL BLAIR QC
VIVIEN ROSE

Sitting as a Tribunal in England and Wales

BETWEEN:

MAKERS UK LIMITED

Applicant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Aidan Robertson (instructed by DLA Piper Rudnick Gray Carey) appeared for the Applicant.

Mr. Tim Ward (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

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CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Can I thank you for your written submissions? It seems to us that the matters
2 which we probably need to consider today are:

- 3 1. the confidentiality aspect of disclosure by the OFT in relation to third party
4 material in connection with the penalty calculation.
- 5 2. whether the Appellant wishes to cross-examine a representative of the OFT having
6 regard to what Mr. Bowman says in paras. 42 and 46 of his witness statement.
- 7 3. whether the issues in the *JJB* and *Argos* Appeals to the Court of Appeal have any
8 bearing on the issues here in relation to penalty and, if so, whether that may affect
9 the timetable; and
- 10 4. tentatively – because they are not here – the Praters’ Appeal.

11 The CMC in that Appeal is fixed for 6th June which is, I think, the same day as the
12 Defence in this case. The OFT has suggested that the hearing in the Praters’ case be
13 consecutive. We do not know today whether any submissions can be made by Makers in
14 relation to that without Praters here, etc., but that possibly we can explore a little. We have
15 looked at the Tribunal diary and our proposal – subject to everything that I have said and
16 whatever submissions are made – is that the hearing of this case should take place during the
17 week of 31st July, although at present we are not sure which day during that week would be the
18 appropriate day, but that possibly would be an appropriate week for the Tribunal.

19 Those were the issues that we identified.

20 MR. ROBERTSON: Ma'am I appear for Makers, and my learned friend, Mr. Ward, appears for the
21 OFT. Can I, maybe in the spirit of Eurovision, take those points in reverse order because I
22 think it is slightly easier to deal with it in that way?

23 Diary for the hearing the week of 31st July, that would be fine.

24 THE CHAIRMAN: We noted you were saying you wanted it I think before August.

25 MR. ROBERTSON: If the Tribunal has looked in its diary, beginning of August, well if that is as
26 soon as it can come on then we are happy to work to that and it should not be any problem.

27 The issue of the Praters’ Appeal: I have had an informal discussion with Mr. Ward
28 this lunch time and the way we see it ourselves is that the OFT Defence is due for 6th June in
29 Makers; obviously until we see that Defence we cannot see if there are any points to which we
30 might need to serve a Reply and so what I would ask for is a direction that we have liberty to
31 serve a Reply (if so advised) and to have 14 days from their Defence in which to do that, and
32 that would take us to 20th June for a Reply. The significance of that date is that the OFT’s
33 Defence in Praters’ is due on or around 20th June as well, so procedurally we would have the
34 pleadings all more or less closing at more or less the same time, and then we can work towards
35 skeletons and the hearing.

1 THE CHAIRMAN: The only question is whether there are any issues of confidentiality which might
2 make it difficult to run the penalty cases together, and we will have to see about that.

3 MR. ROBERTSON: Yes.

4 THE CHAIRMAN: The Defence in Praters is actually 13th June.

5 MR. ROBERTSON: Right. Well, ma'am in that case if we serve any Replies – I think it has
6 probably got to be two weeks after getting the OFT's Defence – we are more or less going to
7 know where we are in the middle of June.

8 Going back up the batting order, *JJB* and *Argos* I will put to one side for the time
9 being – I need to take instructions from those sitting behind me, they have been sitting in the
10 Court of Appeal for the last two weeks, they are acting for parties in those cases.

11 THE CHAIRMAN: I do not know if we have an indication of when the Decision will be.

12 MR. ROBERTSON: If I could just take instructions on that now? (After a pause) The Court of
13 Appeal gave no indication. Perhaps if we return to whether they have any impact?

14 THE CHAIRMAN: Yes.

15 MR. ROBERTSON: Do we need to cross-examine the OFT in relation to the point raised by Mr.
16 Bowman? If I could just turn to the paragraphs of his witness statement?

17 THE CHAIRMAN: Paragraphs 42 and 46.

18 MR. ROBERTSON: In relation to para. 42, this is Mr. Bowman's recollection. At the moment,
19 until we see by way of their Defence – if they have some documentary evidence that definitely
20 demonstrates that it was shown and he just cannot remember it, then that is it, I do not think we
21 need to cross-examine on that point, but we will have to wait and see.

