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IN THE COMPETITION

Case No. 1072/1/1/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

15th September 2006

Before:
LORD CARLILE QC
(Chairman)

DR. ARTHUR PRYOR CB
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED
PLASTIC BUILDING MATERIALS 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.

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good afternoon, Mr. Cook, Mr. Ward. Can I raise a preliminary point first of
2 all, and that is to thank the parties for the care that has been taken in placing the paper work
3 before the Tribunal, which we have read.

4 What I propose to do in a moment or two in an endeavour to assist the parties is to run through
5 the agenda and give you some preliminary potential views – if I can put it that way – that
6 might assist you in deciding what you want to say, but there is a preliminary point. We note of
7 course that PBM Limited are Appellants and we are interested in the *locus standi* of PBM
8 Limited – if I can use the abbreviation – as Appellants.

9 MR. COOK: Sir, it is a point we were discussing a moment ago.

10 THE CHAIRMAN: I am not surprised.

11 MR. COOK: Sir, the answer to that point – and I am actually very grateful to Mr. Ward for having
12 raised it in his skeleton argument – is that we have joined the incorrect parent company. We
13 have joined one up the chain whereas we should have joined two up the chain is the issue, that
14 actually it is Precision Concepts Limited that is the party that the OFT has joined to the fine
15 rather than the intermediate parent company, which is Plastic Building Materials [PBM]. That
16 is the position, and having seen his skeleton we have now recognised that as an error that has
17 been made. At the moment I currently have instructions on behalf of Precision Concepts
18 Limited, as a result of the time involved in doing that I anticipate we will get instructions from
19 them and at that stage I anticipate we will be making – because I cannot go any further than
20 that – an application to the Tribunal to say “We are very sorry, this has been an error and
21 please can we therefore change the Appellants?”

22 Now, we understand that the strict position on that is because we are introducing a new
23 Appellant then we are out of time obviously for bringing an Appeal on behalf of that
24 Appellant, and coupled therefore with that application will have to be an application to the
25 Tribunal coupled with our profuse apologies saying “Please, in these exceptional
26 circumstances, can we effectively have an extension?” All that is going to happen is that we
27 are going to go through and change the name at the top and change such internal references as
28 are necessary to make clear that it is Precision Concepts Limited.

29 THE CHAIRMAN: Does that deal ultimately with the *locus standi* issue? You change the name of
30 the other Appellant, or putative Appellant to Precision Concepts Limited, what do you say
31 their role then is in this Appeal?

32 MR. COOK: Their role is they are a party who has been fined and consequently we would say that
33 firstly they are a natural party to be joined in any event, but particularly in circumstances in
34 which one of the points they will be wishing to argue (but in any event DQS will be wishing to
35 argue) is that it was incorrect to add them to a fine, because they are not part of the same

1 undertaking. I can expand on the legal point a bit more. Could I just say, Sir, if it was the
2 situation and it may be as a matter of back up that Precision Concepts Limited as and when it
3 instructs me (if it does) to apply to Intervene – because I think we are still within time to
4 intervene – on the basis that it is an interested party in this Appeal, that that would to some
5 extent be a slightly artificial way of achieving the same result which is they should be an
6 Appellant; it was a mistake and we apologise.

7 THE CHAIRMAN: Mr. Ward, do you want to say anything about that at this stage?

8 MR. WARD: Only that we will wait with interest and see what is actually said.

9 THE CHAIRMAN: Right.

10 MR. SCOTT: It seems to me that you face particular difficulty, and the particular difficulty that you
11 face is that on the face of the record we have a situation, as I understand it, of 100 per cent.
12 over 80 per cent. although we are not aware of what may have changed since that, and part of
13 the burden of your Appeal is that the interests of PCL and DQS are distinct, so part of the
14 question is going to be for them whether it is proper for them to be represented by the same
15 person.

16 THE CHAIRMAN: No doubt you will address that.

17 MR. COOK: Sir, it is a point that we have considered. If there is a conflict of interest it is one that
18 may be properly dealt with by agreement between the parties. If it is not one that can be dealt
19 with like that then, yes, separate representation will indeed have to be considered.

20 THE CHAIRMAN: I think what the Tribunal would be quite determined upon is that there should
21 be no slippage of time in terms of case management in relation to what you say you are going
22 to do, and there is no reason why there should be.

23 MR. COOK: Absolutely none at all, Sir.

24 THE CHAIRMAN: Simply because it is a name substitution exercise to a great extent.

25 MR. COOK: I understand Mr. Ward's position and the fact that I am the one putting him in
26 difficulty, it would be helpful if I can invite both him and yourselves to give an indication as to
27 whether that is an application that would be looked on favourably, on the basis that if not we
28 will probably, as a matter of safety, have to ensure an application for intervention is made.
29 That will perhaps be formal but in effect unnecessary costs are run up with an intervention.

