IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1048/1/1/05

Victoria House
Bloomsbury Place
London WC1A.2EB

8th March 2005

Before:
MARION SIMMONS QC
(Chairman)
PETER GRANT-HUTCHISON
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED — Appellant

and

OFFICE OF FAIR TRADING — Respondent

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

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

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

CASE MANAGEMENT CONFERENCE

THE CHAIRMAN: Before we start, may I say a few words that might assist? First of all, can I thank you for your skeletons or submissions for this hearing. We note from the provisional Defence of the OFT and from the OFT submissions that the OFT accepts that Double Quick Supplyline Ltd. was incorporated on 8th May 2001 and could not have acted on any prior date. We also see from these documents that the OFT otherwise entirely reserves its position as to whether Double Quick Supplyline Ltd. is liable for the entirety of the infringement which was committed by the undertaking now carried on by that company. We note that the reason for this reservation is that the OFT have identified information from the recent disclosure which indicates the existence of structural links between the Appellant and Hayward Williams Group. It is suggested by the OFT that these structural links may be relevant to the question of whether the Appellant is responsible for any competition law infringement committed by the undertaking it now controls, even when that undertaking was carried on by Hayward Williams Components Ltd.

It appears to us from our perusal of the correspondence between the parties which has been provided to us that the OFT may effectively be embarking on a new investigation into this point within the Appeal process. I should say at this stage that we have not looked at the underlying material. But that raises the question in our minds as to whether the Decision can stand. Our thought process is this. It seems to us, of course provisionally, and of course subject to the submissions today, that whether or not such structural links exist is a question which the OFT must decide in accordance with its own procedures after giving the present Appellant an opportunity to respond. Depending on the conclusions reached by the OFT during such an exercise it may also have to decide to whom the decision can properly be addressed and whether the Appellant is an appropriate party for this purpose. If that is right, having regard to the OFT's provisional defence and the written submissions that have been provided for this CMC, then it seems to us that these are matters which it may be more appropriate to investigate and decide at the Decision making stage rather than at the Appeal stage.

We note that the Appellant asks us to order the OFT to finalise its Defence. It will be appreciated from what I have just said that our preliminary view is that that may not be the appropriate course to take. Our preliminary view, of course subject to submissions today, is that due process requires the Director to investigate and take a Decision on this matter after having given the Appellant an opportunity to respond at the administrative stage. We note that the point raised involves issues on which there has not yet been any judicial authority in this country.

To summarise: our preliminary view on the papers, and subject to any submissions today, is that on this important point, which is the identity of the infringer (or infringers) and who can be fined and for what, there does not seem to be any Decision of the Director on which an Appeal can be founded. We remind ourselves in this respect that our jurisdiction is to hear Appeals from Decisions of the Director. Perhaps the parties might like to consider what I have just said before making any submissions and, if so, we will rise for 10 minutes and see. But before I do so, I should mention one other point and that is the question of the attendance notes of telephone conversations which have been disclosed by the OFT. It is not clear to us what the status of these are, or for what purpose they have been disclosed and we have not looked at them very carefully for the same reason. If the OFT now seeks to rely on any evidence to prove the infringements additional to that, which it had at the time of making the Decision, this raises questions as to whether that is permissible and which side of the line it falls. Such questions have, of course, been considered by this Tribunal in *Napp*, *Aberdeen Journals* and *Argos* and *Littlewoods*. Again, this raises the issue that if such evidence was admitted at the present stage it would deprive the Appellant of being able to comment on such evidence at the administrative stage. We mention that now, although whether it arises depends on how the matters that I have initially referred to are resolved.

So I think you nodded – you would like 10 minutes?

MR. WARD: That would be very kind, ma'am.

THE CHAIRMAN: Have you anything?

MR. COOK: I have no objection to 10 minutes – I am not sure I need it in the same way.

THE CHAIRMAN: Well I think it is probably the OFT that have to think what they want to do. Thank you very much. You will let us know.

(The hearing adjourned at 10.35 a.m. and resumed at 10.55 a.m.)

MR. WARD: Ma'am, we are very grateful for that indication and for the opportunity to consider it. Provisionally our position is that we are not enthusiastic about remission at this stage because we do respectfully submit that it is not actually necessary when one considers the point at issue. Firstly, we have reserved our position as to whether the point is being run at all for now.

THE CHAIRMAN: I know that is the difficulty, yes.