22 THE CHAIRMAN: Yes, but if it is just oral evidence between the two – if you have documentary
23 evidence and he was just mistaken, otherwise it could go to credibility.

24 MR. ROBERTSON: Yes. We will obviously take instructions on that and that is a point that might
25 have to be dealt with by way of reply. At this stage I would not anticipate cross-examination,
26 but we may need to cross-examine the witness on that. I do bear in mind my learned friend's
27 submissions for this hearing, that the OFT did not expect to call any witness.

28 THE CHAIRMAN: That is right.

29 MR. ROBERTSON: We will have to wait and see. In relation to para.46, again this is Mr.
30 Bowman's recollection of what was said – or was not said – at that meeting, and again if there
31 is a contemporaneous record that is put to him he can either say “No, I really do not
32 remember”, but I think that is a point to be put in cross-examination to Mr. Bowman, not the
33 other way around - again, subject of course to the reservation I have just made as to what is
34 actually put in the OFT's Defence. So at the moment I would not expect to see cross-
35 examination on those two very short, discrete points.

1 That takes us to the first point on the list of points.

2 THE CHAIRMAN: The confidentiality point. That is a point for Mr. Ward, is it not?

3 MR. ROBERTSON: I think it is. Our position is we would like to see the penalty calculations

4 because we want to make submissions about treatment.

5 THE CHAIRMAN: I think the OFT do not have a problem showing you the penalty calculations.

6 The only question that might arise is that they show figures of third parties.

7 MR. ROBERTSON: Well I will leave Mr. Ward to address you on that obviously.

8 THE CHAIRMAN: Maybe they have dealt with it.

9 MR. ROBERTSON: So putting *JJB* and *Argos* to one side, whether that is the substantive element

10 of what is in issue in the Appeal and has any bearing on this case, putting that on one side and I

11 will address you again on that if I need to, or if we hear that the Court of Appeal have not

12 indicated as to when they are going to hand down their Judgment in the case – one would hope

13 it would be before the summer vacation in which case we would have it in advance of the

14 hearing on 31st.

15 THE CHAIRMAN: Unless they are going to do it over August, they have three heavy Decisions

16 from this Tribunal to deal with.

17 MR. ROBERTSON: Well we are in the hands of the Court of Appeal then.

18 THE CHAIRMAN: And they have all their other work as well. One of the issues, I think, in those

19 appeals is the overall jurisdiction of this Tribunal in relation to penalties. I am putting that

20 rather widely, but I think it is a rather wide issue. I do not know if that was dealt with, but if it

21 was ----

22 MR. ROBERTSON: If I can just take instructions again?

23 THE CHAIRMAN: Yes.

24 MR. ROBERTSON: (After a pause) I am instructed that it was, in broad terms, an issue and in

25 particular the issue of the extent to which the Tribunal is bound by the OFT's Guidelines on

26 imposing penalties.

27 THE CHAIRMAN: Which this Tribunal has said it is not really bound by.

28 MR. ROBERTSON: That is right, as I think we expressed in our Notice of Appeal, the Tribunal

29 considers it *de novo*.

30 THE CHAIRMAN: Yes, which means that if the Decision is not out it might not be appropriate to

31 deal with the penalties.

32 MR. ROBERTSON: Which would then argue for having a split trial in Makers just on our ground

33 one infringement, and the two issues are separate and discrete – ground one obviously has a

34 bearing on ground two, but you can decide ground one without deciding ground two.

1 THE CHAIRMAN: If the Decision is going to come out in August effectively – it cannot be handed
2 down in August – if it is not going to be decided before 31st July then it probably will not be
3 handed down until October, save if the Court of Appeal knew that we were waiting on it then it
4 might be that they could during the vacation, and if there was a very close time period so that
5 we would not have actually written our Decision yet ----

6 MR. ROBERTSON: Yes.

7 THE CHAIRMAN: -- the time gap is not really very appropriate.

8 MR. ROBERTSON: I think also, in an ideal world, if we proceed to the basis that we are going to
9 have a hearing on 31st July, if the Court of Appeal hands down before then, then we are in a
10 position – or the parties are in a position – to make submissions. It might be necessary to
11 revise that if it turns out that the Court of Appeal is not going to be handing down a Judgment.