30 THE CHAIRMAN: Well it is an application that will be looked on. I mean it really is a matter for
31 Precision Concepts Limited whether they make an application to intervene. They may be well
32 advised to do so.

33 Can we now turn to the agenda and, as I said, what I am proposing to do is to indicate some
34 thoughts that might be helpful to both sides. Item 1 – the forum of the proceedings. This is
35 raised for what I might loosely call “devolved” reasons. We note that there is a regional or

1 devolved connection in this case. This is a Tribunal which sits almost everywhere if required
2 to do so, so we thought that we should indicate to you that if it were desired that the Tribunal
3 should sit elsewhere – and the “elsewhere” would probably be Cardiff in this case – then it is
4 likely that we would be favourably disposed to that. However, if the parties are content to sit
5 in London then that is a matter essentially for you. The Tribunal will decide but the door is
6 open.

7 The second item does relate to permission to intervene. We would like to establish whether or
8 not, apart from what has already been discussed, there are likely to be any requests for
9 permission to intervene. On the face of it, it does not look very likely but the question is
10 raised.

11 The third item is the issues likely to arise, and at a first and fairly considered stab it seems to us
12 that the issues that are likely to be raised in this case are, in no particular order: the appropriate
13 level of fines in this case, and coupled with that whatever guidance there is – and principles
14 can be established – about the level of fines in a case such as this. Related to that are issues
15 about recent and pending European Union changes in connection with the level of fines and,
16 for example, whether or not we should take into account recent determinations within the EU.
17 The fourth item is the effect of corporate structural changes in connection with this case and
18 how we, as a Tribunal, should take account of those.

19 The fifth item is the effect of the fines on the profitability and financial position generally of
20 the Appellants and the extent, if any, to which we should take that into account.

21 The sixth item is an issue within this case of disparity; and finally, on the list that I had noted
22 down, an issue of relative culpability. I hope that is sufficient shorthand to make the issues
23 understood.

24 On the subject of further documentation, whether or not there are issues to be added to that list,
25 we take the view that it would be very useful to have skeletons in relation to the material issues
26 and if I can just give you an indication of the sort of dates we have in mind, we would be able
27 to hold a full hearing on Friday 8th December. So working backwards from that we would
28 suggest as a possibility that the Appellants’ skeletons should be available and served by 3rd
29 November, and that the OFT’s skeleton should be available and served by 21st November, in
30 good time for a hearing on 8th December.

31 The next item on the agenda on which I give an indication is whether or not any issues arise
32 regarding the disclosure of documents, and I would simply say this on behalf of the Tribunal:
33 we all note that we do not have the following items which we thought we might possibly
34 receive. We do not have the agreement (or any agreements) under which Mr. Sander provided
35 management services, although we know he was remunerated for them, and we know the level

1 of the remuneration – approximately at least. We do not have documentation about the
2 invoicing discounting facility which is probably relevant to the autonomy of DQS. We do not
3 have any accounts for DQS for any period and we have only draft accounts otherwise. Also,
4 we do not have any material showing the background to the events in June of this year (the
5 corporate changes) and so simply know of the events – if my memory serves me right – I think
6 it was 21st June.

7 The preliminary view we would take is that it is a matter for the Appellant as to what
8 documents are disclosed in relation to those items, but I simply flag up that those are areas
9 which we noted we did not have information about and therefore at the moment remain
10 ignorant about – that is intended to assist. I am reminded by Mr. Scott that there is also the
11 guarantee.

12 The next point relates to item 6 on the agenda: whether any issue relating to confidentiality
13 arises? Having discussed that, first of all dealing with connected comparators, in other words,
14 in relation to this infringement we would ask the OFT to be sure that the Tribunal knows who
15 the connected comparators are. I am told that, as a matter of practice, it is more practical for
16 the Tribunal then to contact the connected comparators and for the OFT to do it, and I see
17 someone nodding enthusiastically from somewhere in the wings in agreement with that
18 proposition, and I am told that the Tribunal is willing to do it. If any of those comparators,
19 who will be contacted by the Tribunal, wish to take any issue relating to confidentiality then
20 the Tribunal will determine accordingly.

21 The other point in relation to confidentiality is this, to those of us who have criminal
22 experience we are all too accustomed these days to so-called “guideline cases” for sentence
23 including fines. If the OFT are able to (or wish) to identify any comparable cases, albeit not
24 connected with this infringement (or set of infringements) then it might be of some assistance
25 if those comparable cases were identified. Those comparators, we anticipate, would then be
26 followed up by the Tribunal in the way I have indicated.