MR. WARD: Assuming for the sake of what follows that we are, it is also relevant to say that this has arisen because of a completely new point taken in the Notice of Appeal not in the Rule 14 stage and that is why this disclosure exercise was appropriate at all. It has now come to an end – or at least we think it has – we got our final tranche yesterday at 4 o'clock, and again we think we are satisfied with that, it is possible something will come to light, but we are very

grateful for the co-operation we have had over this. There has been no objection to anything we have asked for.

It is also highly relevant that all of this material comes from DQS itself. It is not that the OFT is trying to introduce something which it has obtained from some third party, or merely to bolster its existing case on something which was in the Rule 14 Notice. It is material from DQS in order to meet the point that DQS has taken. The question that you raise, of course, ma'am, with your observations is, is it really necessary from the point of view of the rights of the Defence, that the matter should go back to the administrative stage to allow some form of Rule 14 exercise to take place. But what we respectfully submit is that it is perfectly possible to protect the rights of the Defence here through the Appeal process, because our proposal had been that the OFT would file its finalised Defence, assuming for the sake of argument that this *Aalborg Portland* point appears in it in one form or another, then DQS can simply plead to that in its Reply. The documents will all have come from DQS in the first place. We have made clear already what the outline of that argument will be. We respectfully cannot see how it would be assisted by a further Rule 14 exercise.

THE CHAIRMAN: There are various outcomes of the disclosure process, which is one of the reasons why I decided not to read it – it is for you to decide and see how you put it. One is that you are right all along.

MR. WARD: Yes.

THE CHAIRMAN: And that you have got the appropriate infringer and imposed the fine correctly, and you stand by that.

MR. WARD: Yes.

THE CHAIRMAN: And that is what you say you have reserved your position as to that.

MR. WARD: Yes.

THE CHAIRMAN: The other is that the Appellant is only a part infringer, and that therefore the amount of the fine as calculated may not be appropriate.

MR. WARD: Yes.

THE CHAIRMAN: If you came to that conclusion the first question is, is the Decision sufficient for the part infringement in relation to subject matter? The second question is what are you going to do about the fine?

MR. WARD: Yes.

THE CHAIRMAN: And you would have to recalculate that, and that is something which then requires possibly an Appeal, possibly not – depending on what the Appellants say. That requires proper consideration at the administrative stage. I do not think the third – well I do not know – the third possibility is that these people are not liable at all. I am not sure that that

comes within it because you found an infringement post the date that they were there, but because of what evidence has been coming out I do not know if there is a possibility on that and, of course, that again is a matter in relation to the subject matter, and the content of the Decision. So those are the concerns of the Tribunal.

MR. WARD: I hope I understand those concerns. What I would say though is this. Of course, this Appeal to the Tribunal is by way of a hearing *de novo*. It is not a form of Judicial Review. If the Tribunal were to uphold the OFT's argument s on *Aalborg Portland* then what we would really be saying is "uphold the penalty, uphold the Decision, but effectively vary the reasoning of it. The Tribunal would be saying "The OFT got it wrong in so far as it said DQS Ltd. was simply the same as the owner of the undertaking pre-2001. But nevertheless, because of this new legal argument, based on *Aalborg Portland* the OFT was right to fine DQS £109,000. We respectfully submit that that is an unproblematic exercise of the Tribunal's jurisdiction.

If the Tribunal is against the OFT on that argument then obviously it has implications for the penalty. But assuming for the sake of argument only that the Tribunal accepted that part of the penalty was properly imposed, whether July 2001 onwards or some shorter period, because you will recall that there is a co-ordinated price increase in 2002, for example, and the Tribunal might conclude that that was the only proper basis of the penalty. But in those circumstances it is again an unproblematic exercise of the Tribunal's jurisdiction to simply recalculate the fine as the Tribunal has done in many other penalty cases, as my solicitor reminds me *Napp* and *Genzyme* were both cases where the Tribunal upheld the proposition that there had been an infringement but revisited the fine and revised it downwards.

THE CHAIRMAN: I was not involved in *Napp* or *Genzyme* but when the fine is revisited it is normally revisited on the facts as found. It is just looking at whether that was the appropriate fine, and in *Price* for example, which I can talk about, we revisit the amount of the fine on the facts as found in the Decision.

MR. WARD: Yes.

THE CHAIRMAN: But if, here, we would be looking both at the facts as found and the penalty and the reasoning of the OFT in relation to how on the facts as they want to allege them the fine should be calculated. So it is actually not quite the same.

MR. WARD: No, it is a more extensive exercise, I entirely accept that.

