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**IN THE COMPETITION**

Case No. 1086/4/1/07

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A 2EB

Monday, 16 July 2007

Before:

LORD CARLILE OF BERRIEW QC  
(Chairman)  
PROFESSOR JOHN PICKERING  
PETER CLAYTON

Sitting as a Tribunal in England and Wales

BETWEEN:

**AGGREGATE INDUSTRIES LIMITED**

Applicant

and

**OFFICE OF FAIR TRADING**

Respondent

supported

**HANSON QUARRY PRODUCTS EUROPE LIMITED**

Intervener

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Mr. Peter Roth QC and Miss Valentina Sloane (instructed by Freshfield Bruckhaus Deringer) appeared for the Applicant.

Mr. Rupert Anderson QC and Mr. Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Miss Ronit Kreisberger (instructed by Pinsent Mason) appeared on behalf of the Intervener.

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**CASE MANAGEMENT CONFERENCE**

1 (The hearing commenced at 3.00 pm)

2 THE CHAIRMAN: Good afternoon. Mr. Roth, Mr. Anderson, Miss Kreisberger, we are here for a  
3 case management conference, which I suspect we can get through without too much  
4 complication and difficulty. Would it be sensible if we simply went by the agenda, item by  
5 item, and if you want to raise anything following my initial remarks please feel free to do so?  
6 First of all, the question of the forum: clearly that seems to be CAT England and Wales?  
7 Right.

8 Secondly, intervention. Hanson have intervened, both generally and on the issue of procedural  
9 unfairness by the OFT. Does anybody want to address any remarks to us about that  
10 intervention? No. Good. We will permit that intervention on the basis that Hanson have  
11 satisfied the sufficient interest test, which seems to be the appropriate category. I think that  
12 tidies up any possible difficulties there may have been in earlier phraseology.

13 MISS KREISBERGER: Yes, we are content with that.

14 THE CHAIRMAN: Thank you very much.

15 Thirdly, preliminary discussion about issues likely to arise in the proceedings. I want to raise a  
16 few matters of interest to us at the end, if I may. It might be best to leave that, save to say that  
17 the issues are reasonably clear, it seems to us, hitherto. Obviously, if the OFT want to raise  
18 any new issues that are not obvious to us as yet they need to be raised very clearly.

19 MR. ANDERSON: We are not aware of any issues other than addressing those that have been raised  
20 in the Notice of Application to date. I am assuming that the intervention will largely cover the  
21 issues raised in para.12 of the request for permission to intervene.

22 THE CHAIRMAN: Thank you, Mr. Anderson.

23 Four, to consider the urgency of the application. Our preliminary view, as a matter of case  
24 management and expedition, is that we would like this matter to be dealt with with reasonable  
25 expedition, and we would like to suggest the setting of the date of 31<sup>st</sup> August for the hearing  
26 of this matter. We are at a time of year when not everybody is going to be completely happy  
27 about any date we set. It seemed to us that Friday, 31<sup>st</sup> August, as a target date for a hearing is  
28 within a reasonable time, allows everyone enough time, given that most things have already  
29 been revealed, to make any written submissions that are required and provides a date which is  
30 convenient to the Tribunal.

31 MR. ANDERSON: Could I respond very briefly on that. We did have an opportunity to discuss  
32 this, my learned friends and I, beforehand. We recognise, of course, it being August that there  
33 are inevitable difficulties in agreeing a time that is convenient to all. That particular date  
34 presents me with difficulties. One is that my learned junior is not available; and the other is  
35 that my principal case officer and decision maker, who will be my witness, is not available

1 during that week, though that is the only week in the schedule I have in front of me when he is  
2 not available. I am just enquiring whether there is any flexibility on the part of the Tribunal in  
3 terms of the Tribunal's availability around that time?

4 THE CHAIRMAN: Mr. Roth?

5 MR. ROTH: I fear – as my friend said, it is a difficult time of year – I am away in America on that  
6 date. Of course my clients could instruct someone else. It would, in a case where costs are not  
7 huge, mean somebody starting again, which does seem most unfortunate.

8 As Mr. Anderson said, we did have a discussion about it. Normally, in a merger case one does  
9 feel a great sense of urgency, and indeed in our application we respectfully asked the Tribunal  
10 to treat the matter with expedition. As things have developed and with the undertakings given  
11 regarding keeping separate the Theale business, I understand from the OFT that they do not  
12 feel that it needs particular urgency. There are no stock market considerations. It does not  
13 affect the takeover which has proceeded, and this is one particular aspect that either has to be  
14 divested here or there. Clearly nobody wants it to drag on, but it is not quite as urgent as it  
15 perhaps at first appeared, if that assists if it were possible to find another date.