27 In relation to item 7 on the agenda – witness evidence – if witness evidence is to be called then
28 we would assume and wish that it be put into written form in the usual way and disclosed, and
29 we would ask that any witness statements on behalf of the Appellant be provided by, say, 17th
30 October, with the OFT if it wishes to provide witness statements to reply by 24th October –
31 these are indicative dates only I hasten to add, we are very happy to hear the parties in a
32 moment. If it is intended that there should be cross-examination of any witnesses, that is
33 obviously important in case management terms because it involves time, and we would ask
34 that a clear and realistic indication as to whether cross-examination will be required and
35 preferably how long it is likely to take could be provided as soon as possible.

1 Item 8 – agreed facts – we would hope and wish, and would like to direct, that what I will call,
2 with deference to my colleague on my right, a Scott schedule of agreed facts, or something like
3 a Scott schedule (I am sure the lawyers here will understand what I mean by ‘something like a
4 Scott schedule’) should be provided and we would like to direct that that schedule – it is only
5 going to need names and two columns, I presume – should be made available to the Tribunal,
6 looking at the timetable we have been discussing, again indicative date, by 27th October.

7 Item 9 – timetable, the Defence date is 10th October at the latest, and so far as length is
8 concerned, counsel will tell me how long this is likely to take, but we would all be very
9 surprised if this case could not be completed in half a day, but that is a matter for you.

10 So I hope that slightly lengthy indication of our preliminary views is of assistance. Who wants
11 to go first?

12 MR. WARD: If I may, I will? Sir, thank you it is of tremendous assistance, of course. If I can take
13 the items in the order that they appear on the agenda ----

14 MR. COOK: If I might make a suggestion, it might be sensible if we just do it item by item, rather
15 than getting lost ----

16 THE CHAIRMAN: By all means.

17 MR. WARD: On forum I, of course, have nothing to say. We have said, of course, that the OFT is
18 happy for the case to be heard in London, that is definitely a matter for my friend.

19 MR. COOK: Sir, my instructions are that it is cheaper for those instructing me to come up to
20 London than it is for me and everybody else to go to Cardiff, so we are happy for it to proceed
21 in London.

22 THE CHAIRMAN: How very frustrating! (Laughter) Right, the forum will be London, here.

23 MR. WARD: On Interveners we have nothing to add.

24 MR. COOK: Nor, apart from the comments made earlier, Sir, do we. Issues?

25 MR. WARD: Issues – really nothing to add to your list, Sir. We respectfully agree those are the
26 issues, formulated in a slightly different way from the notice of appeal and of course we will
27 plead to them all in our defence. As we have said in our skeleton today we join issue on
28 everything that has been raised in the notice of appeal.

29 MR. COOK: Sir, again we would agree that the formulation of those issues reflects the issues that
30 are before the Tribunal.

31 MR. WARD: The next item was documentation. Sir, you suggested a timetable for skeletons, that
32 seems very sensible. The hearing date 8th December, I know I am available for that date – for
33 what that is worth – it seems like an appropriate ----

34 THE CHAIRMAN: We will be delighted to see you.

35 MR. WARD: I will be delighted to be here, Sir.

1 MR. COOK: Sir, I have no comments on skeleton, which seem more than acceptable. I have a
2 personal difficulty – and I appreciate the Tribunal does not ordinarily list for the counsel’s
3 availability – which is I was meant to be on honeymoon on 8th December.
4 THE CHAIRMAN: Which, of course, you will postpone for the benefit of the Tribunal? (Laughter)
5 MR. COOK: I prefer not to go on record in relation to that point, Sir.
6 THE CHAIRMAN: May we intrude and ask when you are going on your honeymoon?
7 MR. COOK: I am going away on 3rd, and I probably plan to be away that week, coming back on 10th
8 or so.
9 THE CHAIRMAN: Have you been involved in this matter throughout?
10 MR. COOK: Yes, I have been involved for some time – on and off is the right way of putting it, Sir.
11 (The Tribunal confer)
12 THE CHAIRMAN: What about you, Mr. Ward, are you available the next week?
13 MR. WARD: I am pleased to say in fact the following week I have nothing in my diary at all.
14 THE CHAIRMAN: Sounds like a barrister’s lot these days. What about the Tribunal? (After a
15 pause) With our blessings if that be the right word, but certainly our congratulations and best
16 wishes we will put it back a week. I hope it is not the only occasion on which a case in a court
17 or Tribunal is put back for a honeymoon. I have heard of a case being put back for a barrister’s
18 children’s nativity play in the past. That is your next application! (Laughter) Right, 15th
19 December.
20 MR. COOK: Sir, thank you very much.
21 THE CHAIRMAN: But that is probably your last ever indulgence in this case, Mr. Cook!
22 MR. WARD: The next agenda item was disclosure of documents, and of course it was directed at
23 my friend and his client/clients, and we would certainly concur that those sound like very
24 interesting documents to see.
25 MR. COOK: Sir, we have taken those point son board, if those documents are ones that the Tribunal
26 clearly think would assist them then certainly we will ensure that such documentation is
27 available and is provided as soon as possible.
28 THE CHAIRMAN: I want to make it clear that the Tribunal, provisionally at least, takes the view
29 that it is a matter for you not an obligation.
30 MR. COOK: Sir, I understood that but I tend to take indications of the Tribunal’s desires as having
31 some persuasive value.
32 THE CHAIRMAN: It will give you a more comfortable honeymoon if you disclose them.
33 MR. WARD: Next is confidentiality. Sir, you will have seen that we explained in the skeleton
34 argument that there has been some activity on this front already in regard to the other parties to
35 this particular Decision. If I understand it rightly my friend’s client, DQS at least, has given an