THE CHAIRMAN: Yes, it is an exercise which I think this Tribunal has previously not wanted to go down if it is an extreme case. There is a line between the two and for my purposes I am not sure actually where this case falls. There is a line between the two but it is very difficult to know where the line falls if we do not know what position you are taking.

MR. WARD: I appreciate that entirely. But before moving on to that, again as to where the line falls, what is appropriate for the Tribunal, of course in the replica kit case the Tribunal heard weeks and weeks of oral evidence from various people who were involved in the factual side and made extensive factual findings, so if need be the Tribunal can find facts in order to then decide whether in light of the facts that it has found the penalty is appropriate or not. Here, in truth, the point has a very narrow compass. It is a principally legal point. It is unlikely, I say at this stage, that there will be any factual areas of dispute, because all the factual material comes from DQS. So the question will arise as to what inferences may fairly be drawn from it and a further question will arise as to how extensively the dicta in *Aalborg Portland* can really be applied. But those are matters of submission and matters on which DQS will be perfectly well able to address the Tribunal in the scope of the present Appeal.

THE CHAIRMAN: That is why I, for my part, permitted the further disclosure and went along with that idea because if, as I had anticipated, mainly from public documents one could see whether one was right or wrong, if one was right – if it is all in public documents then I can see the submissions that you are making. I am a bit concerned (a) that after all this time you have not managed to work out what your position is; and (b) that it looks, and I stand to be corrected because I have not looked at the documents, as if it is much more internal documents, and one's view of internal documents of companies and what they say, which might require a lot of evidence and nuances to be explained and that sort of thing, which is getting into an investigation, and we have not then got a decision from you saying "That is what we decide" - a Rule 14 or a Statement of Objections, a response, a Decision and then an Appeal, and what we have to be careful of, it seems to me, is to make sure that the Appellant has two bites of the cherry and that we do not prevent or preclude the administrative bite of the cherry, because there is not an Appeal from us on the facts.

MR. WARD: I entirely see the force of all of that ma'am, though I would just say this: we say the reason they have been deprived of the administrative bite at the cherry is because they did not raise this point at all at the administrative stage. Had it been raised then, then of course the matter ----

THE CHAIRMAN: But they do not have to.

MR. WARD: I am not suggesting they have to, but the reason we are where we are is that we were faced with a completely new point in their Notice of Appeal.

THE CHAIRMAN: Well is that completely fair because you knew the company had come into an existence at a particular date. Therefore, those investigating knew that these people were not the company throughout. They imposed the fine on them as having been the infringer throughout without explaining why they did that, so I am not sure – you are the Regulator.

MR. WARD: Of course, of course, but it is also right to say that in the Rule 14 process they represented the position as being as if DQS had been around for the whole period, and I can take you to what they said in their Rule 14 Notice in response, and I can take you to Mark Mitchell's statement. I entirely accept, as we did in our first skeleton argument, that there were clues buried in the documentation that we had that might have led the OFT to explore this avenue of inquiry, but it certainly was not raised as a defence to say "Hang on a minute, you have sued the wrong person." On the contrary, in the response to the Rule 14 Notice it said "You have correctly identified the parties". So be that as it may, as to why there is not yet a decision on what we want to do on the part of the OFT it is simply this, that the disclosure has been coming in – the other side have been extremely helpful about this I am not suggesting any criticism arises here at all – but it is also right to say that we received an important further tranche at 4 o'clock yesterday afternoon, and what it contains really is relevant.

Now, as to the nature of the documents and what they show, it is partly publicly available materials through Companies House; it is partly internal documentation, but much of what we rely on has effectively been asserted by the other side in their explanations for the material that they have provided. So it may be that there will be room for argument about what this really shows but I respectfully doubt whether it will be at all extensive. It is simply a case of saying "What you have provided shows the following propositions to be the case".

THE CHAIRMAN: Well how do you propose that we deal with it today? What are you suggesting we do because you sound as if you are not in a position to put your cards on the table today ----

MR. WARD: No.

THE CHAIRMAN: -- which is very unfortunate.

MR. WARD: It is unfortunate. What we had proposed was simply that we are directed to file a Defence within 14 days which, of course, will entirely put the OFT's cards on the table. My friend has asked for a further four weeks after that for filing a reply which, of course we would have no objection to and it may well be that at that stage a Case Management Conference would be needed and we can consider what is the case that the OFT has put forward, and what evidence will be called by both sides in order to litigate the Appeal.