12 THE CHAIRMAN: Well, subject to what the OFT says, and they may have different knowledge
13 about this, maybe we should proceed on the basis that they will hand down their Decision by
14 31st July, because it is quite a long time, 31st July.

15 MR. ROBERTSON: That is much our preferred option.

16 THE CHAIRMAN: And they are supposed to hand down within three months, and that actually
17 would be nearly three months, would it not?

18 MR. WARD: Just about.

19 THE CHAIRMAN: Just about, yes, so one would hope that they would have handed down by then.
20 It would mean that if they handed down on the last day of Term ----

21 MR. ROBERTSON: I think the last day of Term is a couple of days before 31st July – from memory.

22 MR. WARD: It says in my diary the 31st is the last day of the Term – Monday, 31st.

23 THE CHAIRMAN: Well I think we will have to see what happens; we will see what the OFT says.
24 Thank you.

25 MR. WARD: If I may deal with those points in the order that Mr. Robertson dealt with them? First,
26 we have no problem at all in the week that you have indicated from 31st July, we would
27 welcome that.

28 Secondly, it does sound sensible for Praters and Makers to serve a Reply at or around
29 the time that Mr. Robertson volunteered. Bearing in mind that some of what we will be saying
30 will, of course, be new, it is right to say that it is likely a Reply will be needed. It is new
31 because, of course, it is meeting the new case. So that does seem, if I may respectfully say,
32 sensible.

33 Dealing then with the *JJB Argos* case, I think also the OFT would not welcome a
34 general cessation of CAT business pending the outcome of that case although we do agree it
35 could well be relevant not only to the issue of quantum but also to the issue of liability as well,

1 because the Court of Appeal is considering the question of whether agreements or concerted
2 practices were made out in those cases. I have not been involved in them personally so I do
3 not know what the detail of the argument was before the Court of Appeal, but it is not
4 inconceivable at all that something will be said that might have a bearing on this case. In my
5 respectful submission the right approach is to go forward with the timetable that is being
6 suggested and then whenever the Judgment comes out we will simply deal with it. If it is
7 necessary to re-open submissions after the hearing that would be regrettable but perhaps
8 unavoidable. As you have intimated, ma'am, that it is conceivable that it will not come out
9 until after the summer – perhaps unlikely but not absolutely out of the question given the
10 weight of those cases.

11 THE CHAIRMAN: It would be unfortunate if they have done it in the beginning of August and then
12 it is left until 1st October to deliver it and we did not have it. I think we will have to, as you
13 say, play it by ear and nearer the time reassess the position. In the meantime they may deliver
14 it.

15 MR. WARD: On Mr. Bowman's witness statement, as Mr. Robertson rightly says the OFT is not
16 planning to adduce any evidence, but simply to cross-examine on those two particular
17 paragraphs using the documents which have been appended to the statement of objections.

18 THE CHAIRMAN: But on 42 and 46, if you cross-examine on that you need some evidence on
19 which you are going to fix because it is oral statements, is it not?

20 MR. WARD: Yes, we do have what we submit is appropriate material on which to cross-examine,
21 and to the extent that the matter stands we will make submissions about its importance
22 because, on any view, it is clearly not the heart of the argument in this case.

23 THE CHAIRMAN: No, it would only go to credibility – it may just be a mistake and not really go
24 credibility at all.

25 MR. WARD: One might take the view as to whether or not it would be best use of the Tribunal's
26 time to adduce oral evidence on that on the part of the OFT.

27 Before moving on to confidentiality and disclosure, whilst we are still really on the
28 topic of documentation, it is right that we point out before the Tribunal today that it is possible
29 that the OFT might be producing some more documentation. In the exchange of skeleton
30 arguments you will have seen that the OFT is quite willing to submit to an order for disclosure
31 of what would have been the access to the file materials – I actually have the file here – and
32 assuming that you make the order we will hand it over now. It is possible that we will want to
33 rely on some of those documents as part of the cross-examination, as part of the case against
34 Makers' new case, when we come to the hearing. I cannot commit myself one way or the
35 other yet because we simply do not know. Of course, that would raise issues if we were

1 merely trying to augment the existing decision. We do say that that is not what I am talking
2 about at all, and of course Mr. Robertson can raise that point later if he thinks that what we are
3 trying to do is impermissible. What I am envisaging is simply in support of the cross-
4 examination against what we characterise as, in effect, a new case. I do not wish to commit
5 myself one way or the other because we have not reached the point of deciding whether that
6 will be the case.