1 undertaking in a form that enables it to use the material in this Appeal. In other cases where
2 this issue has arisen, namely, as to parity of treatment between different parties to the Decision
3 there have been confidentiality rings. Clearly if, as you suggested, Sir, the Tribunal were to
4 write to the parties and put in place their confidentiality ring then there could be no doubt
5 whatsoever or scope for future argument. Now, particularly as we know that Precision
6 Concepts are going to at least attempt to join the Appeal in one form or another, and they have
7 not given any relevant undertakings, I would respectfully suggest that that is the simplest way
8 to deal with the issue.

9 THE CHAIRMAN: What about, Mr. Ward, the question of the OFT providing us with what I would
10 call very broadly 'guideline cases' which might be broad comparators?

11 MR. WARD: Well my clients will of course give that some thought at an early date.

12 THE CHAIRMAN: A very carefully constructed sentence, if I may say so, but thank you.

13 MR. WARD: Of course they are constructions and if there is something that can do that will help we
14 will.

15 THE CHAIRMAN: You need not obfuscate further. Yes, Mr. Cook?

16 MR. COOK: Sir, I take the points about a confidentiality ring, it is right to say that Precision
17 Concepts Limited has not yet given any form of undertaking. It would match any undertaking
18 previously given by DQS for the purposes of that material. There is an issue that arises
19 generally in relation to this type of information which is while it can be kept confidential for
20 the purposes of hearings, an issue obviously arises in relation to the Tribunal's award. The
21 practice the Tribunal normally takes is it is very keen for as much of its Decision to be public
22 as it possibly can be. That is obviously a matter for you, I just thought I would raise it now so
23 that everyone is aware that one can only preserve confidentiality in these matters for so long.

24 THE CHAIRMAN: Speaking for myself – and I am sure I speak for my colleagues – I would be
25 very reluctant to have any kind of 'closed' part of the Judgment. It besets other jurisdictions in
26 which I occasionally dabble, and I would be reluctant to see us departing down that road.
27 There is an issue possibly about business secrets that may arise and I think you will just have
28 to consider that.

29 MR. SCOTT: The point being that the business, as we understand it, is now owned by somebody
30 who is neither an addressee of the Decision nor a party to the proceedings, and so we assume
31 that the confidentiality is of concern to them rather than to those who have sold the business.

32 THE CHAIRMAN: Yes, though I would assume that when there was a transfer of the undertaking
33 one is entitled to assume that in a normal due diligence exercise these elements would have
34 been considered.

1 MR. COOK: They would be, Sir, and it occurs to me – although I must admit I have not actually
2 seen the document – that it may be that we have confidentiality obligations which obviously
3 cease to exist in the context of a court order, or a matter like that, but nonetheless, we might
4 well be obliged to make appropriate submissions on an ongoing basis to try and preserve
5 confidentiality. Thank you very much for flagging the point, we will bear it in mind on an
6 ongoing basis.

7 THE CHAIRMAN: Thank you very much. Yes, Mr. Ward?

8 MR. WARD: Sir, the issue of witnesses is a little bit more complex, as we suggested in our skeleton
9 argument for today. What you have before you under appeal is, of course, a decision of the
10 OFT which relies upon a large range of documentation including certain witness statements,
11 and in various crucial respects witness evidence given by DQS at the administrative stage was
12 actually rejected. The OFT found essentially that the account given was not correct. Broadly,
13 some of the issues on which the OFT found against DQS have been re-ventilated in the notice
14 of appeal. It has been worded very carefully and it may be that my friend will say, “Actually,
15 no, it is completely consistent with the Decision.” Could I just ask you to look at the notice of
16 appeal briefly, and I will perhaps give you the flavour rather than trying to do a line by line
17 analysis?

