IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1126/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5 July 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

ANN KELLY
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

ISG PEARCE LIMITED Appellant

- and –

OFFICE OF FAIR TRADING Respondent

- and -

CREST NICHOLSON PLC Intervener

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HEARING

APPEARANCES

Mr. Paul Lasok QC and Mr. Josh Holmes (instructed by DLA Piper UK LLP) appeared on behalf of the Appellant.

Mr. Daniel Beard and Mr Tony Singla (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

Miss Marie Demetriou and Mr. Nigel Parr (instructed by Ashurst LLP) appeared on behalf of the Intervener.

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THE CHAIRMAN: Good morning, it is not a shrinking team today, I see. Mr. Beard?

MR. BEARD: Mr. Chairman, members of the Tribunal, I have had a brief word with my learned friend, Mr. Lasok, there were just a couple of quick matters to pick up before we turn to the liability appeal. You will recall on Friday that Mr. Lasok made certain submissions primarily in reply in support of, I suppose, what might be termed in judicial euphemism a bold submission that every separate incident of cover pricing in the decision had to have its specific actual impact and effects considered for the purposes of penalty setting. Mr. Lasok ran three points. First of all, *Apex* was terribly specific to its circumstances and should not be read across more generally, which was a wonderful submission, particularly given that one of the *Apex* infringements for cover price was not even used.

The second was that the decision was all general and not specific, even though it actually considered a number of the representations from parties, a lot of them, in some detail.

His third submission was his piece de resistance. If you recall, it was the reference to the French case, *Peugeot*, that was only available ----

THE CHAIRMAN: I will never forget it! You are going to suggest his translation was wrong, are you, because he was doing it with great brilliance, as it flowed!

MR. BEARD: No, his translation was impeccable, it was his selection that was wrong. He had referred to *T-Mobile*, but you will recall that was the only case he relied on for his bold proposition, and you have our submissions on why that is not a good authority and why it was a case that was dealing with issues of effect and not just object. We thought we would do a trawl to see if we could assist the Tribunal in understanding that case. Mr. Singla has tracked down copies of the Commission decision and a summary of it, just to make good the point that this really was an effects and object case and therefore the analysis of penalty thereafter has to be seen in that context. If I may, I will just pass copies of the Commission summary of the infringement, and also a copy of the decision. (Same handed)

THE CHAIRMAN: This is to read in bed tonight, is it!

MR. BEARD: If you are really struggling to get over insomnia!

THE CHAIRMAN: I am very disappointed in Mr. Singla, I thought he was going to produce decisions in multiple other languages!

MR. BEARD: That is for tomorrow! I do not think there is any need, in fact, to look at the full decision, but we provide it to you just in case. The only relevant part is really the summary of the infringement. I do not want to spoil the surprise, but on the latter pages at points 3 and 4, it sets out how, in very brief terms, the fine was approached in that case and the terms

of the decision, and one will see at para.32 of that summary a confirmation that this was an object and effects decision.

THE CHAIRMAN: I think I remember this case now. Is this a case in which they were trying to stop car companies selling imports at local prices?

MR. BEARD: Yes, it was a market partitioning case. It is one of that particular stream of European jurisprudence where it is all about the extent to which exports and imports are being constrained, and here it was to do with exports and imports to and from the Netherlands. You can see this from the terms of the summary, as I say, as a cure for insomnia later. The principal point is simply to make good the general submission that was made on Friday and to assist the Tribunal by providing the outline of the decision at least in English.

THE CHAIRMAN: So we have a better reason for distinguishing it than merely that it is French.

MR. BEARD: That seemed appropriate in the context of European competition law.

THE CHAIRMAN: Thank you. We will consider that in due course. Right, Mr. Lasok?

MR. LASOK: Sir, the representation is the same as on Friday. I cannot help observing that the Commission decision in *Peugeot* says that only the French text is authentic! I am very disappointed that my learned friend did not seek to translate the English version back into French in order to make his submissions!

THE CHAIRMAN: I am sure he could!

MR. LASOK: Sir, at this stage we are dealing with the liability aspect of the case. This is the point that the OFT did not impose a fine on so-called intermediate parents, but did impose a fine on the appellant which is an intermediate parent, and therefore we submit that the OFT was acting contrary to the principle of equal treatment and unlawfully.

In order to explain the background and context of that submission it is appropriate, in our submission, to go back to the earlier part of the decision. If you have it in front of you, I would be very grateful if you could turn to the glossary on p.29. I have drawn the Tribunal's attention to this before, but in the present context it has a particular meaning.

On p.29 just before the middle bit you have got the definitions of "participant company" and "parties". You see that a participant company was "the legal entity directly involved in the relevant infringement"; and the party was "the undertaking" and more particularly the word "parties" in the singular, and the word "party" referred to undertakings listed in para.I.1.

So, to put it another way, you had a situation in which the legal entity directly involved in the infringement would have been a part of an undertaking but the undertaking might well

comprise other companies, other legal entities, but they were not necessarily directly involved, but they were brought within the scope of the decision, they were made a party because of the fact that they formed part of the undertaking. So at the moment we are looking at two quite separate concepts. One is the concept of direct involvement in an infringement and the other concept is that of being part of an undertaking.

If we go to p.30, we see para.I.1 which starts off by saying:

> "The OFT has concluded that the following parties have been party to one or more agreements and/or concerted practices that infringe the Chapter 1 prohibition of the Act".

So effectively these are undertakings that have been found to be a party to the illegal arrangements. When one looks at the list of these parties or undertakings, we see a whole number of references to the ultimate parent company. If you just run your eyes over the list, first reference to an ultimate parent company is party 5, Admiral Construction Limited, and there is a reference to its ultimate parent company. Then in 6, for example, you have got a reference to the current ultimate parent company and the former ultimate parent company – a whole load of these references.

Not all of these cases appear to be situations in which there was more than two companies in the group. If you look, for example, at 5 itself (and the details are provided on p.42) just looking at diagram in para.II.58, you see that from 2003-2006 there were two companies: AC holdings and Admiral. So in some instances the reference to an ultimate parent company is just a reference to the parent.

THE CHAIRMAN: At p.46 there are more than two, but there are plenty of these diagrams.

MR. LASOK: But the example that I wanted to draw the Tribunal's attention to, rather at random, is Party 48. Party 48 appears on p.32 and it is Holroyd Construction Limited, which is referred to as "Holroyd", together with, for infringements prior to 30 March 2005, its former ultimate parent company, which was called Holderness, and for infringements after 30 March 2005 its current ultimate parent which is referred to as Holroyd Group.

If you go to p.138 you will see the Holroyd case, or rather the description of the party. Again, it is probably sufficient just to refer to the diagram on p.139. You can see from para.II.697 that between 2000 and 2005 there were three companies in the group. After the latter date it went down to two, but we are only concerned with the first period when there were three companies. If you track back to the description of the party on p.32 you will see that what they have done so far as the period 2000 to 2005 is concerned is to define the undertaking, that is to say the party, as compromising Holroyd, which was the company

directly involved in the infringement of course prior to 29th March 2005, and the ultimate parent, Holderness, missing out the intermediate parent Holroyd Group. If one goes further on to p.1836, this is part of the table setting out the penalties payable and who the parties were, the big box towards the bottom deals with Holroyd and you see they have split it temporarily. So far as infringements before 20th March 2005 are concerned it is Holroyd together with its former ultimate parent company, Holderness. You see in the next two boxes references only to Holroyd and Holderness.

Then, for the sake of comparison, if you just look across to p.1837 in the penultimate box you will see Pearce, and there it is Pearce together with its parent, Pearce Group, who is of course the appellant here, and their former ultimate parent company, Crest Nicholson. This is simply an illustration to show you in concrete terms the inconsistency in the OFT's approach because when you have a corporate structure like the Crest Group, in which you have three companies, if it is not Crest then they only define the undertaking so as to include the direct infringement and the ultimate parent, and they miss out the intermediate parent, but in our case they do something different.