16 THE CHAIRMAN: When are you saying that it could be heard by, reasonably?

17 MR. ROTH: We thought, through unfortunate circumstances, of looking at everyone's holidays  
18 outside, the beginning of October.

19 THE CHAIRMAN: You are saying that there should be a hearing at the beginning of October, with  
20 judgment maybe a month later?

21 MR. ROTH: Yes, and we think it is a one day case.

22 THE CHAIRMAN: It is a one day case all right, yes.

23 MR. ROTH: I would hope not more.

24 THE CHAIRMAN: We will come to that, Mr. Roth.

25 MR. ROTH: I do not think there will be any live witnesses, as one sees it at the moment. We have  
26 not seen the evidence from the OFT and indeed from the interveners, but one would be  
27 surprised if there were live witnesses. There are no experts.

28 MR. ANDERSON: I ought to have confirmed that it is certainly the view of the Office that this is  
29 not a case where expedition is necessary, because we do have in place the interim undertakings  
30 to keep the business viable and separate. This case is concerned with only one of three  
31 divestments, and the other two are unaffected by this case.

32 My learned friend and I did discuss and mention the date of early October as being the first  
33 date on which everybody, including interveners and their relevant parties, could be available.  
34 The Office for its part would be content with that timescale.

35 THE CHAIRMAN: Do you want to say anything about this, Miss Kreisberger?

1 MISS KREISBERGER: Simply that we are in agreement with that. Unfortunately, as my learned  
2 friend said, the first week in October was the first date we are all available. There is no  
3 particular drive for expedition from my client. My client would also prefer that the additional  
4 costs of instructing additional counsel were not incurred in this case. A further issue from our  
5 part was that the key individual at the client is away for ten days in September, which also led  
6 us to the first week of October.

7 THE CHAIRMAN: The instinct of the Tribunal in cases of this general kind is to get them heard as  
8 quickly as possible because they always smell of urgency by their very nature. Managing  
9 these cases expeditiously is of importance to the Tribunal. Just give us a moment.

10 (The Tribunal conferred)

11 THE CHAIRMAN: We are prepared to accede to that. I am not sure that we can put the precise day  
12 of the week on it here. Perhaps that can be dealt with administratively afterwards, but it will  
13 be in the first few days of October. I am afraid you will just have to bear with us  
14 administratively as to the day of the week, subject to negotiation.

15 MR. ANDERSON: I am very grateful for that.

16 THE CHAIRMAN: I should emphasise however – I think the observation needs to be made – that in  
17 cases of this general kind the period that is being allowed in this case is at the extreme. If it  
18 were not for the fact that everybody had taken the appropriate measures to secure that there  
19 was no urgency, the convenience of counsel and the parties would only be one of the  
20 considerations.

21 Item five, whether any further documents are necessary for the Tribunal to determine the  
22 Appeal. First of all, there is the question of the intervention. You have supplied your  
23 statement of intervention, Miss Kreisberger. If there is anything else that you need to submit,  
24 we would ask, allowing for the extended timetable – I am sure my colleagues would agree with  
25 me – that any additional documentation the intervener wishes to submit should be submitted  
26 within 14 days.

27 MISS KREISBERGER: Yes, that is absolutely fine. I understand my learned friend Mr. Anderson  
28 may have something to say to that. He may wish to see something from us sooner than that.

29 MR. ANDERSON: Our position was simply that, firstly, we were in fact originally operating to a  
30 slightly tighter timetable than we are now operating to. What we had envisaged was that we  
31 would serve a defence, which embraced both the notice of application and anything that was  
32 said by the intervener in support of their intervention, in a single document which we were  
33 hoping to submit by Friday, 27<sup>th</sup> July, which would then have involved the statement of  
34 intervention, or the further supporting documentation submitted by Hanson, in time for us to  
35 absorb that before serving our defence on the 27<sup>th</sup>.