7 THE CHAIRMAN: Ordering disclosure and using it as evidence are two different things.

8 MR. WARD: Absolutely, but it is right, I think, that we flag it up now. In addition, there is one
9 particular issue which arises in the detail of the Notice of Appeal, namely the extent of the
10 turnover of Coverite, which is quoted in the Notice of Appeal; there is an issue about that and
11 we may make some limited disclosure of documents relating to where the Coverite turnover
12 figures came from that were used in the calculation of the penalty because that seems very
13 fairly and squarely put in issue by the Notice of Appeal.

14 THE CHAIRMAN: Does Coverite have confidentiality in that material?

15 MR. WARD: Well it does indeed and, of course, it is subject to whatever you may see fit to order on
16 that front.

17 THE CHAIRMAN: Have you approached Coverite about it?

18 MR. WARD: No, no.

19 THE CHAIRMAN: Is it appropriate for us to make an order if you have not yet approached Coverite
20 in relation to it?

21 MR. WARD: Perhaps not, perhaps not. But again, I am rather anticipating something which we
22 have not yet got to in truth. This question has only just arisen and obviously needs to be dealt
23 with properly and Coverite's confidentiality has to be respected, but again I am mentioning it
24 now simply so that the Tribunal appreciates what it is that we have in mind.

25 Finally under this head, of course the big issue here is how the stage 3 uplift for
26 deterrence was calculated and what we have said in our skeleton argument (which happily
27 seems to coincide with what Makers have actually asked for) is that we will produce, appended
28 to the Defence, an explanation of the calculation and you may have seen that the OFT wrote,
29 which was referred to in the Notice of Appeal talking about the minimum deterrence threshold.
30 We will explain exactly how that works in the Appeal.

31 One thing I would like to flag up now, if I may, is the extent to which that explanation
32 will go. How the minimum deterrence threshold worked was that in certain cases, including
33 this one, a minimum threshold of 0.75 per cent. of total turnover was applied and the OFT's
34 case will be that that was applied consistently across the three cases in which it was applied at
35 all. Then, of course, it will be for you to hear submissions about the adequacy or otherwise of

1 that. As the letter explained that figure was actually derived from the work done by the OFT in
2 other roofing cases – as you know there have been five such Decisions – and it was done in
3 fact in the name of consistency. What we do not propose to do is to reopen the thinking that
4 went behind that figure. Of course the issue for CAT will be whether the overall penalty is a
5 proportionate one having regard (to some extent at least) to the OFT’s guidance. The real
6 question is, is the overall figure in this case £526,000 proportionate and is it, of course,
7 consistent with the other penalties which have been imposed in this case? We do not propose
8 to adduce evidence explaining exactly how that 0.75 per cent. was ever arrived at in the first
9 place because really the issues are: is it proportionate overall and is there some element of
10 discrimination vis-à-vis the way the other Appellants in this case were treated?

11 THE CHAIRMAN: There are two stages are there not? There is the stage of how do you get to the
12 0.75 per cent.?

13 MR. WARD: Yes.

14 THE CHAIRMAN: Maybe there are three stages – is it proportionate within this Decision?

15 MR. WARD: Yes.

16 THE CHAIRMAN: And then query, is it proportionate across the board in relation to all decisions?

17 MR. WARD: Yes.

18 THE CHAIRMAN: Are you saying you are not going to adduce or explain how you get to the 0.75
19 per cent. at all?

20 MR. WARD: We were not planning to, save for explaining that it derives from the West Midlands’
21 Decision which came first, and then in an attempt to attain parity across the Decisions that
22 followed this 0.75 per cent. figure was arrived at and, indeed, in some cases it is 1.05 per cent.
23 but you will have seen that in the letter as well. What we are not keen to do is to turn this
24 Appeal into an audit of all five of the roofing Decisions, each of which contain numerous
25 parties and numerous different alleged concerted practices. The actual scope of the critique in
26 this case in the Notice of Appeal is really confined to two things: first, is it proportionate? For
27 this, in a sense, the OFT’s reasoning does not matter. It helps the Tribunal to see how the OFT
28 got to where it did, but we entirely accept, of course – subject to what is said in the
29 forthcoming Judgment – that the CAT is forming its own judgment about the proportionality of
30 the Appeal. In respect of the question of discrimination the allegation here in a sense is that
31 Coverite and/or Praters have been given preferential treatment. So to that extent again we were
32 very reluctant to go into what one might call a large scale audit of the four previous roofing
33 decisions. I thought it was right to flag that up now so it is not said later that the OFT has
34 somehow failed to adduce the evidence that was required to dispose of the Appeal.