The reason why that seems to have happened is to be found in section II of the decision. The Pearce section starts at p.180. You can see the diagram on p.181, so from a diagram perspective it is just like the Holroyd case that we have just seen. Then if you turn on a couple of pages and go to II-1022 on p.184, that says in the first sentence:

> "The OFT is holding Pearce Group [the appellant] liable, however, as the undisclosed principal of Pearce and, therefore, because it was directly involved in the relevant infringement."

So the appellant is found to be directly involved – it is a participant company – and that is the reason why, unlike the Holroyd case, the appellant is included in the description of the party, the undertaking. Therefore, for the purposes of the liability issue before the Tribunal what we are looking at is what was it that made the appellant a participant company, and whether that was lawful.

Our case, in essence, can be reduced to four points, some of which are uncontroversial, but they are as follows: firstly, it is common ground that where you have got a company structure such as the one we see in the Holroyd case, it is lawful and appropriate to hold the subsidiary and the ultimate parent liable, and there is no necessity, whether of law or appropriateness, to make the intermediate parent company liable. That is common ground.

The second point is that in order to sustain the different treatment of the appellant it is necessary for the OFT to be able to demonstrate the existence of some factor that justifies

the different treatment of the appellant. I do not think that there is any difference between the parties on that point either.

Thirdly, our case is that that factor, the differentiating factor, must be something that is both real, it has got to be something of substance, it is a matter of reality; and it must also be relevant. I am just going to make a point about relevance. We all encounter situations in which things are different, but the question of whether or not a difference in things is material depends on the context, it depends on the question we ask. For example, if you are asking the question, if you have got two people, A and B, one is tall and one is short, and you ask generally the question, is that difference real as a matter of substance? The answer is clearly yes. Is it relevant? You can only determine relevance if you have a more precise question. For example, if you say, who is the kind of person best able to accompany Captain Scott on his expedition to the Antarctic, the answer actually is, it is the short person not the tall person, because the short person is physically better able to withstand extreme cold. There are other illustrations of that. Another one would be, who is the person better able to reach down a book from a tall shelf? The answer is, it is the tall person rather than the short person. You can start off with an objective difference between cases which in some instances may be relevant and in some instances it may not be relevant. When we are looking at differences, we need to define what the question is in order to see whether the difference is a relevant difference or not.

In the present context the question is, was the appellant directly involved in the infringement, because that is the reason given in the decision for why the appellant was placed in the category of a participant company, and why the fine was imposed on it.

So we need to look at factors which relate to, are relevant to, the idea of direct involvement in an infringement. I think there, there is a difference of views between the parties. So there is a difference of views between the parties on the third point, which is whether or not the factor that the OFT has to identify must be real and relevant.

The fourth point is the submission that we make, is that that no real and relevant factor can be identified in the present case. That is the main point of argument between the parties, and most of our oral submissions will be directed to that last point.

THE CHAIRMAN: But is point four separate from point three really?

MR. LASOK: I will explain why I separated point three from point four. It is a distinct submission which is based upon really two things. Remember that our point three is that the factor that the OFT relies upon must be real and it must be relevant, it must have those features. It cannot be a matter of legal form.

Why do we say that it has to be real and relevant? On the one hand you have got the principle of equal treatment, which is the principle on which we rely. The principle of equal treatment says that where you have cases that are the same, they have to be treated in the same way. You can only treat similar cases differently if there is an objective justification for doing so. In our submission, that means you have to look at the substance; you cannot just treat cases in the same way or differently merely on the basis of just a superficial glance at a situation; you have got to look at what is the reality of the position.

The second point that we make goes back to what this decision actually says. In our submission, this decision requires the OFT to have identified something that is real and relevant because of the criterion adopted by the OFT in the decision, because of what it said.

If we go back to the Pearce section, section II, of the decision, I have already drawn attention to para.1022 on p.184 where the OFT says that it was holding the appellant liable as the undisclosed principal of Pearce and therefore because it was directly involved in the relevant infringement. This goes back to the distinction that we can see in the glossary. There is a distinction between direct involvement and an infringement, and being part of the undertaking that it is a party to the case. The OFT decided that the appellant was directly involved in the infringement. It was therefore a participating company. The reason was because of the undisclosed principal relationship. If we go to para.1023 second sentence the OFT says:

> "Direct involvement is not a legal concept or novel basis for attributing liability, but is a statement of fact."

That means, in our submission, that the criterion adopted by the OFT was a criterion of fact. They were not relying upon legal form, they were not relying upon a fiction. They were relying, in our submission, on what they considered to be a fact: the fact that the appellant, in their view, was directly involved in the infringement. In our submission, both the principle of equal treatment and this paragraph justify the submission that the factor that the OFT is relying upon in order to differentiate the appellant from other intermediate companies must be a matter of substance, of reality, of fact. Obviously it must be relevant. It must be relevant to the idea of direct involvement in an infringement, which of course is said to be a matter of fact.

That brings me to the fourth point, which is our submission that there just is not anything in the evidence that bears out or supports the OFT's conclusion that, as a matter of fact, the different treatment of the appellant was justified.

The starting point for this, in our submission, is the observation that the OFT did not find that the appellant was directly involved in infringement 75 because it was the intermediate parent of Pearce Midlands. It did not find that the appellant was directly involved in infringement 75 because the appellant was taken to have exercised decisive influence over Pearce Midlands. In fact, the OFT rejected the idea that the appellant was able to determine its conduct on the market autonomously. If you look at para.1034 p.188, 1034 deals with arguments advanced by Crest Nicholson. In the second sentence of 1034 the OFT says:

> "The OFT considers that Crest Nicholson's arguments fall short of rebutting the presumption and do not establish that either Pearce or Pearce Group was able to determine its conduct on the market autonomously."

That followed from earlier findings which we can see in paragraphs 1013 p.182, 1015 and 1019, that the appellant was controlled by Crest and Crest also controlled Pearce Midlands. So you have got in 1013 in the second sentence:

> "The OFT considers that this provides evidence that Crest Nicholson exercised decisive influence over Pearce's conduct at the time of the Infringement."

Then if you go to 1015 second sentence:

> "The OFT considers that this provides evidence that Crest Nicholson exercised decisive influence over Pearce Group's conduct at the time of the Infringement."

And in 1019 first sentence:

> "The OFT considers that Crest Nicholson, as 100 per cent owner of Pearce Group and Pearce, can be presumed to have exercised decisive influence over Pearce Group's and Pearce's commercial policy from 2000 until 31 January 2003 and therefore formed part of the same economic entity."

Of course, when one turns to the liability of Pearce Group, which is the subsection starting on p.184, we see a discussion that is in fact concerned with the idea of direct involvement and the direct involvement was not something that was based upon the exercise of decisive influence by the appellant over Pearce Midlands, but it was in fact based upon the agency agreement. So, for example, if you look at 1023 p.184 last sentence it says:

> "As noted above, the OFT considers that Pearce Group exercised decisive influence over Pearce at the relevant time, but this does not preclude the OFT from also concluding that Pearce Group was directly involved in the relevant Infringement as a result of the agency relationship which existed between it and Pearce."

If you go to p.186 para.1027 the OFT says that it:

> "… remains of the view that Pearce Group is liable for the relevant infringement, not only because it exercised decisive influence over Pearce, but because of its direct involvement in the relevant tender as undisclosed principal of Pearce. The agency relationship also means that Pearce Group is not in the same position as other intermediate parent companies in this case, and the OFT is therefore not discriminating against Pearce Group by including it as an addressee of this Decision."