1 It is still our intention to serve our defence to the notice of application by Friday, 27<sup>th</sup> July,  
2 which I think is just a few days before the statutory timetable expires. We would ask for seven  
3 days to respond to anything that the intervener says. If that then means that we are submitting  
4 two documents, a defence on 27<sup>th</sup> July and a response to the intervention seven days after that  
5 document, then we do not mind that what we say is split between two documents. We would  
6 ask for some time in which to respond to anything further that Hanson says before we go back  
7 on all that we say in the form of pleadings.

8 (The Tribunal conferred)

9 THE CHAIRMAN: The suggested amended timetable is that the intervener should submit any  
10 additional documents, if there are any, in relation to the intervention by 27<sup>th</sup> July.

11 MISS KREISBERGER: I am much obliged.

12 THE CHAIRMAN: The OFT, expedition no longer being required, should file their defence by  
13 10<sup>th</sup> August. That gives you the opportunity to reply to the intervener.

14 MR. ANDERSON: Just on that one point, the reason why we wanted to serve on the 27<sup>th</sup> was simply  
15 because after that was the first chunk of time that was inconvenient. I am personally away for  
16 the two weeks from the 27<sup>th</sup>. If we could have until the very early part of the following week  
17 that would enable me to get up to speed.

18 THE CHAIRMAN: It can be until, say, 15<sup>th</sup> August.

19 MR. ANDERSON: I am very grateful.

20 THE CHAIRMAN: I am sorry about that, I did not quite understand your timetable, Mr. Anderson.  
21 So 27<sup>th</sup> July is the first date, 15<sup>th</sup> August is the second date. Any further reply by the applicant  
22 should be by 31<sup>st</sup> August, Mr. Roth?

23 MR. ROTH: Yes, sir. Sir, we were just wondering, and it is very much a matter for the Tribunal –  
24 there are two aspects, one is any further evidence which there may or may not be, which could  
25 be by 31<sup>st</sup> August, although, like Mr. Anderson, I would ask for just for a few extra days  
26 because I am also, as I said earlier, away that week, but back the following week.

27 THE CHAIRMAN: 4<sup>th</sup> September.

28 MR. ROTH: 4<sup>th</sup> September, I am very grateful. We were wondering whether you would wish us to,  
29 as it were, do a pleaded reply or whether it might be more sensible – and it is a matter for you –  
30 to go straight to skeleton arguments.

31 THE CHAIRMAN: We would prefer to have one document than two.

32 MR. ROTH: So possibly, rather than doing a reply to the OFT defence, we could do a skeleton  
33 argument which would cover everything.

34 THE CHAIRMAN: I think we are content to leave that to you, but what we would urge is that there  
35 is as little duplication as possible.

1 MR. ROTH: That is the advantage – I would imagine you would want a skeleton argument – of not  
2 having to formally do a reply as well.

3 THE CHAIRMAN: We are content with that, a skeleton argument incorporating the essence of what  
4 would be in a reply by 4<sup>th</sup> September.

5 MR. ROTH: I am very grateful.

6 THE CHAIRMAN: Miss Kreisberger, do you want to say something?

7 MISS KREISBERGER: Yes, we are particularly alive to the need not to have duplication, so in the  
8 spirit of that we would ask to put in a skeleton argument some days after the applicant's  
9 skeleton argument.

10 THE CHAIRMAN: Yes, you can have seven days after the applicant's skeleton argument to put in  
11 your argument. Again, we would ask everyone to bear in mind that one document is better  
12 than two for the purposes of this hearing.

13 MISS KREISBERGER: So that would be 12<sup>th</sup> September?

14 THE CHAIRMAN: Yes.

15 MISS KREISBERGER: Thank you. I am obliged.

16 THE CHAIRMAN: Item six, to consider whether any issues arise regarding the disclosure of  
17 documents. We are not aware of any such issues. Are there any?

18 MR. ANDERSON: We are not aware of any, sir?

19 THE CHAIRMAN: To consider issues relating to confidentiality. We have a paper which has been  
20 supplied by the applicants relating to confidentiality. The applicants will need to provide the  
21 intervener with a non-confidential version of the document. Do we need to set a time limit for  
22 that, or can we take it that that is going to be done in?

23 MR. ROTH: That is already in hand to be done. There may be, and this picks up the previous item  
24 as well, some documents that will be disclosed with ranges, for example, given for some of the  
25 figures instead of actual figures. It might be appropriate to have a full disclosure within a  
26 confidentiality ring of legal representatives so that they can actually see all the documents. For  
27 example, I understand from Miss Kreisberger that her client is likely to put in something  
28 regarding their business proposals for the plant. That is something that is obviously very  
29 confidential to my client in case the sale did not go through, or if it did go through indeed, but  
30 it might assist if the legal representatives could see it so that the argument can be ----

31 THE CHAIRMAN: Is there any difficulty about that with the other parties? It is unlikely to be a  
32 problem for you, Mr. Anderson.

