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**IN THE COMPETITION**

Case No. 1072/1/1/06

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

Friday, 9<sup>th</sup> March 2007

Before:  
LORD CARLILE OF BERRIEW QC  
(Chairman)

DR. ARTHUR PRYOR CB  
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED  
PRECISION CONCEPTS LIMITED

Applicants

and

OFFICE OF FAIR TRADING

Respondent

Mr. Matthew Cook (instructed by M&A Solicitors, Cardiff) appeared for the Applicants.

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

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**PROCEEDINGS AFTER  
JUDGMENT HANDED DOWN**

1 THE CHAIRMAN: Good morning. I just want to deal with one or two other things  
2 before we come to costs, if you would just bear with me for a moment.  
3 First, I want to say something about confidentiality, if I may, on behalf of the  
4 Tribunal. We have received some submissions from the co-infringers that  
5 various elements of the OFT's fining method should be kept confidential. They  
6 raise the possibility that readers of our Judgment may be able to make various  
7 deductions. We have considered those arguments. However, we have  
8 concluded that it is in the public interest that the elements of the fining method  
9 in this case should be known, otherwise business and the general public would  
10 be ill-informed of the approach of the Office of Fair Trading and the Tribunal in  
11 cases such as this. There may be cases in which a different approach could be  
12 justified. This is not one such case.

13 The second issue I wanted to raise before we come to costs relates to para.43 of  
14 what you will have received as the Draft Judgment. At the end of para.43, and  
15 this amendment appears in the printed version now because the change has been  
16 made, the last sentence will now read, "However, a penalty of £180,000 would  
17 be very detrimental". In other words, three lines of the draft have been  
18 removed.

19 Now we come to the question of costs unless anyone would like to say anything  
20 about those matters.

21 MR. COOK: Sir, only to say thank you on behalf of my client for making that  
22 amendment.

23 THE CHAIRMAN: Thank you for thanking us, very courteous. Yes, Mr. Ward?

24 MR. WARD: You do have, I hope, before you a written submission on costs.

25 THE CHAIRMAN: We have. I should say, Mr. Ward, and this may help counsel,  
26 that the Tribunal have carefully read and, without reaching any conclusions  
27 finally, have discussed the written submissions that we have received on the  
28 question of costs. So please do not think that you have to, or indeed that it  
29 would be particularly helpful for the Tribunal, rehearse the excellent written  
30 submissions that have been most helpful to us, but we are very happy to  
31 consider any additional points you wish to make, or any reinforcements you  
32 wish to add.

1 MR. WARD: Sir, I have no additional points to make at all. In the light of what you  
2 have said I will be extremely brief and will merely make what I submit are the  
3 central points that we say support an award of costs in this case.  
4 Firstly, of course, the Tribunal has a general discretion as to the award of costs;  
5 secondly, and very importantly in my submission, the Tribunal's own case law  
6 has evolved in this area. We set out a quote from the *Argos* and *Littlewoods*  
7 Costs Judgment, which I will not take you through as I appreciate you have read  
8 it, but, as you will have seen, the position has moved away from there being an  
9 inclination to lean against costs orders, and there is a general jurisdiction to  
10 award costs.  
11 What we have done in para.5 of the skeleton argument is set out what we say  
12 are the factors that militate in favour of an award of costs in this case. Really  
13 there are three that are particularly important, although para.5 contains a  
14 number of subsidiary points. One is that this was a very serious infringement,  
15 as the Tribunal found. Secondly, the OFT has prevailed on every ground in the  
16 Appeal. Thirdly, we rely on the conduct of the Appellants, and you will have  
17 seen that we have listed a number of matters that arose in the course of the  
18 Appeal which have served to increase the OFT's costs simply from the way the  
19 appeal was prosecuted by the Appellants.  
20 Then perhaps very briefly, the fourth point is simply this: in a number of the  
21 penalty cases where the OFT has not received an award of costs the Tribunal  
22 has said that, in effect, the OFT's conduct was partly responsible for the Appeal  
23 being brought. So, in the *Apex* case, the OFT failed to follow the Rule 14  
24 Notice procedure properly and failed to give reasons on one particular point.  
25 The Tribunal said – and these are not the Tribunal's words – that it is hardly  
26 surprising there was an appeal. Here the Decision has been defended entirely in  
27 its own terms and the Tribunal has not in any way criticised the OFT's conduct.  
28 There are a number of subsidiary further points in the written submission, as  
29 you will have seen, but unless I can assist further those are my submissions.

30 THE CHAIRMAN: Thank you very much, Mr. Ward. Mr. Cook?

31 MR. COOK: Sir, I am afraid I will be slightly longer because I want to address  
32 Mr. Ward's para.5, which obviously raised a number of detailed points that now  
33 is my opportunity to respond to.