Of course, if the only factor had been that the appellant was an intermediate parent, then based on the OFT's practice illustrated by the Holroyd case it simply would not have been included as a party. It would not have been a participating company and it would not have been a party. It was solely the agency relationship that caused the appellant to be a participant company and therefore a party. The question that one has to ask oneself is whether or not that is, by reference both to the principle of equal treatment, but also by reference to the OFT's own approach of describing this issue as a matter of fact, the question is whether or not the agency relationship justifies that conclusion.

What I am going to do is to start off with this idea of direct involvement. Direct involvement is described as a matter of fact, not a legal concept, in the decision. That was para.1023.

What does "direct involvement" mean? In our submission, as a matter of fact, direct involvement means joining in something. If, for example, there is a brawl in a pub, and we ask the question, "Who is directly involved in the fight", it would be those people who were swinging punches. If, for example, you have somebody who is having tea with a maiden aunt in a tea shop several hundred metres down the street, you would not, in the use of ordinary language, say that that person was directly involved in the pub brawl, even if, for some peculiar reason, there was a principal agency relationship between him and somebody who was in the pub throwing punches.

THE CHAIRMAN: So the football manager whose football team are involved in a brawl down the road is not participating, he is not directly involved in the brawl?

MR. LASOK: No.

THE CHAIRMAN: I can think of real examples of that in the world of Wales in which I used to live!

MR. LASOK: Also, there is one branch of the law, the criminal law, where there is actually a lot of experience and understanding of what involvement in a criminal offence is, and I do not want to get into that because ----

THE CHAIRMAN: I know it well.

MR. LASOK: -- it is heavily laden with concepts such as ----

THE CHAIRMAN: Foreseeability.

MR. LASOK: Foreseeability, what does aiding and abetting mean ----

THE CHAIRMAN: Recklessness.

MR. LASOK: -- and all that kind of thing, but the OFT is not applying the test of the criminal law here. It is approaching it as a matter of fact, and it is using a phrase "direct involvement", and variations of it like "directly involved", that are words of ordinary language. In our submission, one can simply take these ordinary words with any ordinary meaning and apply them to a factual situation and answer the question, "Is somebody, or are they not, directly involved?"

When we look at an agency relationship, in our submission, the starting point is that an agency relationship is a legal relationship and it is based on a legal concept. It does not necessarily produce a change in facts. In our submission, one has got to be very, very careful when one is plucking out of the air a legal agreement or a legal concept, and then suddenly saying that that gives rise to a change in facts. I am going to move away from the fight example to suppose this one. Let us suppose that you have a motor car manufacturer who enters into an agency agreement with somebody who is dealing in motor cars and makes that person, the retailer, agent of the manufacturer in the sale of motor vehicles, and the agent, unbeknownst to the manufacturer, starts dealing in stolen cars. I do not want to get into the criminal law, but just take the ordinary words "directly involved", and viewing the matter as a matter of fact ask the question: where you have that state of affairs, is the manufacturer directly involved in the selling of stolen cars by reason of the fact that there is a principal/agent contract with the retailer? In our submission, the clear answer is, no.

Of course, it could be that the agency agreement, the agency relationship, generates a change in behaviour, so let us say that the existence of the agency relationship causes the manufacturer to talk frequently to the agent, and in the course of these discussions the agent lets slip the fact that it is engaged in the buying and selling of stolen cars. So the manufacturer has now got knowledge of what the agent is doing. Again, we can ask the question: as a matter of fact, just using the words "directly involved" as words of ordinary meaning, is the manufacturer directly involved in the buying and selling of stolen cars? We

would submit no, because knowledge that somebody else is doing something does not make you directly involved as a matter of fact in what they are doing.

For example, if a noise wakes me up in the early hours of the morning and I look out of the bedroom window and I see a vandal demolishing the bus shelter on the other side of the road, I know that that is what the vandal is doing, but the fact that I know it does not mean that I am directly involved in what the vandal is doing.

Let us suppose another variation of the same situation, the manufacturer with the agency agreement with the retailer, but this time the manufacturer obtains the knowledge and then decides, I will get in on the act on this one", and says to the retailer, "I would like a cut, and I would like to help you out". At this point the manufacturer has moved, we would submit, into a position in which he is directly involved.

What is the relevance of the agency agreement? Of course, what has happened is that the agency agreement was historically an event that gave rise to a relationship with the retailer that produced a situation in which the manufacturer's behaviour changed as a matter of fact.

If we were applying the concept of direct involvement in the buying and selling of stolen cars, just looking at it as a matter of fact, we would be focusing upon what the manufacturer did. We would not be worried at all about the fact that at some stage in the past he entered into an agency agreement with the retailer and it was that agreement that kicked off a series of events that led to his direct involvement in the buying and selling of stolen cars. That is an illustration of what is, in our submission, a basic fallacy in the OFT's argument, because an agency relationship, in our submission, cannot, as a matter of fact, and interpreting the phrase "direct involvement" as words of ordinary meaning, give rise to a direct involvement unless something else is going on.

When the something else is going on, the change in behaviour is occurring, that is something that may have been caused by the agency agreement, but it is not necessarily something that is required by the agency agreement. The agency agreement is historical.

THE CHAIRMAN: If you inject into your various ranges the motor manufacturer for some reason or another purchasing the dealer and thereby becoming the dealer's principal, how does the issue of vicarious liability then affect your analysis?

MR. LASOK: Because vicarious liability is a legal concept applied for particular legal reasons.

What we are told here by the OFT is that it is applying a concept of fact. Its direct involvement in the OFT's perception is a matter of fact. It is specifically stated in 1023 that it is not a legal concept. So, in our submission, we are stuck with a situation in which the OFT has said that what it is doing is observing a factual state of affairs.

The submissions that I have been making are directed to establishing that an agency agreement is not, in itself, something that generates a state of affairs in which there is direct involvement. Obviously, there are legal concepts floating around, but as a matter of fact it does not produce direct involvement – as a matter of fact.

If we look in the present case, there is actually no evidence that the agency relationship produced any change in behaviour on the part of the appellant, or any change in the relationship between the appellant and Pearce Midlands that could, as a matter of fact, justify the conclusion that the appellant had become directly involved in the infringement. After all, there is no evidence and no allegation that the appellant even knew what Pearce Midlands was doing in relation to infringement 75. The evidence in, I think it is, Mr. Leigh's witness statement is that Pearce Midlands would not have been told about things like infringement 75 until after the event. The evidence of Mr. Leigh is that the businesses, or at least Pearce Midlands, was run effectively independently of the appellant. There were only certain types of transaction of significance that had to have the approval of the appellant and infringement 75 was not one of them.

The upshot is that the evidence does not indicate that the agency agreement caused the appellant to act in any way differently from a parent, vis-à-vis Pearce Midlands. Of course, as we see from the OFT's decision, it seems to have regarded a parent subsidiary relationship as a necessary condition, but not as a sufficient condition for imposing liability. The sufficient condition was the agency relationship. It was not the parent subsidiary relationship.

It is interesting also to note that the agency agreement seems to have been considered as an arrangement that would produce the consequences intended by Crest without altering the way in which the appellant and Pearce Midlands operated – in other words, it was designed to achieve a result that Pearce intended, but without altering the *modus operandi* of the companies. That is Mr. Leigh's witness statement, para.9, last sentence.

Since a number of things I am going to say relate to the undisputed evidence, it might be useful to look at Mr. Leigh's evidence. It is in the witness statement bundle and it is tab 1. If you go to the second page of the witness statement, this is just very briefly running through some parts of it, you see that in para.5 he talks about the history, and in the second sentence he makes the point that historically Pearce Midlands and Pearce Group, which is the appellant, were active in different parts of the country. This case concerns a contract that fell within the geographical area covered by Pearce Midlands. You will also observe in para.5 the bit about actions to close Pearce Midlands commencing in November 2002 with

the live projects being run off. That is relevant to the background to the penalty issue but not to the present case.

Then he deals at great length (and I do not propose to repeat all this) with the background to the agency relationship at paragraphs 6-7, and the consequences. At the end of para.7 he says:

> "However, in practice, Pearce Midlands, like all of the other Pearce Group subsidiaries, continued to operate independently and in the same manner as before the agency agreement was entered into."