33 MR. ANDERSON: It is unlikely to be a problem for us.

34 MISS KREISBERGER: Our preference would be for a confidentiality ring formed of the legal  
35 advisors.

1 THE CHAIRMAN: So you are content with Mr. Roth's application?  
2 MISS KREISBERGER: We are.  
3 THE CHAIRMAN: We are content that the applicant provide the intervener with disclosure within a  
4 confidentiality ring of legal representatives. That simplifies the matter, does it not?  
5 MR. ROTH: We will also prepare, as I think everyone will need for the hearing, a non-confidential  
6 version which we will also of course supply.  
7 THE CHAIRMAN: We will so direct, without setting a time limit, although obviously it must be  
8 done in a time that is consistent with the preparation of any other documentation.  
9 MR. ROTH: Might I apologise, I did not jump up on the timetable you set before, which ended  
10 I think with the skeleton argument from the interveners on 12<sup>th</sup> September. Perhaps we can  
11 have a date for a skeleton argument from the OFT.  
12 MR. ANDERSON: I was going to raise that when we got to item ten on the timetable. We would  
13 propose to put in a skeleton argument before the hearing. Given that the intervener and the  
14 applicant's replies will be taking the form of a skeleton argument, we would propose putting in  
15 a skeleton argument seven days before the hearing, whenever the hearing is.  
16 THE CHAIRMAN: That seems reasonable, seven days before the hearing.  
17 Can I ask that, whatever is done about confidentiality, whatever documents are given to the  
18 interveners in particular, the Tribunal be provided with five copies. The one thing the Tribunal  
19 really cannot afford to do is to act as a copying agency for litigants, particularly in a case like  
20 this.  
21 Item eight, to establish whether any witnesses are sought to be called by any of the parties.  
22 I simply express the hope that if there is evidence to be called it could be done in writing.  
23 MR. ANDERSON: It is our proposal to put in with our defence a witness statement exhibiting any  
24 further documents that there may be. We do not suspect it will be controversial or the witness  
25 will be need to be called, but it will certainly be in writing and we would hope that his witness  
26 statement would then stand as his evidence.  
27 THE CHAIRMAN: Yes. Any difficulties over that?  
28 MR. ROTH: We cannot guarantee that we will not ask to cross-examine until we have seen it, but  
29 on past experience it is perhaps unlikely.  
30 THE CHAIRMAN: We will give every encouragement we can to whatever evidence is being  
31 adduced to be agreed.  
32 Item nine, facts that may be agreed in writing between the parties in the interests of the  
33 efficient and expeditious disposal of the appeal. I am concerned that there should be clarity for  
34 the Tribunal when it hears this case as to what facts are/are not agreed. I suspect this will be a  
35 simple document. If there are issues that can be agreed we would like those listed; and if there

1 are issues that are not agreed and are clearly for the determination of the Tribunal, could those  
2 be flagged up in a single document? I would hope that there can be agreement on issues such  
3 as markets and volumes, so far as possible. Does anybody want to say anything about that?  
4 No.

5 Timetable for the conduct of the oral hearing: given that we are going to have skeleton  
6 arguments and clarity in those documents, our provisional view is that an hour and a half for  
7 each of the main parties and half an hour for the intervener should be quite sufficient for  
8 dealing with any oral argument.

9 MR. ANDERSON: Could I say one thing on that. The time of the oral argument may well depend  
10 on how live or how far we have to go into the first ground of appeal raised by the applicant in  
11 this case, which is the question of whether the Office applied, in restoring pre-merger levels of  
12 competition, the correct legal test within the context of the statutory test. That is, in fact, an  
13 issue that was squarely raised and challenged in a case called *Co-Operative* ----

14 THE CHAIRMAN: Yes, we are aware of it.

15 MR. ANDERSON: ---- which has been fully argued and we now await judgment. If this case is  
16 heard after the judgment in that case, and we believe that would be a sensible course, then that  
17 will be, in our submission, a much shorter issue than would be the case if it were to be argued  
18 out fully again in the context of this case.

19 THE CHAIRMAN: I am not sure that lengthens the argument at all. It is just a question of the  
20 proportion of the time given to it.