You will have seen from my friend's skeleton that he has raised the possibility that they will be calling, or relying on the evidence of Mr. Stock and Mrs. Williams and so of course one of the questions for the Tribunal will be how much oral evidence is, in fact, going to be given and what sort of cross-examination is going to be called for, and I accept that of course depends to some extent on what is the OFT's Defence. Of course, in the interim my clients are bound to give careful thought to everything you have said this morning.

THE CHAIRMAN: The difficulty is we do not know how you are going to put it in your Defence, and until we know how you are going to put it in your Defence -----

MR. WARD: We have tried to, if you like, open-handedly explain the gist of the argument that we will be running, if it is run at all.

THE CHAIRMAN: Not really on this point.

MR. WARD: Well I hope we gave a flavour of it in the Skeleton Argument.

THE CHAIRMAN: Oh, in the Skeleton.

MR. WARD: Not in the Defence, certainly not – in the Skeleton Argument. The OFT obviously has to perform a balancing exercise here. It has to say: how strong is this material that has been disclosed? How closely does it resemble the circumstances in the decided cases, and does it wish to mount this argument in this case? None of those are very simple questions.

THE CHAIRMAN: I can understand if you go down the line that you are going to say that your decision is right on calculation, and that the only question is how you put it in relation to explaining why the Appellant is liable for the whole period?

MR. WARD: Yes.

THE CHAIRMAN: I think that is debatable as to whether that should be in a Decision, but just assume for the moment.

MR. WARD: Yes.

THE CHAIRMAN: If you come to the conclusion that, in fact, the Appellant is only liable for part then your calculation of the amount and why you get there is going to have to go into the Defence, and the Decision effectively you are abandoning, and your Decision becomes the Defence. Now, it is very simple to deal with it because you could take a new Rule 14 Notice on that point, or Statement of Objections on that point and deal with it, but we do, I think, have to make sure that we get the administrative procedure appropriate.

MR. WARD: Again, I see the force in that, but we would say that there has been an administrative procedure here which dealt with the points which were actually raised by the Appellants at the time. If the OFT does conclude that it does not want to run the *Aalborg Portland* point and effectively wants to defend only part of the Decision obviously you are right, it will have to set out its positive case in the Defence as to what it now says the penalty should be. But as a matter of analysis that is simply the effect of making a concession in the course of litigation. My friend and his clients will be able to plead to that, and make whatever contrary assertions they need to in their pleadings and through their evidence. But we respectfully say that there would not be any real practical gain in sending the matter back just because a new point has been taken in the Notice of Appeal. As a matter of practicality it can all be dealt with perfectly well through the Tribunal procedure. Of course we will be sympathetic to whatever

submissions my friend makes about the procedural consequences of this to ensure that his client does have every chance to meet the case that the OFT is then advancing. It does not obviously necessitate the delay and expense of a further administrative stage.

THE CHAIRMAN: Shall we see what Mr. Cook says?

MR. COOK: Ma'am, thank you. You said essentially there were three possible outcomes here. Your three outcomes were: the OFT were right on the *Aalborg Portland* matter, we were a party infringer; or there was no infringement whatsoever.

I will deal with the last of those. We would accept that there was a small infringement which we were party to and nothing in the documentation we produced will allow us to escape liability for that, other than legal arguments about questions of appreciability, irrelevance essentially, and therefore no penalty being due. But in factual terms there is going to be something capable of being an infringement, subject to legal argument there, regardless of what happened.

THE CHAIRMAN: Do you also say possibly no penalty?

MR. COOK: That is certainly something we would be arguing for, but factually there are circumstances which, subject to legal argument, could be capable of constituting infringement.

Going back to the first of the points, which is whether the OFT are right. With respect to my learned friend he has not made the point yet but, quite frankly, it is unsustainable. It arises actually from a misquotation from *Aalborg Portland*, the missing out of a word. From the circumstances in that case and from *Anic*, it is quite apparent the economic continuity test cannot possibly operate in this circumstance because the ECJ made quite clear in that Decision that the economic continuity test can only apply where the legal person responsible for running the undertaking previously has ceased to exist in law, and it has not even been suggested that is the case here. So with all due respect, one realistically has to accept that that point is unsustainable, and what is in fact going to be happening here is that one is going to be looking at a partial infringement. In any event I am not going to take you to the detail of that at the moment. Realistically there is a very good chance that partial infringement is what we are talking about, and the grave difficulty with partial infringement at this stage – and I make quite clear we suggest it should be remitted ----

THE CHAIRMAN: You are suggesting it should be?