That is basically the theme of his witness statement, and it is supported by the witness statement of Mr. Herring. Nothing in that is disputed. So we are left with a situation in which the undisputed evidence is that the agency relationship did not create a change in the relationship between the appellant and Pearce Midlands so that they operated in a way differently than a parent and subsidiary would normally operate. So it added nothing in practice. The agency agreement was installed, on the evidence, simply to achieve a particular accounting result. As Mr. Herring says in particular, it did not produce a situation in which Pearce Midlands ceased to be trading because in fact Companies' House took the view that it was trading, and the accounts had to reflect that. So what we had was a situation in which Pearce Midlands was the company that was doing the business, Pearce Midlands was the company that was creating the turnover through its own efforts. The agency relationship did not affect that one iota.

In our submission, that is crucial because the appellant was not fined; it was not brought into the definition of participating company; it was not brought into the definition of a party to the infringement because it was an intermediate parent, because there was a parent/subsidiary relationship between it and Pearce Midlands. All this happened solely because of the agency relationship. Therefore, in our submission it is crucial to focus on the facts concerning the agency relationship and what actually happened to see whether or not it is justified to regard the agency relationship as meaning that the appellant became directly involved as a matter of fact in infringement 75. We have, in the undisputed evidence, the fact that the appellant would never have known about infringement 75; it would never have been involved in the commercial decisions, if any, that led up to what happened in infringement 75; that Pearce Midlands was carrying on its business independently of the appellant. It is not even a situation in which the relationship between the appellant and Pearce Midlands was different from that of a parent/subsidiary relationship in relation to money. The evidence is that Pearce Midlands declared dividends in favour of the appellant

for monies between the companies within the group under the inter-company loan accounts. The agency relationship simply did not produce, as a matter of fact, anything justifying the conclusion that the appellant was directly involved in the infringement.

The evidence against that consists only of the witness statement served by Crest, which has been the subject of detailed criticism in writing in the skeleton – or at least the reply that we wrote in response to Crest's intervention and its evidence. The major problem with Crest's evidence is that Mr. Maguire, who is the person who provided the witness statement, simply was not around at the material time. He joined Crest only in 2008, which was long after the appellant had been sold off, and he did not have any knowledge of what was happening at the time of the infringement, or indeed any knowledge of what was happening over the entire period of the agency relationship. So he is unable to give any evidence on whether or not the agency relationship had factual consequences of the sort that, in our submission, would be required if the OFT were going to justify the different treatment of the appellant. Although Mr. Maguire says a number of things that appear to be emanating from his own opinion or assessment of the situation, what he does not do is even to disclose any documents that may have been in Crest's files which shed light on this; he does not tell us where he gets his opinions or understandings from. More particularly, he does not address any of the very detailed points made in the evidence of Mr. Leigh and Mr. Herring. Both of them go into great detail about what was actually going on as a matter of fact.

THE CHAIRMAN: They both being contemporary?

MR. LASOK: They were both there over the relevant period. So they give very precise evidence as to how the relationship actually operated, how decisions were made, and they exhibit documentation such as extracts from the minutes of board meetings and the like. In our submission, their evidence, when you read it as a whole, gives a very detailed, precise picture of what went on. Our basic submission is that that picture simply does not justify the conclusion that the appellant could legitimately be described as directly involved full stop. But it also shows that the agency relationship cannot be relied upon as something that justifies the conclusion that the appellant was different from any other intermediate parent referred to in the decision. The evidence shows that there is simply no factual basis for saying that viewing direct involvement as a matter of fact (which is the way the OFT puts it) there was direct involvement. The agency agreement simply had a formal function that was concerned with accounting processes and accounting formalities. It was not intended to have any other function.

Accordingly, in our submission, viewing the basic question as a matter of substance and of reality, the OFT was unjustified and acted unlawfully in pinning liability on the appellant. I have not gone in detail through the witness statements, because I think the best thing actually is for the Tribunal to read them as a whole.

THE CHAIRMAN: We have done it already.

MR. LASOK: It would be idle for me to pick out bits of it at this stage. Unless there is anything further on which I can assist the Tribunal, those are our submissions.

THE CHAIRMAN: Thank you very much, Mr. Lasok. You will be next, Mr. Beard, and then I think Miss Demetriou later. We will have a short break now. We will have a break until about 20 to. That will leave us plenty of time, will it not? We are willing to sit into the lunch hour.

MR. LASOK: That is not going to be a problem, I do not think.

(Short break)

THE CHAIRMAN: Can I just make a general plea for a little bit less silent telephonic activity, without blaming anyone in particular. It is a bit distracting for us because we can actually see everything that goes on because we are sitting at a higher elevation. Thank you. Mr. Beard?

MR. BEARD: Mr. Chairman, members of the Tribunal, to deal with the appeal on liability, the analysis needs to be taken in stages. First of all, we are dealing with the notion of an undertaking. It is a word used in both domestic and European competition law. In particular, it is a word used in s.2 of the Competition Act. You do not need to turn it up, but it is to be found at volume 1, tab 4, of your authorities bundle, and it is an undertaking that infringes Chapter I prohibition, therefore, s.2, when it enters into an agreement or concerted practice which prevents, restricts or distorts competition. So the focus of competition law is on the undertaking. The same is true, as I say, of European law, and of course by virtue of s.60 of the Competition Act this is a term that must be applied using the EU case law in this regard, since we are dealing with the substance there rather than the penalty guidance, which is a different matter.

The notion of an undertaking is considered in guidance that has been promulgated by the Office, and it is perhaps just worth turning this up. It is at volume 11, tab 133. This guidance is not guidance to which I think this Tribunal has been referred previously. It is the very basic outline guidance that is promulgated by the Office explaining how effectively the Chapter I prohibition works in very broad terms. It is very clearly written, it does not deal with all of the nuances of the competition law, but it is nonetheless of assistance, one

hopes, to the business community generally, and it has been a document that was promulgated in its first form at the advent of the Act in 2000 and updated in 2004, following of course modernisation.

The particular part to which I would refer the Tribunal, is section 2, "Anti-competitive agreements: the provisions". One sees at para.2.4, p.5, "Terms used in the provisions", and then a sub-heading, "Undertakings".

THE CHAIRMAN: It is really 2.6, is it not?

MR. BEARD: It is really 2.6. 2.5 is all about the question of whether something is engaged in economic activity, because there were arguments that, for instance, sole traders or charities did not fall within the scope of competition law and those notions have been well crushed by the case law referred to.

2.6 sets out how it is that groups of companies who form part of the same economic entity will form part of the relevant undertaking, and therefore when an infringement occurs it is that undertaking that commits the infringement. It is therefore a wide concept. It applies to any entity engaged in economic activity, and groups of companies will ordinarily form part of the same economic undertaking.

A particular issue relating to this has been raised in the Durkan case, which I think a different constitution of this Tribunal is to hear in about a fortnight's time. But no such point arises here. It is clear and uncontested that at the time of the infringement Crest, Pearce Group (who is the appellant today and to whom I will refer as "Pearce"), and Pearce Midlands formed part of a single economic undertaking for the purposes of competition law. As I say, it is the undertaking that commits the infringement, and it is not denied that the undertaking may be held liable for the infringement.

Since an undertaking can be made up of a number of legal persons, each of them is liable, jointly and severally, for the infringements. Each legal person can be made specifically liable for the infringement. Again, this proposition is uncontested. So in principle it is absolutely clear that Crest, Pearce and Pearce Midlands can be made liable for infringement

75. Mr. Lasok, when he read certain extracts of the section relating to the liability of Pearce Group, overlooked para.II.1021 in which Pearce Group accepted the OFT "was entitled to hold it liable as an intermediate parent company of Pearce" subject to the principle of equality.