1 THE CHAIRMAN: Even if we take a broad brush approach and start *de novo*, do we not need to
2 have some feel for how one gets to the percentage, whether it is 0.75 or some other figure –
3 you are going to try and justify the 0.75 are you not?

4 MR. WARD: We are trying to justify the overall proportionality of the penalty, obviously. That is
5 the big question. The explanation that we are planning to adduce is simply to say that this 0.75
6 figure has been applied in these other cases and was ultimately derived from the way the
7 penalties were imposed in the West Midlands' case.

8 THE CHAIRMAN: Is the West Midlands' case the case that I dealt with?

9 MR. WARD: Yes, the *Apex* and others.

10 THE CHAIRMAN: *Apex* and *Price*?

11 MR. WARD: Yes, exactly, which I think was the first in time of the roofing Decisions, when it was
12 actually adopted.

13 THE CHAIRMAN: Did we deal with the 0.75 in that?

14 MR. WARD: No.

15 THE CHAIRMAN: No, I did not think we did.

16 MR. WARD: We dealt with the overall question of proportionality but there was no specific
17 challenge to the Stage 3 penalty in that case.

18 THE CHAIRMAN: And is there a change here to the 0.75?

19 MR. WARD: Not directly. There is a challenge to ----

20 MR. ROBERTSON: No, ma'am, there could not be, it was not ever explained in the Decision. The
21 first time 0.75 was explained to us was in correspondence after the Decision from the OFT.
22 There is not an explanation in this Decision. There is not an explanation of West Midlands
23 (the first case) either, and I know that because I acted for one of the units' applicants who did
24 not appeal in that case. So this is the first time that it has been exposed to the Tribunal, and it
25 does call for a full explanation from the OFT.

26 MR. WARD: I entirely accept all of that without hesitation. The real question that I am ventilating
27 is how much explanation is required? Is it necessary to go through the mathematics of all the
28 Appellants in all of the roofing cases? That information, of course, is confidential. So in a
29 sense I suppose one could put it this way: is the infringement of confidentiality that that would
30 entail and, indeed, the added complexity that that would entail for this appeal in any way
31 justified?

32 THE CHAIRMAN: That is why I put it in three stages – do you need to look at the individual cases
33 to explain how you get to 0.75? Or can you not explain how you get to 0.75 in a neutral way?

34 MR. WARD: Well that is precisely what we intend to do – the latter.

35 THE CHAIRMAN: Ah, right.

1 MR. WARD: I did not intend to present it as a bald figure. What I do not intend to do either is go
2 through the minutiae of how the calculations were done in apex, price, and whether ----

3 THE CHAIRMAN: That is the next stage, is it not? You first have to decide what your percentage
4 is going to be, so you will have to justify the 0.75. Then you apply the 0.75 in various cases
5 and what you are saying is you are not going to do that in any case except the three cases here?

6 MR. WARD: Precisely so, ma'am.

7 THE CHAIRMAN: And so that we do not look at confidential information in the other cases, or the
8 amounts that actually arose in those cases and the fines that were made. But you are going to
9 produce evidence in relation to how you get to 0.75?

10 MR. WARD: Yes, by way of an explanation as opposed to arithmetic?

11 THE CHAIRMAN: Yes.

12 MR. WARD: Yes, certainly. What we had in mind, of course, was to disclose the calculations in all
13 of the appeals that form this Decision, not just those three.

14 THE CHAIRMAN: Yes.

15 MR. WARD: So that one can examine questions of parity between the cases where the 0.75 was
16 applied and the cases where the 0.75 was not applied at all.

17 THE CHAIRMAN: Does that cause you to disclose confidential information?

18 MR. WARD: It does, and that is of course subject to the order that you have been invited to make by
19 Mr. Robertson.

20 THE CHAIRMAN: And that is dependent on whether it would be appropriate before we made that
21 order, that those parties were approached in relation to confidential information so they
22 could ----

23 MR. WARD: That is obviously a matter for the Tribunal to consider.

24 THE CHAIRMAN: We do not know if there is a claim to confidentiality effectively.

25 MR. WARD: Here, as ever, the OFT is caught in the middle, in the sense it is not the OFT's
26 confidential information at all.