18 The gist of this is at paragraphs 4.57 through to 4.59. The broad gist of DQS’s case is that
19 even though it went to this meeting its involvement was passive, and the OFT’s answer to that
20 in part is to say that that makes no difference, actually. What we have done is increase the
21 penalty for those who took an active role, but merely attending a meeting of this kind and
22 failing to distance yourself from it is actually sufficient to amount to a concerted practice. But,
23 in any event, DQS argued at the administrative stage and put in witness statements to say that
24 its involvement was passive and there were various disputes of detail in the Decision. But just
25 to take one point, which is illustrative, in para.4.57 it says: “No documentation was prepared
26 prior to the meeting. No list of target customers were produced at the meeting by either John
27 Hesketh or Jim Sander ...” who of course were the witnesses. You will see this dealt with by
28 the OFT at p.66 of the Decision, para.232:

29 “In the oral representations in support of its Supplementary Representations, DQS has
30 sought to argue that a list of UKae customers was not even brought by John Hesketh
31 to the Meeting. However, DQS has provided little in the way of credible evidence to
32 support this claim, arguing only that (i) the OFT has ‘no evidence ...that a request was
33 made to John Hesketh to prepare or bring a list of customers to the meeting’.”

34 Then the OFT goes on and summarises various other evidence that was to opposite effect, and
35 so indeed “this evidence is summarised above” – in fact it is in para.231, and you will see

1 various witness statements and documents are relied upon, the gist of which is that John
2 Hesketh produced a computer print-out of customers from UKae.

3 In the notice of appeal the allegation has been carefully worded and it says: “No
4 documentation was prepared prior to the meeting” and it may be that that is not supposed to
5 cover a computer print-out. “No list of target customers was produced”, and it may be said
6 that the UKae print-out is merely a list of UKae customers, and so on and so forth. I can
7 continue in this vein. Over the following pages of the OFT’s decision there are a couple of
8 other issues taken about the degree of involvement of DQS. In broad terms the OFT found
9 against DQS on these issues.

10 Now, it is clearly open to the Appellants to try and reopen these issues of fact in these
11 Tribunals. I accept that without hesitation. Logically, of course, the position is that the OFT is
12 relying on these various witness statements which it says supports its notice of appeal. What
13 my friend said in his skeleton argument, of course, was that there are no issues of fact in this
14 Appeal. But what I want to make clear on behalf of the OFT is that we are, of course, content
15 for the case to be argued on the basis of the findings of fact which are actually in the notice of
16 appeal. If that is right, then of course there is no need for the oral evidence to be heard. But if
17 those findings of fact are going to be questioned or even chiselled away at that really raises
18 another question altogether. The position of the Appellant is not clear in the light of the
19 skeleton argument as to exactly how they want to do this.

20 There are two other issues which have some of the same flavour, even though there is not quite
21 the same direct collision with what is actually said in the Decision, and those issues are first,
22 the financial circumstances of the Appellant, and secondly, the relationship between Precision
23 Concepts and DQS.

24 On financial circumstances, if I could ask you to turn back to the notice of appeal the issue is
25 raised at para.4.7.1. It says “The OFT has been made aware on several occasions throughout
26 its investigation that DQS has experienced severe financial hardship.” You will have seen in
27 the Decision that the OFT dealt with this and, in fact, it might be useful just to show you what
28 the OFT said ----

29 **THE CHAIRMAN:** If you will forgive me, can I just interrupt you, because there is a point, which I
30 hope I made clear using summary words earlier, that is of concern to this Tribunal and that is
31 to what extent does financial hardship play a part in the determination of fines in this particular
32 jurisdiction?

33 **MR. WARD:** Sir, with respect that is undoubtedly a point that will be argued out in this Appeal, and
34 the OFT will set out its position in its Defence and there is a clearly a difference between the
35 parties, at least on the facts of this particular case. If I may, as I say, reserve the OFT’s

1 position on that. It is obviously an issue. The Appellants' case is essentially that all this
2 material should have been taken into account, or at least in a way that was better or more
3 substantial than the OFT actually did, and I just wanted to show you very briefly what the OFT
4 actually found on this. It is at p.156 of the Decision in para.632. You will see in the third to
5 fourth line of the paragraph: "Whilst the OFT notes that DQS' financial position has
6 deteriorated ..." and it gives some turnover figures. But then it ultimately concludes, if you
7 look just to the last line of the paragraph, it did not justify any reduction of penalty in this
8 particular case.

9 The Appellants' argument, which is perfectly proper, of course is that it did justify a reduction
10 in the penalty, and the Tribunal will have to decide whether or not that is right. The difficulty
11 that is raised by this notice of appeal is – if I can invite you just to turn on to the next page of
12 the notice of appeal, paras. 4.75 onwards – you will see that there is a reference to what was
13 said at the administrative stage. "The Tribunal's attention is drawn to the written
14 representations submitted to the OFT and the supplemental submissions ..." and then at
15 para.4.77: "The oral evidence of Richard Jones", and in particular a paragraph is quoted from
16 what Mr. Jones said on that occasion:

17 "I can tell you honestly from my position as finance director that any fine imposed by
18 the OFT could have catastrophic consequences for the Group of companies and might
19 well push the Group into insolvency leading not only to the loss of 225 jobs, but also a
20 major reduction in competition in our industry."