THE CHAIRMAN: So what is the question of fact that is referred to in para.II.1022 of the Decision? Is it a question of fact as to factual participation in the act complained of, or is it

the question of fact referred to in para.2.6 of the guidance – that is, whether the subsidiary has any real freedom to determine its course of action etc?

MR. BEARD: It is not 2.6 of the guidance, because 2.6 of the guidance is effectively whether or not Pearce Group and Pearce Midlands are part of the same undertaking. Those are the issues to do with decisive control. It is something beyond that.

THE CHAIRMAN: It is participation in the act.

MR. BEARD: It is participation in the act; it is a differentiation of factual circumstances.

THE CHAIRMAN: What does that mean?

MR. BEARD: The intermediate parent in this case, Pearce, was in a factually different position that should be treated as a matter of direct involvement in the infringement. That is what the OFT have set out in the Decision. But it is not simply a factual question relating to 2.6 of the guidance.

The fact that Crest has separated from Pearce and Pearce Midlands, I should say, does not matter. Crest remains liable, and indeed Crest does not contend otherwise. Obviously, it has complaints which it aired on Friday about the level of penalty, but it is no part of Crest's case that it is not liable as part of the undertaking. So the Tribunal might, at first blush, find it particularly strange that Pearce, the company closest to Pearce Midlands, should be contending otherwise when the ultimate parent is not.

The only basis for this contention is that there has been unlawful unequal treatment here. It is said that other intermediate parent companies were not included in the decision. Although no specific reference is made in any of the pleadings to which particular comparator cases are concerned, it is accepted that intermediate parent companies were not automatically included as liable within the scope of the Decision in respect of particular infringements. In fact, there are intermediate parent companies named as liable in the Decision, but they are not named for the same reason as Pearce is named.

The special features of the present case all arise from the arrangements put in place by Pearce and Crest about how Pearce Midlands was to exist and be treated vis-à-vis the parent companies That is the agency agreement. There is no issue that here, there was put in place an agency agreement, and that it had certain legal consequences. Mr. Lasok has striven hard to say that although it had legal consequences it did not have factual consequences, and that proposition is simply unsustainable.

Mr. Lasok has sought to suggest that the arrangements for Pearce Midlands were some sort of trivial accounting mechanism and the OFT should have looked behind them at the supposed reality of the situation. But the truth of the matter is that the reality of the

situation was one created by the agency agreement. It did matter. One can see that in particular just by looking at a set of the statutory accounts. If one has the witness statement bundle and looks at the second tab under tab 13 of Mr. Leigh's statement.

THE CHAIRMAN: What is the page number at the bottom?

MR. BEARD: 111. It is the Pearce Construction (Midlands) Limited Directors' Report and Account of 31st October 2001.

THE CHAIRMAN: Got it.

MR. BEARD: This is, on the face of it, a relatively standard document. This is the Audited Accounts for Pearce Midlands for the year 2001, which is of course the period at around which the particular infringement occurred. On p.112 one can see that this is the Directors submitting their report and audited accounts. On p.113 there is the standard statement of Directors' responsibilities. Then, halfway down the page one sees the heading: "Report of the Independent Auditors to the Members of Pearce Construction (Midlands) Limited". It sets out the standard caveats in relation to auditor duties.

At the bottom of that page one sees the opinion:

> "In our opinion the financial statements give a true and fair view of the state of affairs of the Company [Pearce Midlands] as at 31 October 2001 and of the result for the year then ended and have been properly prepared in accordance with the Companies Act 1985."

If one turns over the page, what one actually sees is a very abbreviated set of accounts, because one only finds there a selection of a very limited part of what would ordinarily be expected to be a balance sheet – current assets, capital and reserves. The Notes to the Accounts.

THE CHAIRMAN: There is no trading account as such.

MR. BEARD: No trading account, no turnover. Notes to the Accounts 2 Profit and Loss Account. One would expect one in audited accounts.

> "The company did not trade during the year in its own right, acting only as an undisclosed agent of Pearce Group plc, consequently no profit and loss account has been prepared."

It is also worth noting Note 3 in relation to the creditor point raised above:

> "Creditors: amounts falling due within one year. The above creditors are liabilities incurred on behalf of Pearce Group plc and are recoverable from that company."

Just for completeness, if one turns back to p.112, the Report of the Directors Business Review:

> "The Company did not trade during the year but acted as an undisclosed agent of Pearce Group plc."

That is the reality of this situation. Pearce Midlands was a vassal of Pearce Group; it was a conduit for monies. Why was that? It was because of the agency agreement.

Sir, in the same bundle, if one turns back to tab 2 of Mr. Leigh's witness statement (little tab 2) p.13.

THE CHAIRMAN: The agreement?

MR. BEARD: Yes, the agreement itself. Mr. Lasok did not trouble the Tribunal referring to this in any detail, but since it is the crux of the concern here, it is worth looking at it. It is an agreement between C. H. Pearce & Sons plc and W. A. Cox (Evesham) Limited. It is described as an agency agreement on the first page. If one turns over, you have got ordinary recitals. The fact that it is between C. H. Pearce and W. A. Cox is not material. For these purposes one can effectively read C. H. Pearce and "the Company" as a reference to Pearce throughout the document, i.e. Pearce Group (the appellant today). One can read W. A. Cox (Evesham) Limited, called "the agent" as reference to Pearce Midlands throughout the document.

What one then sees is an agreement whereby at point 1:

> "The Company hereby appoints the Agent and the Agent hereby accepts appointment as the agent of the Company for the sole purpose of carrying on on behalf of the Company in the name of the Agent the business of building contractors and property developers upon such terms and subject to such limitations as the parties may from time to time agree in writing. (2) Within the scope of the Agency Business the Company hereby grants to the Agent full power and authority on behalf of the Company to enter into any contract or contracts and do any other acts or things in the name of the Agent as are necessary for or incidental to the responsible conduct of the Agency Business. (3.1) The Agent shall conduct the Agency Business in the best interests of the Company and shall do its utmost to advance and protect the interests of the Company in relation thereto and shall observe all directions and instructions given to it by the Company in relation to the Agency Business. (3.2) The Agent shall provide to the Company or to persons designated in writing by the Company such information as the Company may reasonably require … (3.3)

> The Agent shall keep full and proper books of account in relation to the Agency Business such books and records being kept separate from those (if any) not relating to the Agency Business and remaining at all times the property of the Company … (3.4) The Agent shall pay all monies received on behalf of the Company into a designated account maintained by the Agent and the Agent shall adopt a limited bank mandate form approved in writing by the Company which shall enable the Agent to draw cheques upon this account for the purposes which are necessary for … the Agency Business. (3.5(1)) The Agent shall hold: (a) all real and other property and any estate or interest … (b) the benefit of all contracts entered into by the Agent; and (c) all sums standing to the credit of any bank account maintained by the Agent … as nominee of and trustee for the Company and the Agent shall have no beneficial interest in any Agency Property and the Agent hereby undertakes and agrees not to transfer --

THE CHAIRMAN: Mr. Beard, how does this helps us to determine the meaning of the sentence: "Direct involvement is not a legal concept or novel basis for attributing liability but is a statement of fact"? Whatever the agency relationship, interesting as it is, the legal relationship, if direct involvement in an infraction or an infringement is a statement of fact and the facts do not establish that the directors or principals of the appellant were directly involved, where are we left?

MR. BEARD: The agency agreement is the determinant of whether or not Pearce is directly involved. Mr. Lasok seeks to effectively ignore the existence of the agency agreement. Pearce Midlands is merely a vassal for Pearce Group in this context. In those circumstances, any activities that are undertaken by Pearce Midlands, any turnover it generates, is turnover of Pearce Group. In those circumstances, it is the agency agreement which means there is direct involvement on the part of Pearce Group.