27 THE CHAIRMAN: No, absolutely.

28 MR. WARD: The OFT is obviously concerned that the issue is properly considered and what we
29 have tried to indicate in our skeleton argument is that if the Tribunal considers it is appropriate
30 – and we quite see why the issue arises – then we are, of course, not going to obstruct an
31 appropriate order.

32 THE CHAIRMAN: But – was it in *Umbro* – where the order was made, were the parties with the
33 confidential information approached first? I think they were.

34 MR. WARD: I believe they were through the Tribunal.

35 THE CHAIRMAN: Yes, and then their claim to confidentiality was overruled.

1 MR. WARD: Would you excuse me one moment?

2 THE CHAIRMAN: Yes.

3 MR. WARD: (After a pause) We do know, of course that Coverite in particular is actually in
4 administration, which I am reminded of, but that does not preclude it, I suppose from asserting
5 a claim for confidentiality.

6 THE CHAIRMAN: No, because it is not in liquidation. If it is in administration it may be being
7 sold, so that sort of information I do not know if there would be a claim or not.

8 MR. WARD: No, I reiterate, in a sense this is not an area where the OFT is seeking to push the
9 Tribunal one way or the other. They just see the sense of why Mr. Robertson wants to see this
10 information to make good his appeal – or at least to have his appeal examined.

11 (The Tribunal confer)

12 THE CHAIRMAN: I am being reminded that in *Umbro* part of the information was that of the
13 Football Association, and they were not before the Tribunal, but I think they were asked and
14 then it was overruled.

15 MR. WARD: Yes, their objections were considered by the Tribunal in that Decision, so they
16 certainly had a chance to be heard. Of course, the OFT has no objection whatsoever to some
17 kind of course being adopted by the Tribunal that allows that to happen.

18 THE CHAIRMAN: And we could then deal with it on the Praters' CMC – it would be a way of
19 dealing with it.

20 MR. WARD: The only difficulty that arises, of course, is the OFT's Defence. The present intention
21 is that it will refer to this information. They can, of course, be served separately in the sense
22 that the body of the Defence need not contain any of the confidential details and the
23 calculations will be put into a separate annex and schedule in any event, so that may be a
24 relatively trivial problem.

25 (The Tribunal confer)

26 THE CHAIRMAN: Mr. Robertson, did you want to say something about confidentiality?

27 MR. ROBERTSON: I only wanted to add that in the football shirts' case it was the Tribunal that
28 wrote to the parties rather than the OFT, and we would invite the Tribunal to do that, and we
29 would be happy for any objections to be dealt with by the case management conference also
30 taking place on 6th June, since the Tribunal has already got that date in their diary.

31 THE CHAIRMAN: It is unfortunate if we have to have the costs of two CMCs rather than one CMC
32 (i.e. today's) but it may be that everybody has to come – I do not know what is going to
33 happen with the idea of doing it consecutively, etc. and whether you would be coming on the
34 Praters' CMC in any event.

1 MR. ROBERTSON: I do not think we would be appearing there otherwise. I think it is just on this
2 issue of confidentiality, but it is clearly highly important on ground 2 and we would rather it
3 was dealt with properly than somehow ----

4 THE CHAIRMAN: Why do you think the Tribunal should do it in this case rather than the OFT
5 doing it?

6 MR. ROBERTSON: I was just drawing the Tribunal's attention to the fact that there was a
7 precedent for the Tribunal writing to the parties.

8 THE CHAIRMAN: I cannot remember why the Tribunal did do it in that case, but there was a
9 reason.

10 MR. ROBERTSON: If I can take instructions from those instructing me who were there. (After a
11 pause) We are not absolutely certain in that case why there was not necessarily a clear
12 reason ----

13 THE CHAIRMAN: I was not in the case, but my recollection is that there was some special reason
14 why there was a problem, and that is why it was easier for a neutral party to do it. I do not
15 think there is a problem in this case.

16 MR. ROBERTSON: If the OFT is prepared to do it, then of course I am happy as long as it is
17 subject to the jurisdiction of the Tribunal to reserve any disputes as to the disclosure of this
18 information. I suspect a lot of it has ceased to be confidential through passage of time.