34 THE CHAIRMAN: Of course.

1 MR. COOK: Just quickly to start off with the Tribunal's case law in this area,  
2 I obviously recognise that the Tribunal has leaned very hard about establishing  
3 any form of general rule or general principle in this area and it is very much a  
4 case by case jurisdiction. I am not suggesting that there are rules that must be  
5 followed by any means.  
6 What one has, sir, in my submission, in relation to the evolving judgment we  
7 have had on costs is the initial starting off with the view that the Tribunal would  
8 lean against an award of costs. While it is fair to say there has been some  
9 rowing back, there have been particular factors that have been identified as  
10 potentially justifying costs.  
11 The two most significant factors that have been identified are, one, the concept  
12 of keeping cases within manageable bounds, and that is something that I can,  
13 I hope, dismiss very quickly because Mr. Ward accepts that this was a case that  
14 was kept within manageable bounds.  
15 The second point is, and it comes out of a judgment that was quoted at para.4 of  
16 Mr. Ward's submissions, the fact that especially in heavy price fixing cases  
17 involving substantial undertakings there may be strong reasons for considering  
18 orders for costs. Of particular importance, I would say, is that it talks about  
19 "substantial undertakings", and one can clearly understand why in a case, as  
20 that one did, involving something of the scale and size of Argos and  
21 Littlewoods, there is a view that if companies of that scale and size run up costs  
22 the public purse should not necessarily have to bear them.  
23 My submission is going to be that neither of the companies concerned –  
24 Precision Concepts and clearly not DQS – are substantial undertakings. This is  
25 a point that Mr. Ward has dealt with in his para.5, it is picked up at para.5(3),  
26 where he refers to the point and suggests that it is not as a matter of conjecture  
27 about how substantial the undertaking is, and refers, quite rightly of course, to  
28 the comments made by the Tribunal about how satisfactory you found the  
29 evidence put before you about the scale of the undertaking. I am not going to  
30 seek to try or, in any event, succeed in changing the Tribunal's view about what  
31 you have there, but the question is, having taken into account all you have seen,  
32 obviously you have not been satisfied that the information before you  
33 demonstrated a sufficient degree of financial difficulty that this warranted a  
34 reduction in the penalty. This is, of course, a completely different question.

1 You are now being asked to consider whether this is a substantial undertaking,  
2 and I would suggest that it is very clear from the balance sheets that you have  
3 had – you have had the balance sheet of Precision Concepts and DQS – that this  
4 is clearly not a substantial undertaking. That is as far as I can take the point.  
5 I am not going to take you through the documentary information. The Tribunal  
6 will either feel that it has got enough information to take that view, or that it has  
7 not. That is my submission, these are clearly not substantial undertakings and  
8 the Tribunal’s concerns, which certainly I would suggest – though I may be  
9 wrong about this – arose in the areas about the ability to raise capital finance  
10 and about cash-flow issues. That is an entirely different matter from looking at  
11 balance sheet values, and you have had the balance sheets, as to whether this is  
12 a substantial undertaking or not ----

13 THE CHAIRMAN: You are not suggesting, Mr. Cook, that there is case law that  
14 justifies a firm conclusion that there could not be an order for costs against  
15 anything that was less than a substantial undertaking? It remains within the  
16 discretion of the Tribunal.

17 MR. COOK: Sir, as I started off by saying, I recognise that this is absolutely a case  
18 by case jurisdiction and there are a number of factors you will take into account  
19 and you will do what you consider to be right, and you are not bound by  
20 established case law. I am just referring to the two particular factors that  
21 previous Tribunals have identified as very strongly justifying awards of costs,  
22 and I would suggest that neither of them are met.

23 THE CHAIRMAN: You can take it that, in terms of the “substantial undertakings”  
24 that are referred to in the case you referred to, this is not a substantial  
25 undertaking.

26 MR. COOK: Sir, I am grateful for that indication. What I will then do, sir, is just  
27 take you very quickly through the Appellants’ response to Mr. Ward’s para.5.  
28 At para.5(a) he makes the point that this was a very seriously infringement, and  
29 that is of course what the Tribunal has found as fact. That, in my submission,  
30 while absolutely correct, is completely irrelevant to the issue of costs and  
31 amounts very much to an argument of double jeopardy. The seriousness of the  
32 infringement has been taken account of in the level of fine awarded. To then  
33 say, “Because it was a serious infringement, you have had the serious fine, you  
34 are also then going to be exposed to costs where if there was a less serious

1 infringement you might not have been” is, in my submission, effectively being  
2 punished twice for the same infringement.

3 MR. SCOTT: I think in terms of this “very serious infringement”, what we are at is  
4 an infringement for which you did not disclaim liability, an infringement which  
5 was at the intentional rather than the negligent end of the spectrum. It is not a  
6 case where we were dealing with a grey situation, it is a case where we were  
7 dealing with, as it is put in (a), a blatant infringement. I think that is really the  
8 point in (a) rather than a double jeopardy point.