21 Now, the extent to which that remains relevant is an open question given that the company has
22 been sold, but it gives fairly the flavour of this evidence, and the point that I want to make is
23 that it goes far, far beyond any findings of fact which are actually in the Decision. Now, my
24 friend may well criticise that. It would be perfectly understandable if that formed part of his
25 appeal. The OFT will say, of course, it did not need to go into this in exhaustive detail, or
26 investigate it, or make findings of fact on the minutiae of the allegations. But the question is
27 this: is the Appellant going to invite the Tribunal to make findings of fact about the state of the
28 company? The OFT made a finding that its situation had deteriorated. As you said yourself,
29 Sir, there are some accounts in fact in this bundle but very few of the relevant ones. The
30 question is, is a factual inquiry going to be undertaken here. If so, obviously there has to be
31 evidence.

32 THE CHAIRMAN: Can I understand clearly for my own benefit – I am sure my colleagues do –
33 what you are saying? What you are saying in essence is that the finding of facts upon which
34 the adjudication was based stands unless further findings of fact are made by the Tribunal. In

1 order for the Tribunal to make further findings of fact they have to be evidenced based. Is that
2 it?

3 MR. WARD: That is precisely what I am saying, and I am simply saying that the notice of appeal
4 proceeds on the basis as if everything said at the administrative stage can be taken as evidence,
5 and should be accepted. The OFT does not accept it. I cannot say now exactly the extent to
6 which it would be challenged if it were put in the form of formal evidence and from what my
7 friend said in his skeleton argument, it may be that none of this is going to be sought to be
8 proven before the Tribunal. But if he wishes to go beyond the findings of fact in the Decision
9 he will need some evidence.

10 My third point is very much of a kind with that, and that arises out of the question of the status
11 of Precision Concepts. You will see at para. 5.8 of the notice of appeal a lengthy series of
12 assertions about the precise relationship between Precision concepts and DQS. You pointed
13 yourself to some of this, Sir, when you were mentioning about security and the role of the
14 invoice discounting facility and so on and so forth. Most, although not all, of this material was
15 actually advanced at the administrative stage. Some of these paragraphs deal with points that
16 were never raised in fact at the administrative stage. The OFT's case is going to be that none
17 of this makes any difference, and then what matters is that Mr. Sander and his wife are the
18 Directors of Precision Concepts. Mr. Sander is the Chairman of DQS, and Mr. Sander
19 attended the meeting at which the cartel was formed. That, we will be submitting very
20 broadly, is sufficient. I am simplifying but that is the core of the OFT's case.

21 THE CHAIRMAN: It is a sort of "eyes and ears" argument really?

22 MR. WARD: In a manner of speaking, yes. Exactly how Precision Concepts is financed really is
23 neither here nor there we will submit. But we face a case in which all this has been advanced.
24 The core case advanced by the OFT has not been disputed, namely, the role of Mr. Sander,
25 instead essentially the case is "Oh no, that has to be put in a wider context", and when one
26 looks at the wider context these entities are sufficiently distinct that they do not qualify as a
27 single undertaking. So here again is a large amount of really quite complicated assertion about
28 the interrelationship of these companies without documentation, as you pointed out, Sir, under
29 the head of disclosure. If you are going to be asked to find as a fact that any of this is true in
30 order to form the basis of favourable decision for the Appellant, evidence is needed. As I have
31 already said, the OFT's case will be again that it really makes no difference, rather as that is
32 the OFT's case on the financial question. It really makes no difference for the reasons that are
33 in the Decision. But here we have a puzzle, namely, a lot of factual assertion in the notice of
34 appeal that goes beyond the Decision – yes, an assertion in a skeleton argument that there are
35 no issues of fact.

1 THE CHAIRMAN: I think we have got the point. Shall we hear from Mr. Cook on this? Thank
2 you, Mr. Ward?

3 MR. COOK: I think my skeleton was pointing towards that these are predominantly legal issues.

4 THE CHAIRMAN: That is not what it says. It sort of says that there are no factual issues, and I
5 must say when I started to read these papers I blinked several times at that assertion.