It goes without saying that here we have a legal agreement that does have real effect. Mr. Lasok has tried to pretend that this is a matter of form or fiction. It is neither. It may have meant that Pearce Midlands continue to operate on a day to day basis in a similar manner to a subsidiary that did not have such an arrangement in place. The evidence that has been put forward by Mr. Leigh and Mr. Herring as to the day to day operation, contracts being entered into by Pearce Midlands in its own name, it retained books, and so on, that described its own business internally are entirely consistent with that agency agreement. The agency agreement had the effect, not just as a matter of law but as a matter of fact, that what Pearce Midlands was doing had changed. To use Mr. Lasok's own words, the

arrangement did have results and consequences. There was a real change in the way the world saw Pearce Midlands. When I say "the world", I mean generally if you ask what the state of the business of Pearce Midlands was as it is described in the statutory accounts it was a non-trading company, it had no turnover. Companies House accepted that. Companies House have said that you have to put some sort of creditor details in those accounts because it was not a dormant company. It did not require full turnover, it accepted that because of the agency agreement there was no turnover. So Companies House would see it that way, lawyers would see it that way, the tax man may see it that way, banks may see it that way. If you ask to borrow against the assets, what assets does Pearce Midlands have autonomously?

All of these real questions, facts in the world have been changed, because what constitutes the nature of a company is described in its accounts. So Mr. Lasok saying, "One can go behind those accounts, one can consider detailed evidence from Mr. Leigh and Mr. Herring as to how day to day operation worked", does not assist him. The direct involvement of Pearce Group occurred because it was Pearce Group that were using Pearce Midlands to carry out these activities, and that was recognised through the scheme of the agency agreement and the accounts, and that is the flaw in Mr. Lasok's argument, and that, Mr. Chairman, is why the terms of that agency agreement are so crucial. They did change the way in which the world worked. They changed the relationship between Pearce Midlands and Pearce in a substantive manner and it meant that, for these purposes, Pearce was directly involved in the activities of Pearce Midlands in a way that no other intermediate parent was.

Of course, it goes without saying that this agency contract must be interpreted in line with all contracts. That means objectively and not subjectively, what a reasonable person reading the document would take to be the intentions of the parties and no doubt the Tribunal does not require any citation or assistance on that, but the words of it are clear. The intention and purpose are clear. Whatever Pearce Midlands does it does for Pearce, it does it on behalf of Pearce. It holds assets on trust for Pearce. It is in turn indemnified by Pearce for any claims.

As I have said, it could have its own management accounts, it can contract in its own name, but that is neither here nor there. What was Pearce Midlands was Pearce's as a matter of law and, as the statutory accounts make clear, as a matter of fact. This arrangement was particularly material. Mr. Lasok tried to suggest that you could have all sorts of differences which were not material to the assessment, but this difference was material to the way in

which the Office of Fair Trading considered the penalty to be imposed because of the way in which penalties are considered in the light of the guidance using turnover. In essence, the agency agreement meant that if Pearce were not included as part of the undertaking for the purposes of imposing liability there would be no turnover on which to impose any penalty for Pearce Midlands or Pearce because of the arrangements in place. In the circumstances, it was plainly right for the Office to act so as to prevent the operation of the agency agreement enabling such avoidance.

To put the point in another way, as the OFT does in the decision, the effect of the agency agreement on turnover was to make Pearce the party with the turnover relating to activities in respect of which the infringements had occurred, and it was this that constituted the direct involvement.

I should emphasise, this was the only case amongst the 103 where, without wishing to sound too Conan Doylish, this was the only case of the disappearing turnover. There were no other cases akin to Pearce Midlands where the infringing legal entity had zero turnover at the time of the infringement and continued to do so. No one else was operating a similar agency agreement.

So not only was the situation of Pearce different from that of other parties, but it was a material and important difference which, if ignored, could enable the avoidance of penalties. It is for that reason that there is a change in the facts, even though the day to day operation of Pearce Midlands may have remained the same, as is put forward in the evidence of Messrs. Leigh and Herring.

There are three points plus one to pick up. Mr. Lasok has not in the oral submissions referred to the European Union Verticals Guidelines. It was a point raised in the notice of application. Essentially, it was an attempt to put the dogs off the scent in this case. The agency discussed there, just for the Tribunal's reference, is the consideration of agency for a very different reason. What those guidelines are concerned with is a circumstance where, if you have an entirely independent legal entity with which you enter into an agency agreement, that agency agreement is or is not caught by Article 101 or the Chapter I prohibition. Here that does not arise because, of course, what we are talking about here is companies that falls within an undertaking and therefore agreements between themselves would not fall within the scope of Article 101 or Chapter I in any event, because *intra* undertaking agreements do not.

The second point to note is the fact that when it comes to considering relevant turnover and total turnover the OFT focuses on the year prior to decision, but that is irrelevant to this

analysis and Mr. Lasok has not suggested otherwise. The question the OFT had to ask itself was: at the time of the infringement, what entities formed the relevant undertaking and which should be made liable. Then the penalties are calculated and attributed and this is the approach which is illustrated by the involvement of Crest. It was the ultimate parent at the time of the infringement. By the time of the decision, of course, it was separate, but it was nonetheless captured for the purposes of imposing a penalty.

Thirdly, a couple of practical points. For all the reasons given Pearce is plainly wrong that it was discriminated against, and it has wholly failed to make out its case here. The facts of day to day operation not changing does not mean there is absence of change of factual circumstance. There was no turnover in Pearce Midlands even though it was a company that, as Mr. Lasok puts it, was active and trading, for the purposes of recognition of statutory accounts – in other words, the reality of the way the company was presenting to the world, it had no turnover, it was therefore very different.

If you were to eliminate Pearce, as it seeks to do, this would leave the OFT with two particular problems which the Tribunal should be aware of. First, Pearce Midlands, not only did it not trade in the year before the decision, which did occur in relation to other cases, but of course because of the agency agreement it was deemed not to have traded at any period post about 1995 when the agency agreement came into place. So it had no audited trading figures going back for years before the advent even of the Act. If you were to take Pearce out of the equation, how are you supposed to go about assessing relevant turnover in relation to this case? Mr. Lasok may start saying, "One looks at management accounts and all sorts of other things", but that is not a good basis for a regulator to be proceeding on, that it is second-guessing statutory accounts, those that are proved by auditors consistently with their duties under the Companies Act.

Secondly, and importantly, the practicalities of enforcement may become a great deal more complex. Pearce Midlands is now dormant. It has not had turnover or assets for the past 15 years because of the operation of the agency agreement. There must be real concerns about the possibility of enforcement against such an entity. Of course, if Mr. Lasok says at this point, "Pearce Midlands is indemnified under the agency agreement, so there is always going to be the possibility of enforcement against Pearce Midlands", we will say, yes, precisely, except that merely illustrates our fundamental point, this is really all about Pearce Group trying to take an opportunistic legal point in order to avoid a penalty. If, on the other hand, he says, "Actually, Pearce Midlands is an empty shell, there is no way of enforcing against it", this precisely illustrates a concern that the Office would have in this sort of case

if the Tribunal were to say, this is a relevant distinction, notwithstanding the existence of a legal agreement which operates and has consequences, and one can see those consequences made manifest in the statutory accounts.

In conclusion in relation to the appeal on liability, there was no unlawful equal treatment here. A special situation was created where Pearce Midlands was treated differently from others and Pearce was correctly and lawfully made liable.

There is one additional point to add, and this relates both to this appeal and indeed to Friday's hearing, that it was one that could not properly be made until we had heard how the liability case would be put. There is a particular oddity about the position we are in. Pearce is contesting liability. It continues to do so long after it has seen all of the evidence and knows all about Crest's admissions. On Friday, it was being said, "We have been terribly hard done by here, we lost an opportunity", and that it was procedurally unfair in particular. When the Tribunal comes to deal with the arguments about discounts on penalties that were considered on Friday, and in particular that procedural fairness point, it is hard to see how any material detriment could have been suffered by Pearce when it now, long after it knew about the admission by Crest, continues to maintain non-liability – in other words, even if it had had the opportunity it contends should have been afforded to it, there is a good basis for considering that it would not have taken that opportunity, and it cannot be right, therefore, in the context of the Friday appeal to require any, or any material, reduction in penalty in relation to Pearce Group.