MR. COOK: We say absolutely correct, it should be remitted. The problem with partial infringement is that what we have at the moment – and it depends in part on the position the OFT take – are four or five individual events in the context of the OFT's Decision looking at DQS as a single entity (incorrectly, we would say). The OFT has said one joins those together as part of the single infringement. As soon as you have a split in the entity involved one is

looking at a very different world, particularly in the context of the fact that Mr. Ray Stock, formerly the managing director, and the only individual named from DQS (the business) as being involved in the earlier infringements, did not transfer. What that means is one is looking at a situation and I am particularly talking about the period from June 2001 to January 2002, where one has to consider to what extent DQS Limited is liable for any infringement, or was party to doing anything at all and we would say in that context one needs an entirely new Decision to say "We believe that DQS Limited was party to the infringement because Mr. Mitchell knew, and DQS Limited was doing something – whatever those "somethings" might be and whatever the person they are gong to say knows about it. It is not enough, we would suggest, to say the economic entity carried on doing the same things. You cannot say that DQS Limited was party to an agreement, or a concerted practice if none of our employees knew anything that was going on outside the company in terms of what ----

THE CHAIRMAN: They need to re-look at the underlying evidence.

MR. COOK: If they wanted to pursue an argument that we were liable for an infringement from 12th June 2001 onwards then in my submission they would have to produce evidence saying DQS Limited through its operations' manager, through its managing director, through its raft of employees – whatever they are going to say – knew about an underlying agreement and carried on operating in accordance with that. That must be the touchstone for an infringement. The OFT has made no attempt to do that in its Decision because it was not looking at it in that context. It was looking at a single course of infringement ongoing in a single entity. Once one splits the entities one then has to create a whole new basis for the infringement.

Now if one comes to the position where the OFT simply relies on what it has found, which is January 2002 onwards, that is a slightly different matter. Again, the problem that one has with that is one is simply not altering the time period for the penalty. It is not simply a question of saying we applied a penalty for three and a quarter years, we are now down to a year and a quarter, or a year and three quarters. Once one starts on moving elements of the infringement, one starts altering the seriousness of the infringement because of what is going on – its potential effect. So we are not simply talking about the number of years you are multiplying by, one is talking about the percentage. It is currently 7 per cent., should it be 5 per cent? Should it be 4 per cent.? There is not a Decision like that because the OFT has not considered it like that because it has not considered the new set of facts that would arise. In my submission it is appropriate in a case like this to remit it to the OFT for Decision, because the context of an Appeal is that the OFT is trying to defend as much of its Decision as it can, whatever that might be. It is not, and was not at the Decision stage, sitting down and saying who is the right party to penalise, and that is the *Aalborg Portland* point, they are

desperately trying to say "We have made a Decision and we want to defend it". Really the right thing they should have done at the Decision making stage – they did not because they did not appreciate this point – is to sit down and say "Who should be penalised for this?" Certainly large chunks of the infringement are ones on which we should not be penalised at all. If it was remitted for Decision the OFT could properly consider which entity is the right party, not just trying to force as much as they can upon us simply because we are the party who are appealing, which is in fact what they are trying to do here.

THE CHAIRMAN: What do you say about them saying that this is really caused by you not having taken the point before?

MR. COOK: Ma'am, as you rightly said, there was material before them on which the point could have been taken. It is entirely correct to say that the point was certainly not banged home by us as clearly as it should have been, and certainly not as clearly as we take it now. There was material there, it was put forward to them, and certainly we were not blameless in not jumping up and down and saying "This makes a difference". However, it was a point that was being drawn to their attention after the Rule 14 process had effectively finished, and they did not take account of that particular point.

THE CHAIRMAN: What, before they fined?

MR. COOK: It was before the Decision, this material was all in by June 2004, so long before the Decision, six months before it. (After a pause) It is being pointed out to me that the OFT expressly asked us in correspondence, and this is what we were responding to, to provide us with a description of the management structures for Double Quick Supplyline, Hayward Williams Group Limited, Double Quick Supplyline Limited ----

THE CHAIRMAN: When was this?

MR. COOK: This was July 2004, six months before the Decision. So they came and asked us exactly this point and we responded with providing them with the information, and the response saying that Double Quick Supplyline was a division of Hayward Williams Group PLC, business and assets were sold to a new subsidiary set up from June 2001 who carried it on. So the material was before them, and it was in the context of a specific request from them which we responded to.