6 MR. COOK: Sir, I accept certainly that statement on its own goes too far. What I meant to say, and
7 what I was intending to say, was that predominantly the majority of the issues here are legal
8 ones – whether all of the points my learned friend was making about “the first point” in each of
9 these cases, for example: “Is it relevant to take account of financial hardship?” “What is the
10 correct test for whether it is part of a single undertaking or not?” Assuming you determine
11 some of those issues in DQS’ favour, yes, there may be some factual points and I accept
12 that ----

13 THE CHAIRMAN: Let us suppose that we have a hybrid position. It is appropriate for us to take
14 account of financial hardship to some extent, somewhere between a sort of rank deterrent
15 position and a rank “the fine must not be outside the pocket of the person fined” sort of
16 criminal law position. We then have to ask the question “What pocket?”

17 MR. COOK: Of course.

18 THE CHAIRMAN: And we cannot answer that question without evidence, save by making the
19 assumption that the financial basis upon which the OFT reached their Decision was correct,
20 unless you provide evidence to the contrary.

21 MR. COOK: Sir, I obviously accept that we are going to have to provide evidence for these things.
22 There are two witness statements within the evidence, and some of the material dealt with in
23 the notice of appeal is dealt with in those witness statements, so we will obviously have to look
24 – particularly based on the comments you have raised about additional documentation – about
25 what additional material is helpful and necessary in the context of that. In part it is going to
26 come down to what the OFT chooses to challenge. If the OFT says prove all of these points
27 then we will have to prove all of these points.

28 THE CHAIRMAN: It may also come down to your clients deciding that discretion is the better part
29 of valour and disputing of a relatively limited number of factual issues, but that is entirely a
30 matter for you.

31 MR. COOK: I understand and we need to pick our battles, Sir.

32 THE CHAIRMAN: Exactly.

33 MR. COOK: But that goes both ways, the OFT needs to pick its battles as well, and some of these
34 points if it takes the view they are irrelevant, there may be something where they can say “It is
35 so irrelevant you do not need to establish it ----”

1 THE CHAIRMAN: You have been forewarned by Mr. Ward, who said at an early stage, that they
2 are up for battle on all fronts.

3 MR. WARD: Sir, I must express a little disquiet about the way that my friend's clients are
4 approaching this issue. As of course you will be aware Rule 8 of the Tribunal Rules requires
5 them to exhibit the witness statements to the notice of appeal that they propose to rely upon,
6 and instead what my friend is saying is more like "We will wait and see what the OFT puts in
7 its Defence, and then we will know what we have to produce witness evidence on." With
8 respect that really is to put the thing the wrong way round. We need to know what the factual
9 assertions are that are being made, which the Appeal is to be advanced upon, and then we will
10 know the extent to which the OFT may have to call for cross-examination of the witnesses, and
11 therefore the extent to which the OFT may rely on witness evidence of its own.

12 THE CHAIRMAN: Speaking for myself it seems to me that it is clear that there are factual issues in
13 this case and the Appellants are going to have to decide which of those factual issues they wish
14 to pursue. Once that is identified you will know what factual issues you have to meet. From
15 the OFT's view point, because so much work has been done in the background, it will be a
16 relatively simple exercise, and I mean "relatively" simple exercise, to identify the areas of
17 evidence that will then have to be tried out in front of us.

18 MR. SCOTT: Part of the factual matrix that is not present in the Decision is the events of June this
19 year so that, as we understand it, the decision was taken on the basis of evidence that did not
20 include the sale of the business to SIG. Therefore, a question arises about the nature of that
21 decision by the OFT and the nature of the decision taken by us in relation to any penalty
22 against a revised factual matrix; that does raise questions about the plea of financial hardship
23 and its current status.

24 THE CHAIRMAN: Yes. Thank you. I think all that leads to the conclusion – and I am grateful to
25 both counsel – that probably our indicative view about witness statements was about right,
26 which is always heartening. Yes, Mr. Ward, agreed facts?

27 MR. WARD: Agreed facts. I confess I was not absolutely certain the kind of schedule you had in
28 mind, Sir. The starting point for us is that we rely on the facts in the Decision – it is a very
29 lengthy document and I am sure you did not want it put into the form of a Scott schedule.

30 THE CHAIRMAN: No. I am sorry, I did not make myself clear enough. There are going to be
31 primary facts and secondary facts, as there are in every case. If a schedule could set out the
32 main propositions of fact which appear to be in dispute and the propositions in one column are
33 the propositions made by the Appellants, and in the other column the propositions made by the
34 OFT (the Respondent), then that will provide a useful "at a glance" version of the main factual
35 issues. As an ancient – admittedly – veteran of building disputes I certainly always found that

1 concentrated my mind when preparing cases and it certainly usually helps courts and
2 Tribunals. Does that make it sufficiently clear?

3 MR. WARD: It does, Sir, yes, thank you, I am sure we can provide that.

4 THE CHAIRMAN: We do not want something that we would have to carry around in a suitcase,
5 and hopefully it will be something that will not take up too much computer space either. It is a
6 snapshot document that we are after, and I am sure counsel can devise that without regarding it
7 as too demanding.