For completeness, whilst the position is slightly different in relation to Pearce Midlands because there is no specific challenge to liability, it is to be noted that there is no admission made by Pearce Midlands, and of course it is a subsidiary controlled by Pearce. There is no argument but that Pearce has decisive control. Indeed, as I say, it is perhaps that, given the relationship between the two, no such admission was forthcoming.

I add that final point linking the two appeals, but the fundamental point today is the agency agreement. It was a real agreement in law. Mr. Lasok's submission that legal agreements do not change the world is one that is very difficult to sustain. Legal agreements have a purpose. They try to achieve results and consequences, as Mr. Lasok put it. They did here. Those results and consequences are a material difference, which justified the difference in treatment.

I have not dealt with the variety of novel situations with which Mr. Lasok sought to compare the present situation. The point is a simple one. You have to look at the particular

circumstances of these arrangements and say, did these amount to a material difference in relation to this case which means that the principle of equal treatment was breached here. Questions of direct involvement and the meaning of that term as applied in other fields are not material to this assessment. One can look at all sorts of different offences and the constituents of them may mean that you can certainly be directly involved in, for instance, the conspiracy, even when you are sitting quietly in auntie's tea house whilst your henchmen are busy down the road meting out the punches.

Unless I can assist the Tribunal further, those are the submissions of the OFT.

THE CHAIRMAN: Thank you, Mr. Beard. Miss Demetriou?

MISS DEMETRIOU: Sir, just a few submissions in support of the OFT.

THE CHAIRMAN: You can spread yourself if you want to, we are in no hurry!

MISS DEMETRIOU: I do not want to repeat anything obviously that Mr. Beard has said.

THE CHAIRMAN: Everyone is being very succinct this morning.

MISS DEMETRIOU: I would like to try and grapple with what I think we are all agreed is the central point, as things have transpired today in this liability appeal. The question for the Tribunal is whether the agency agreement constitutes a relevant difference such as to justify the differential treatment accorded by the OFT to Pearce. Mr. Lasok says no, and he says the reason for that is that they agency agreement is irrelevant. He accepts it is a difference, but he says it is irrelevant. The reason for that in turn is because he says that the question of direct involvement is a question of fact, and he refers to para.1023 of the OFT's decision.

Sir, in relation to that, I have two submissions to make. The first is that it is important not to read para.1023 in isolation and out of context. It is also important not to read it like a statute and place too much weight on those words, which is what Mr. Lasok, in my submission, has done.

Perhaps the Tribunal could turn up para.1023 and I can make my point about context.

What the OFT is doing in para.1023 is responding to submissions made by Pearce Group, which are summarised in para.1022, and we see there that:

> "Pearce Group disputed that the OFT was entitled to hold it liable on this basis, stating that neither 'direct involvement' nor 'participation' are established concepts in UK or EC case law. 'The concept of direct involvement is entirely novel as a basis for attributing liability in competition cases.'"

THE CHAIRMAN: Where does that quotation come from?

MISS DEMETRIOU: I think that must come from their representation.

THE CHAIRMAN: It was not clear from the footnoting. Thank you.

MISS DEMETRIOU: Sir, the last sentence is:

> "Pearce Group submitted that the attribution of liability rests solely on the concept of 'decisive influence'."

So what the gist of Pearce Group's submissions are here is that the case law establishes this concept of decisive influence which can be a legitimate basis for holding a company to be liable, yet they say the concept of direct involvement as a legal concept is not known as an independent legal basis for liability. So they are saying we all know about decisive influence, and we know about the concept of an undertaking and a single economic entity, but there is no such legal concept of direct involvement.

What the OFT is doing in the next paragraph is responding to that submission and saying: we know it is not a legal concept; it is a question of fact. That does not mean that the question of fact (and this is the second point) has to be determined in a manner which is divorced from the legal context. That simply is not what that paragraph is saying. It is saying that the concept of direct involvement itself is not a legal concept; it is one of fact, but it is not saying that the question of fact has to be divorced from the legal context surrounding it. That is the key point, in my submission.

Here, the legal context in which the factual question of direct involvement has to be assessed is the existence of the agency agreement. For the reasons that Mr. Beard gave, the agency agreement had very real factual consequences. That is the purpose of an agency agreement. So Mr. Lasok's analogy of a pub brawl is entirely inapposite because the OFT is not here restricted to determining as a matter of fact whether Pearce Group physically took part in the decision making which led to the infringement. Why should it be so restricted to those particular facts? The OFT is entitled to take account of all surrounding facts to reach its factual conclusion at the end of the analysis.

THE CHAIRMAN: So in this case, on the facts of this case, are you saying that there is really no difference between the meaning of decisive influence and direct involvement?

MISS DEMETRIOU: No, I am not saying that.

THE CHAIRMAN: It is getting close to it, is it not?

MISS DEMETRIOU: What I am saying in this case is there are two bases clearly on which it is possible in principle to hold Pearce Group liable, but what we have to show is that the agency agreement provided an independent basis. Otherwise, there is a prima facie difference in treatment. I accept that. But the point here is that the question whether or not Pearce Group was directly involved might be a question of fact in the sense that the concept of direct involvement does not have a special legal meaning. But that question of fact has to

be determined in light of all relevant circumstances. The relevant circumstances here include the agency agreement, which produces legal effects.

So it is artificial to say that because this is a question of fact one has to ignore the legal context. That is the key point, and I think that is where Mr. Lasok's submissions, in my respectful submission, fall down. He is seeking to shut the Tribunal's mind to the legal context. To illustrate that, an important question to ask in this context would be this. Given the agency agreement, would a third party with whom Pearce Midlands contracted to provide construction services be able to sue Pearce Group if Pearce Midlands defaulted on its contract, breached its contract? The answer is of course it would, because Pearce Group would be liable as the principal.

THE CHAIRMAN: That is a law of agency.

MISS DEMETRIOU: That is the law of agency. Indeed, this would be very important in practice. As we have seen from the Accounts, Pearce Midlands had no assets of its own; it held all assets in trust for Pearce Group. So all of its property and income belonged to Pearce Group.

As a result of the agency agreement, Pearce Group would be liable if a third party sued, and that is a question of fact. That is a question of fact resulting from the impact of the legal agreement. It is precisely the same here. So Mr. Lasok, in my submission, is trying to place much too narrow a meaning on the words "question of fact" in para.1023. The consequence of the agency agreement would in fact give rise to legal liability if a third party sued because, as a matter of fact, for the purposes of legal liability, Pearce Group would be said to be directly involved as principal.

If one asked a court hearing such a claim: is Pearce Group directly involved in this breach of contract, they would say yes, they are directly involved because of the consequences of the agency agreement. Precisely the same applies here, in our submission.

To put the point another way, as the Tribunal is aware, this infringement was not an infringement which led to any gain by Pearce Midlands because the contract went to another company, but it could have been an infringement which led to financial gain. Who would have benefited? Not Pearce Midlands but Pearce Group. We see from the agency agreement that the benefits of the contract are held in trust for Pearce Group, as the company defined in the agency agreement.

THE CHAIRMAN: I suppose it is arguable both would have benefited, given that there are some accounts and it might have affected the balance sheet of Pearce Midlands?

MISS DEMETRIOU: I am not quite clear in what way they would have benefited. It appears from the agency agreement itself that the benefit of any contract or property (which is broadly defined as property emanating from agency business) is to be held on trust by Pearce Midlands for the benefit of Pearce Group. So in my submission Pearce Midlands would have no beneficial interest in any gain to be achieved from the infringement.