9 MR. COOK: What I would say on that is this, it comes back to the same point, this  
10 was a challenge on penalties. We were always accepting that the infringement  
11 had taken place and that we were liable for that, so we have not come back on  
12 challenging the liability with a penalty case saying that the penalty awarded was  
13 inappropriate for all the reasons that you have rehearsed in the judgment most  
14 recently. I suggest that the seriousness of the infringement, we have moved on  
15 from that stage, we were not challenging that, and it comes back to why is the  
16 infringement relevant to the point of whether we should pay costs when we  
17 have brought an Appeal against the penalty. I suggest that is Mr. Ward’s point,  
18 it comes out as being a double jeopardy point, that because we were wrongdoers  
19 when we come to try and challenge the sentence, because the sentence is a large  
20 one, we have less right effectively to challenge it, or we are taking more risks in  
21 challenging it.

22 THE CHAIRMAN: That involves the proposition that costs are a sentence, or akin to  
23 a sentence, does it not? One can imagine three situations, and let me just put  
24 these to you because it may help us to clarify the matter in our own minds. You  
25 could have a situation in which there has been a penalty, but the OFT has  
26 followed procedures inaccurately or obscurely, so there is a good reason for  
27 coming to the Tribunal in order to clarify those procedures and ensure that the  
28 penalty was reached by appropriate methodology. Secondly, there can be a  
29 penalty that has been imposed on the basis of a false understanding of the  
30 economic undertaking upon which it has been imposed, and therefore there is  
31 every reason for it to be considered by this Tribunal and re-assessed. There is a  
32 third sentence, which is that a penalty has been imposed and the Tribunal comes  
33 to the conclusion that it was approached on the right methodology, that is not  
34 too much and, in a sense, it is simply a straightforward appeal against the

1 penalty. This is that kind of case. Does not someone making an appeal, which  
2 is found against on that basis, simply run the ordinary risk of litigation. They  
3 know perfectly well when they start that, if that is the result, costs are likely to  
4 follow the event, as in all civil and all criminal and administrative litigation. It  
5 even happens in the Administrative Court, save for permitted interveners.

6 MR. COOK: What I would say on that, sir, is that, of your three categories, the first  
7 two are probably going to be successful cases.

8 THE CHAIRMAN: They may not be successful cases. The Tribunal in many of  
9 those cases may say the penalty was absolutely right, but it was reached by the  
10 wrong process and therefore there will be no order as to costs because, frankly,  
11 the OFT have made a cock-up in their methodology and we are correcting that  
12 methodology.

13 MR. COOK: I mean successful in the sense that somebody comes along with a  
14 number of challenges and succeeds in those challenges. I agree that the end  
15 result may be that the number does not change, but in those circumstances you  
16 have substantially won on a number of the points that you were raising. So  
17 I would suggest that both the first two categories are cases where the Appellant  
18 would be standing up and saying, "I have substantially won". It may be a  
19 situation where sometimes the right result is reached for the wrong reasons, but  
20 the first two categories are cases of substantial success, even if the end number  
21 does not change.

22 The third category is one where you are saying the parties brought a challenge  
23 and lost. What you are suggesting, sir, and what has not been done here in the  
24 statute, is that there should be a presumption that unsuccessful appellants should  
25 pay costs. That is not what the statute has established and that is not what the  
26 case law has established.

27 MR. SCOTT: Just pausing there, the point put by the Chairman to you was that in  
28 taking the action of appealing an Appellant, whether in this case or in any other  
29 case, recognises there is a risk in costs, costs which, if they do not fall to be paid  
30 by the Appellant, fall to be paid out of the public purse. I take it that an  
31 Appellant coming before us needs to weigh that risk, bear in mind that the  
32 Tribunal has to have regard to the public purse as well as to the situation of each  
33 Appellant.

1 MR. COOK: Sir, the issue that was first considered by the Tribunal in the early cost  
2 cases on this was the desirability of a public interest that allowed people to  
3 come before the Tribunal and challenge penalties, subject obviously to doing it  
4 in a way which was not fanciful and frivolous. There are always going to be  
5 circumstances in which claims are fanciful and frivolous. If you do that you are  
6 always going to be exposed, and anyone who does that takes that risk.  
7 The public interest point that was pushed, which the Tribunal accepted and  
8 made a great deal of in the early cases, was that people who are appealing for  
9 reasons that are not fanciful and frivolous should be able to do so without  
10 knowing that necessarily there was going to be that additional burden of costs if  
11 they were unsuccessful. That is the public interest concern that I would suggest  
12 has to be weighed in the balance against obviously the concerns of the public  
13 purse.