21 MR. ROTH: Yes, it may mean, as Mr. Anderson says, that certain ground, depending on what that  
22 judgment says – and one would hope, given the date of the first week of October, that the *Co-*  
23 *Operative* judgment will be out by then – may shorten as a result.

24 I find it just a little difficult to comment on timing of argument at this stage when we have not  
25 seen the OFT's defence and evidence. It may well be that I would say, "Yes, absolutely, an  
26 hour and a half", but I am very much in the dark at the moment. That is all I can say, and I am  
27 sorry that is not more helpful.

28 THE CHAIRMAN: It is actually rather helpful. Miss Kreisberger, you are the intervener, you are  
29 not a main party.

30 MISS KREISBERGER: And we appreciate our role, and we expressly recognise our role to be  
31 supplementary to that of the applicants. We do not propose to repeat or duplicate argument.  
32 We would wish to speak to those matters as set out in our request, which are additional to the  
33 submissions of the applicant. Having said that, like my friend Mr. Roth, we are somewhat  
34 fumbling in the dark, having seen nothing from the Office. One would certainly hope to limit  
35 the submissions to 30 minutes.

1 THE CHAIRMAN: As long as you get in the European Court of Human Rights is not a bad  
2 measurement, is it?

3 MISS KREISBERGER: We may have hoped for 50 per cent of a primary parties' time, but we  
4 would look to be limiting it to half an hour.

5 THE CHAIRMAN: We obviously cannot hold the parties to the minute, but the point we are trying  
6 to make is that this hearing is going to be completed within a day. This hearing can be  
7 completed within a day. Those are the ball park figures for argument. We have very  
8 experienced and skilled advocates for everyone here. We believe that those sorts of ball park  
9 figures are achievable and that it can all be done within a day leaving us enough time, not to  
10 produce a judgment obviously, to at least be able to have a sensible discussion without leaving  
11 London on the "red eye".

12 MR. ROTH: I am sure that is right.

13 THE CHAIRMAN: If it is carefully noted that those are the target figures then that would be very  
14 helpful.

15 In our view, we do not need an additional case management conference. It would simply put  
16 the costs up. Everything can be dealt with administratively if there is anything else, unless  
17 anyone dissents from that view.

18 The *CWS* case, the *Co-Operative Group* case, has already been mentioned, and that was put in  
19 the agenda simply so that it was not overlooked. It may in the end be that either there is a very  
20 simple conclusion that can be drawn from the judgment in that case, if it has appeared by then,  
21 or that it simply does not assist, that it is not on the point.

22 I would like to flag up and draw your attention to some matters which we have discussed and  
23 which you might like to deal with. You are not obliged to. These are just matters which, in  
24 our discussions, have occurred to us and we give you the opportunity, if you wish to, to deal  
25 with them.

26 First of all, and these are basically from the OFT, the respondent, the quality and reliability of  
27 data, especially market share data.

28 Secondly, the process by which the OFT considered the further submissions made by the  
29 applicant.

30 Thirdly, how the conclusions that were reached from customer opinions were arrived at.

31 Fourth, how the OFT justifies its assertion that what is required is the restoration of  
32 competition to the pre-merger level.

33 Fifth, so far as relevant, the OFT's submissions on the working of the market.

34 Sixth, how the OFT justifies its view that Hanson would face only one rival in the relevant  
35 market.

1 Seventh, the economic position of the material companies, if it is relevant. This may be  
2 something that is more for the applicant to deal with.

3 Eighth, the influence of the national market on local market competition – the relationship  
4 between the national market and the local market.

5 Ninth, it would be helpful to have an explanation of the relevance of the applicant's comments  
6 at tab 11, annex 2, on consumer product retail markets, given that here we are not dealing with  
7 consumer products.

8 Tenth, if there was market failure, how might the market itself respond to such failure?

9 As I say, we are not obliging anyone to deal with any of those points, and some of them may  
10 be non-germane to our decision, but those are simply issues that have occurred to various  
11 members of the Tribunal as to matters that might be dealt with.

12 MR. ANDERSON: We have heard what you say, sir, and we will take them all away and consider  
13 them.

14 THE CHAIRMAN: This is not intended to be prescriptive in any way. Does anybody else want to  
15 say anything about that? Is there anything else? Thank you all very much for your assistance.

16 (The hearing concluded at 3.30 pm)