19 MR. WARD: No doubt that those behind me have no objection to doing it.

20 THE CHAIRMAN: I think it is easier, and it will be quicker.

21 MR. WARD: If that what the Tribunal prefers then I am sure it can be done.

22 THE CHAIRMAN: Yes. So on confidentiality you will write forthwith ----

23 MR. WARD: Yes.

24 THE CHAIRMAN: -- and see if there is any objection?

25 MR. WARD: Yes.

26 THE CHAIRMAN: And hopefully that can be resolved in the next week?

27 MR. WARD: Well if we write immediately and indicate in the letter that if there is any dispute that
28 you have indicated you would like it dealt with at the 6th June case management conference
29 then that at least puts them on notice that they have to move quickly if they are going to move
30 at all.

31 THE CHAIRMAN: Absolutely, and then we can deal with it on 6th June. Meanwhile you would put
32 the information in a schedule and you will blank it out ----

33 MR. WARD: Yes.

34 THE CHAIRMAN: -- and it can just be substituted hopefully on 7th June?

35 MR. WARD: Yes.

1 THE CHAIRMAN: Unless, of course, they write back and say they do not have a problem ----
2 MR. WARD: In which case we will just proceed.
3 THE CHAIRMAN: -- and then you can probably just get on, yes.
4 MR. WARD: And perhaps we will take the same approach to the information regarding the Coverite
5 turnover in particular.
6 THE CHAIRMAN: Yes, the same thing. So the bundle that you have, has that got the confidential
7 information in?
8 MR. WARD: Would you just excuse me a moment?
9
10 (The Tribunal confer)
11 MR. WARD: (After a pause) Two matters, ma'am. **This** file, apparently there is nothing in **here**
12 that is confidential or raises any issues, so that we can hand over in due course. I have just had
13 handed to me a note about the fate of the various parties in this Appeal since the Decision was
14 made.
15 THE CHAIRMAN: Oh dear!
16 MR. WARD: Pirrie is in liquidation, Asphaltic is thought to be probably no longer on the
17 Register ----
18 THE CHAIRMAN: What, you mean struck off?
19 MR. WARD: Yes. Rock in administration/struck off, and then Coverite we also know is in
20 administration. So whether we can get quick or clear answers from any of those parties
21 remains to be seen. Then at least if we try then the Tribunal will be in a more informed
22 position to make a Ruling on 6th June.
23 THE CHAIRMAN: Well if there is a problem it may be that we can deal with it in a confidentiality
24 ring.
25 MR. WARD: Yes. At least this way we try and if we can obtain a clear answer there is no problem.
26 THE CHAIRMAN: Then we do not have a problem, otherwise we may be able to do it on a
27 confidentiality ring. I think after 6th June we should try not to hold up this case because of the
28 confidentiality, especially if the companies have been struck off. If the companies have been
29 struck off then do they have any confidentiality, because they are no longer there?
30 MR. WARD: There is nobody to assert it?
31 THE CHAIRMAN: No, there is nobody to assert confidentiality and they would have to be
32 reinstated for that to happen. If there is a liquidator then somebody can think about that. But if
33 they have been struck off, they are not there any more so there cannot be any confidentiality,
34 can there?
MR. WARD: It is difficult to see how there could be.

1 THE CHAIRMAN: But if they are in administration that is different, but there is an administrator
2 there.

3 MR. WARD: Yes, well we will see where we can get with that, because it may be when it is
4 examined properly that that is not the whole position or the whole story, but we will certainly
5 try.

6 THE CHAIRMAN: So has it turned out that Praters and Makers are the only two companies that
7 have survived the fine?

8 MR. WARD: As far as I understand it, yes – suggesting the fine was obviously a modest one!
9 (Laughter) Ma'am, I have dealt with everything that you raised at the beginning of the hearing
10 – unless there is anything else?

11 THE CHAIRMAN: Thank you. Mr. Robertson were you going to say something else – you look as
12 though you are just about to stand up.

13 MR. ROBERTSON: Not on confidentiality, but there is one outstanding matter ----

14 THE CHAIRMAN: Is that on the 0.75?

15 MR. ROBERTSON: No, the outstanding matter is a disclosure of documents. As Mr. Ward
16 reminded the Tribunal Makers did not seek access to the file during the administrative
17 procedure for reasons of explaining their Notice of Appeal. He has said at point 5 of his
18 skeleton argument that they are happy to give access to the file now if the Tribunal are
19 prepared to order it. He did not think that there would be very much there that was not already
20 disclosed in the Statement of Objections, and I think just to ensure that we are fully in the
21 picture we would seek access to the file and if it is necessary for that to be dealt with by way of
22 an order of the Tribunal then we would seek that order, but I would have thought it could be
23 dealt with by way of undertaking from the OFT.