8 MR. COOK: Sir, if I might say briefly in relation to that, and thank you very much for the
9 clarification which has been of enormous assistance, I would see a document like that as being
10 naturally linked to a list of issues because this is not a case where the factual issues necessarily
11 come first particularly. It is more you have the question: "what are the issues?" e.g. financial
12 hardship, you have an initial legal issue followed by potentially some factual issues. It might
13 be that there is scope to combine this, even if only by cross-reference within an agreed list of
14 issues between the parties and that might provide a structure.

15 THE CHAIRMAN: You have the advantage of creating the rules of this particular part of the game,
16 because you create the schedule first. I think it might be sensible for the parties, or at least
17 counsel, to agree as to what columns should go into it so we do not have to hear you on the
18 "column-ness" of this document, but that apart I do not think the Tribunal has any particular
19 views as to whether there should be three, four or seven, columns. Clarification of the issues
20 certainly would be helpful, and as long as it fits landscape on one piece of paper rather than
21 two landscapes side by side, I think we shall be perfectly content.

22 MR. WARD: Sir, this rather dovetails into the next head in the timetable, the OFT Defence, due on
23 10th October. There is no difficulty with that at all as currently anticipated. It would obviously
24 be helpful for the OFT in formulating its defence to know actually which findings of fact, if
25 any, in the Decision are under attack. The notice of appeal may have been worded very
26 carefully, it is not clear, and we would like very much to know before putting in our Defence
27 which parts of the Decision are in fact challenged, if any.

28 THE CHAIRMAN: Well, can that be done?

29 MR. COOK: Sir, I must admit I rather thought we had done it in the notice of appeal. If there is
30 some lingering confusion and Mr. Ward has certainly pointed to some confusion he seems to
31 be suffering under, I am sure we can clarify that. I think it is probably best dealt with if we
32 have a word between counsel outside, and if he is unclear we will clarify.

33 THE CHAIRMAN: I think this is best dealt with informally. We will come to another procedural
34 matter in a moment, but I mean if it is absolutely necessary you have permission to apply for

1 further directions, but you are likely to get a pretty unsympathetic hearing if you cannot agree
2 between yourselves, are you not?

3 MR. WARD: I hope we can, Sir, and I confess that the skeleton for today has caused a little
4 confusion on our side.

5 THE CHAIRMAN: So far as the question of a further case management conference is concerned,
6 given that we have a firm hearing date, which is now 15th December, I would suggest to you
7 both that there is no obvious need for a further case management hearing, but of course you
8 have permission to apply and if the cards do not fall into their right place in the pack then the
9 Tribunal will at short notice – possibly very short notice – order a further case management
10 hearing. Do you want to say anything about that?

11 MR. WARD: That seems very sensible, Sir.

12 MR. COOK: That seems eminently sensible, Sir.

13 THE CHAIRMAN: In that case with the adjustment as to the hearing date, the indications I gave
14 earlier on will form the basis of the order.

15 MR. COOK: The only point I think we have left hanging, Sir, is the length of the hearing, and I
16 would certainly welcome my learned friend's views on this. We would have thought that half
17 a day is going to be quite short for this. If, as I said, potentially going to be some factual
18 issues, albeit secondary perhaps.

19 THE CHAIRMAN: Well half a day is a day, is it not?

20 MR. WARD: Sir, if the case proceeds on the basis of submission without any oral evidence a day is
21 going to be plenty, whether it be half a day or a day. At the moment it is really difficult to say
22 whether the hearing might be two days or, heaven forbid, even three days, if there is extensive
23 oral evidence. As I have said, the OFT relies on a series of witness statements which, on the
24 face of it, contradict the Appellants' account. Are those witnesses going to be called for cross-
25 examination? Well if so at least another day will be required.

26 THE CHAIRMAN: I think we are going to have to leave that – we can always sit on the Saturday,
27 can we not? (Laughter) My own view behind that mischievous comment is that in reality I
28 suspect that a day – maybe half a day is optimistic – ought to be enough to dispose of this case,
29 given appropriate discipline, which I am sure would be self-imposed. But if we need to take
30 more than a day we will take more than a day, the Tribunal will not hurry anyone unduly.

31 (The Tribunal confer)

32 THE CHAIRMAN: It is always dangerous to be optimistic, but I think we will list it on the 15th, say,
33 at 10 o'clock for the day, if necessary we can sit a longish day and we will just see how we go.
34 Anything else? (After a pause) We are very grateful to you both, and those instructing you,
35 for your assistance.

1 | MR. COOK: Sir, if I could say thank you very much again for making sure I start off marriage
2 | relatively happily at least.

3 | THE CHAIRMAN: Pass on to your bride our good wishes.

4 | (The hearing concluded at 4.20 p.m.)