14 THE CHAIRMAN: We have the point.

15 MR. COOK: Absolutely, sir. That is that point.

16 Paragraph 5(b), Mr. Ward says they prevailed on every ground. That is  
17 obviously right and that is a point which we would ask you to consider. It does  
18 not necessarily suggest costs following the event.

19 Paragraph 5(c), Mr. Ward accepts that it was kept within manageable bounds.  
20 He says it was a wide ranging and unsuccessful attack. It dealt with the issues  
21 which we considered the OFT went wrong on. I would again say that it comes  
22 back to the point – the Tribunal have their own view on this – whether you feel  
23 that anything we said was frivolous or completely unreasonable.

24 THE CHAIRMAN: We do not. Nobody is suggesting that it was frivolous or  
25 unreasonable.

26 MR. COOK: Paragraph 5(d), the manner in which the case was run by the  
27 Appellants. He starts off at para.5(d)(i), the change to the party. Sir, that was  
28 an incidental change to the name. It really cannot be suggested that any  
29 significant costs or any costs at all were run up in relation to that change of  
30 name point. The costs that were run up were run up by the Appellants in  
31 making submissions and the Tribunal has dealt with those. The OFT was really  
32 not involved in that.  
33 Then there was the point about whether it was going to be a trial with witnesses.  
34 There was a point in my skeleton argument which I know raised some concerns

1 with the Tribunal at the time. I suggest that actually it did turn out to be quite  
2 correct as it turned out at the hearing, and that was what I did anticipate in this  
3 case, that it was a dispute about law and everything else. There was indeed a  
4 point where clarification was sought and clarification was given. Again, the  
5 costs involved with that were minuscule in the scheme of things. That added  
6 very little, if anything at all.

7 Then we come to look at the material before the Tribunal. In fact, there was in  
8 some measure a sort of rolling process of documentation being provided. You  
9 are aware of the history, that additional documentation was provided in separate  
10 tranches. It was provided in response to, effectively, challenges by the OFT  
11 that not enough had been provided. The Tribunal has obviously found that  
12 those early challenges were more than right because we did not get to the right  
13 stage at the end.

14 What I would say on this is that if the Tribunal does feel that we should have  
15 provided more and better information and documentation ----

16 THE CHAIRMAN: I can reassure you, Mr. Cook, that there is no question of costs  
17 being ordered in this case on any basis connected with the process, the  
18 unfolding process of the appeal. That is not something that is in our minds in  
19 the least, if it helps you.

20 MR. COOK: Thank you. Sub-paragraph (e), I have dealt with. That is the  
21 substantial undertaking point.

22 Paragraph 5(f), it is being suggested that we were unreasonable to pursue the  
23 ground of appeal in relation to financial hardship without providing full  
24 information about the actual financial situation. What I would say on that, sir,  
25 is that very strong efforts were made by the Appellants to put material before  
26 the court and a very substantial volume of material was put before the court on  
27 the financial position. I recognise the Tribunal was not satisfied by that and we  
28 did not reach the right hurdle that would have satisfied you, but I would submit  
29 that attempts were made in good faith to try and achieve what was required and  
30 we effectively have not made good a submission. It cannot be said that the  
31 efforts we undertook were so poor as to be unreasonable.

32 MR. SCOTT: I think the difficulty you seem to have faced is that throughout  
33 proceedings, because you were arguing that this was not a single economic  
34 entity, the stress tended to be at the bottom of the pyramid rather than the

1 overall pyramid. In consequence, at no stage did the Tribunal get an overall  
2 picture embracing what the Tribunal saw and the OFT saw as a single economic  
3 entity. I think that is the difficulty.

4 MR. COOK: That is a very fair analysis of what happened, sir, but it comes back to  
5 the point that we made an effort to put what we saw as relevant before the  
6 Tribunal. Obviously we were wrong. But it certainly was not unreasonable,  
7 I would say, what we did, so unreasonable that we should be criticised as to  
8 that.

9 Mr. Ward's other points deal with a number of circumstances in which  
10 obviously the OFT has been held to be at fault, and that has been a point that the  
11 Tribunal has mentioned. I fully accept that this is not one of those cases and we  
12 are not in those circumstances.

13 Sir, those are the points. I do not want to repeat a submission that on one level  
14 you have already rejected about financial hardship, but that is the point my  
15 clients are very keen to have me make again. A very substantial fine has been  
16 imposed, it will impose very severe financial burdens upon the business and of  
17 course there are their own costs of the Appeal, and an imposition of an  
18 additional level of costs will simply increase that level of financial hardship.

19 THE CHAIRMAN: Thank you very much. We are very grateful to both counsel for  
20 the written and oral submissions. We are going to retire and consider this  
21 matter. We may be a few minutes.

22 (Adjourned for a short time)

23 (For ruling on costs see separate transcript)

24