24 THE CHAIRMAN: If they have been entitled to access to the file before surely it could be done as a
25 matter of course.

26 MR. WARD: There is no objection at all in principle, and just for clarification this file that I was
27 holding up are the documents that the OFT thinks could possibly be of any relevance to this
28 particular infringement. This is the entire index of the entire file for the Decision, but of
29 course the bulk of it deals with the other alleged concerted practices or agreements.

30 THE CHAIRMAN: Yes.

31 MR. WARD: But of course we will provide the index, in fact, I think this was provided with the
32 Statement of Objections but we will provide it in addition to **this** file and if there are other
33 documents that they wish to inspect then the OFT has no objection.

34 THE CHAIRMAN: So Makers will get access to the file as they would have ----

35 MR. WARD: As they would have and to that extent.

1 THE CHAIRMAN: And that does not need to go into an order, that should be able to be done ----
2 MR. ROBERTSON: I am very happy for my learned friend's confirmation.
3 THE CHAIRMAN: Is that all right?
4 MR. WARD: Yes, I think that we thought that an order might be preferable just in case there was
5 some form of arcane procedural problem in granting access to the file at a later stage than was
6 envisaged by the Rules.
7 THE CHAIRMAN: Does the OFT feel that they would like an order in this case?
8 MR. WARD: Yes, then there can be no dispute about the power to do so, or any subsequent
9 argument, or argument in another case, or anything of the kind. It is just clear the basis that it
10 has been done.
11 THE CHAIRMAN: Yes, we will make an order that they are entitled to access to the file as they
12 would have had during the OFT investigation.
13 MR. WARD: Thank you very much.
14 MR. BLAIR: I just wondered, Mr. Ward, whether the extent to which you were going to re-open (or
15 not re-open) the 0.75 matter in the Defence. I have read the letter of 12th April with some
16 care, and it would help me, I am bound to say, to know a little bit more about the basis on
17 which the deterrence figure is arrived at. In particular, it seems to be a disembodied figure that
18 runs across the board without regard to the length of the alleged infringement or the number of
19 cases concerned, or indeed the mental element or knowledge of the persons concerned. Now,
20 if that is its nature, it would be helpful to have that set out a bit in the defence, so that we can
21 understand what that stage of the five stages is seeking to do.
22 MR. WARD: Well sir, that we will do.
23 MR. BLAIR: Thank you very much.
24 THE CHAIRMAN: Is there anything else? No. So if we go back to the agenda for a moment, just to
25 make sure that we have dealt with everything. The issues likely to arise - I think they are
26 going to be clearly set out in the pleadings so I do not think we need a special order in this
27 case. The documents we have dealt with. Confidentiality we have dealt with. Witnesses we
28 have dealt with. This is not a case where we are going to be able to have any agreed facts in
29 relation to the issues, and the timetable we have dealt with. Any further issues? Well if there
30 are issues arising from today then they should be dealt with on 6th June, and we could have a
31 CMC in this and in Praters. I do not want to add to the costs so if that can be avoided that
32 would be better. Is that an appropriate way of dealing with the matter?
33 MR. ROBERTSON: Yes, if we can deal with things in correspondence then we will do so. If you
34 consider that the right course is for Praters to be heard consecutively, then there is no problem.
35 I do not know who is representing Praters but if the points are similar then you may want some

1 sort of co-operation and you may only want one counsel rather than two submitting different
2 things – I do not know how you want to deal with that, and that might need to have a little bit
3 of consideration, and I will say the same to Praters.

4 MR. ROBERTSON: Yes, we will certainly give that consideration and make the appropriate
5 contacts.

6 THE CHAIRMAN: It may be that they are completely separate and each will have their own
7 submissions.

8 MR. ROBERTSON: We certainly do not want to be addressing duplicate submissions to the
9 Tribunal.

10 THE CHAIRMAN: Or the question of contradictory submissions.! Nothing else? Thank you very
11 much.

12 (The hearing adjourned at 2.50 p.m)