Sir, that is the simple point I wanted to make, but it is a point which, in my submission, goes to the very flaw in Mr. Lasok's argument (which of course was very well put, as we are used to from Mr. Lasok). The flaw in Mr. Lasok's argument is that he is construing the words in para.1023 far too narrowly and out of context, and he is construing them in a way which attempts to force this Tribunal to shut its eyes to the legal context of the factual conclusion that has to be reached. Those are my submissions.

THE CHAIRMAN: Flaw or flawed, Mr. Lasok?

MR. LASOK: In my respectful submission, the position taken by the OFT is fundamentally flawed. I will only deal with six points that arise out of the submissions.

THE CHAIRMAN: He is a quick thinker, is he not! (Laughter)

MR. LASOK: The first concerns my learned friend Mr. Beard's reference to the accounts in tab 13(b). What he did was to skilfully avoid referring to the management accounts in the witness statement bundle tab 13(a). If you go to 13(a) starting at p.71 you have got the Pearce Midlands stuff. If you go, for example, to p.84 you have got there accounts that set out turnover.

The upshot is that we have got an extremely odd situation. If you look at one set of accounts you see that Pearce Midlands has got turnover. If you look at another set of accounts you see that it does not have turnover, and Mr. Beard says; aha, the relevant accounts are the ones that do not mention Pearce Midlands' turnover. One must ask the question; why are those accounts the relevant accounts? Is it not the case that what we are confronted with is an accounting convention?

How is it possible for Pearce Midlands to include turnover in its management accounts if it is not achieving that turnover? In our submission, this is one of the basic problems in this case: that the OFT is focusing upon matters of convention and form and not going to matters of economic reality and substance.

The second point concerns my learned friend's submission that Pearce Midlands was the vassal of the appellant, and nothing other than a conduit for monies. The phrase "vassal of the appellant" appeared at least twice in his submissions.

The OFT's decision actually finds that both the appellant and Pearce Midlands were the vassals of Crest. Pearce Midlands was not the vassal of the appellant, because it was Crest that had control over them, and neither of them (including the appellant) had commercial independence. That is a specific finding made by the OFT. So the vassal argument disappears.

The lovely one I thought, with great respect to Mr. Beard, was the "conduit for monies". Where do these monies come from so that they could be passed down a conduit? Who owned them? Pearce Midlands. Who did the work? Pearce Midlands. The conduit function is nothing different from what one sees in any group organisation where subsidiaries earn pots of money and pass the fruit of their commercial endeavours up to the holding company. That is all that happened here.

The third point concerns the agency agreement. My learned friend went through the agency agreement, but he omitted to comment upon the singular fact that the agency agreement arose in a context in which Pearce Midlands was carrying on business in one part of the country and the appellant had been carrying on business in another part of the country.

If we have an agency agreement that turns Pearce Midlands into a vassal, where is the provision in the agency agreement under which Pearce Midlands gave up its lucrative business in the Midlands to the appellant? It is not there. The agency agreement is not a commercial agreement. Nobody has ever suggested that it was. It was just there in order to fulfil Crest's desire to achieve a particular accounting treatment, that is all.

I then pass on to my fourth point. Both my learned friends went on eloquently about various consequences that they say flowed from the agency agreement. But the problem in the present case is: how are any of these consequences relevant to the question? The question concerns direct involvement in an infringement as a matter of fact. One of the reasons why I made submissions about relevance and how things can be relevant in one context and not relevant in another, it all depends on what the question is. We can all identify differences in any given situation. The question is, are they relevant? No relevance has been established here. For example, if you hypothesise that in the event of a contractual dispute it could be the principal, the would be defendant in a claim, what has that got to do with the entirely different question raised by the OFT in its decision: are you or are you not, as a matter of fact, directly involved in an infringement of the Chapter I prohibition? That is the question. So these differences have got to be relevant to that question. They have to provide an answer to that question. I am afraid to say that what has happened is that

there has been a great deal of arm waving going on without people actually addressing the question that the OFT was addressing in the decision.

The fifth point concerns my learned friend Mr. Beard's submission that, as I understand it, the OFT had to do what it did because, if it did not, there would not have been turnover, or enough turnover, for the purpose of fixing the penalty.

I have to say that the problem with that submission is that that is not what the decision says. The decision does not say, "We, the OFT, are making the appellant liable, because we need to do so in order to include enough turnover in order to the penalty a realistic ----

THE CHAIRMAN: Your point is this: the decision says they were directly involved.

MR. LASOK: They were directly involved, and either they are right or they are wrong. If they are wrong, that part of the decision cannot be sustained on the basis of a collateral argument now being advanced that if the Tribunal were to find that they actually had got it wrong that would have holed

the fine that they had imposed in respect of infringement 75. If it is so, it is a case of the OFT being hoist by its own petard, but that is the problem with petards, you should not hoist them!

THE CHAIRMAN: Right!

MR. LASOK: There was more or less in conjunction with this point something about enforcement of the penalty but no explanation has been given as to how a conventional approach, as was followed in the Holroyd case, would have produced a penalty that was not enforceable.

Finally, there is the procedural unfairness point. My learned friend reverts to a point that he made on Friday and he says that there cannot be any procedural unfairness in relation to the Crest admission because the appellant is still contesting liability. With all due respect to my friend, this is a confusion. The procedural unfairness point concerns the position of Pearce Midlands. When I say "the position of Pearce Midlands", it concerns its position as being the infringer, which is the starting point. Neither Crest nor the appellant accepted that they were directly involved in the infringement. The procedural unfairness point simply goes to the question of the direct involvement of Pearce Midlands in the infringement. Had the appellant known of Crest's position then, for the reasons that I stated on Friday, it would have been inevitable that the appellant would have admitted to the direct involvement of Pearce Midlands in the infringement. Then you would have had, in our submission, if the OFT had been behaving lawfully, a 15 per cent reduction in the total amount of the fine. There would have been a completely separate issue as to the direct involvement of the

appellant in the fine, and so there should be no confusion between the position of the appellant and the position of Pearce Midlands on this point.

In our submission, that is the end of it, despite the blandishments – all counsel engage in blandishments, but our submission is that ours are better than the others. Unless there is anything further I can assist the Tribunal with ----

THE CHAIRMAN: No, but there is obviously Mr. Beard wants to raise. You have your petard, Mr. Beard.

MR. BEARD: On petards, I am sorry, you do not hoist a petard, you are hoist by a petard, it is an explosive. There is something terribly road-runnerish about ----

THE CHAIRMAN: I am not sure what a petard is?

MR. LASOK: A petard is a bomb, and you get a hefty broad shouldered chap who would rush towards the City gates and he would hoist the petard on the gates, because you had to get it in the middle of gate, and then light the blue touch paper and retire pretty quickly so that it would blow the gate up and then a whole load of other courageous chaps through the gate. The problem was that when you were fiddling around in all this a part of your uniform might get caught on the petard, so you would be hoist by it, but you still have to hoist the petard.

THE CHAIRMAN: Very informative, you are obviously an expert, Mr. Lasok, on gloomy metaphors and myths, as in Procrusteanism too.

MR. BEARD: The real point was this: it appeared that Mr. Lasok seemed to be suggesting, but I may have misunderstood, that somehow the activities of Pearce Midlands in relation to its own geographic area continued to subsist and fall outside the scope of the agency agreement. If that was his suggestion, we do not understand on what possible basis it is said to be the case, because all of the activities of Pearce Midlands were treated as falling within the relevant terms of the agency agreement, and there was no turnover in relation to any of the activity anywhere declared in the statutory accounts, but Mr. Lasok may be able to clarify what he was saying in relation to that.

MR. LASOK: That was not my point.

THE CHAIRMAN: Thank you very much. I am very grateful to all counsel for their succinct and, if I may say so, interesting and entertaining submissions, including of course their juniors.

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