THE CHAIRMAN: Is that a letter that they refer to that we have not seen?

MR. COOK: It is a letter of 30th July 2004.

THE CHAIRMAN: Sorry, it is a different letter.

MR. COOK: It is a different letter. We provided them with the basic material – it was not terribly detailed at that stage – then we got a response back asking for descriptions of management structures. We gave a response. It is certainly not as detailed as is now the case, but it did

make clear that it was previously a business run by a separate company and the business transferred across rather than simply a limited company being transferred between groups. So the material was before them, and respectfully it should have been taken into account, at least as noticed by the OFT, and while we could have banged it home more clearly we did not expect that we needed to. There is no point being taken by the OFT that we should not be allowed to run the point at this stage.

THE CHAIRMAN: No, because you are allowed not to say anything to the OFT and then come here, but the question then is where the line falls?

MR. COOK: Of course, and I appreciate it makes it easier to say it should all carry on in the Appeal, but nonetheless, we would submit that the right thing to do in a context like this is, rather than the OFT, on the hoof try in its Defence to come up with effectively new infringements, because if it wanted to pursue a claim that we were part of the infringement from 12th June 2001 onwards, it will effectively have to say "There was an agreement to which DQS Limited was a party through X employee from that date onwards". That is not in the Decision at all. There is no attempt in the Decision to do that, and so we will have to come up with a new infringement and then in effect start trying to argue the percentages applied are correct in the light of whatever new infringement it is putting forward. It is that type of new case on the hoof which, in my submission, is inappropriate for an Appeal Decision and appropriate for remittal for reconsideration at the administrative stage.

Ma'am, those are my submissions unless I can assist you further.

MR. WARD: Can I come back very briefly on a couple of points my friend made?

THE CHAIRMAN: Yes.

MR. WARD: He said that perhaps they could have banged the point home a little more clearly at the administrative stage. I will just read you, if I may, the sworn witness statement of Mr. Mark Mitchell, which was served with their response to the Rule 14 Notice.

THE CHAIRMAN: Have we got this?

MR. WARD: It is appendix 5 to the Notice of Appeal. To say they could have banged it home a little more clearly is perhaps not a fair reflection of what really was said.

MR. COOK: Ma'am, could I help? I am not in any way suggesting that in the formal response to the Rule 14 Notice and the evidence we attached at that stage that what we were saying was not misleading, was not taking this point. Matters then moved onwards where an email was sent in June 2004 explaining the position, in response to a request from the OFT, then a letter was written by the OFT in July 2004 which expressly requested confirmation with certain material which showed they knew the distinction between the business, the limited company, and in particular the previous ownership of it. We responded with diagram charts to that,

which set out that material there. It is absolutely fair to say, as my learned friend does, our response to the Rule 14 Notice did not go into this, it was misleading in that regard. In any way in which it was misleading we then came back with additional material long before the Decision which made clear the position, but that was simply my submission on that point.

MR. WARD: I am grateful for that clarification.

THE CHAIRMAN: Do you want to show us Mr. Mitchell's statement?

MR. WARD: Very briefly, if I may.

THE CHAIRMAN: Which paragraph?

MR. WARD: Well it is really useful to start with the heading:

> "I, Mark Mitchell, managing director of Double Quick Supplyline Limited, thereafter defined as DQS…"

THE CHAIRMAN: Yes.

MR. WARD: Paragraph 3:

> "I have been an employee or director of DQS during the whole period of the supply arrangements with UOP to which this witness statement relates."

So he is saying DQS Limited (Double Quick Supplyline Limited) "I was employed by them throughout the whole period of the infringement", and you will see particularly – it is pertinent to what my friend has recently been saying – at para.6:

> "I did not attend the meeting at Callow Hall on 3rd November 2000 which I understand was organised by Tony Scullion. My colleague, Ray Stock, who was managing director at the time, attended the meetings …"

and so on. There is no way to read this statement other than as a positive averral that Double Quick Supplyline Limited was the owner or the operator of the undertaking at all material times. Actually, there is more, because the Rule 14 Notice as you will anticipate did actually define the parties, and you may not have that conveniently to had – it may be more helpful if I just read out the very, very short sentence or two.

THE CHAIRMAN: Well it probably is to hand, is it not?

MR. WARD: Well if it is to hand so much the better.

THE CHAIRMAN: We have everything here, I hope. Do you know where it is?

MR. WARD: I have not the faintest idea where it is in your bundle, I am afraid, ma'am.

MR. COOK: I think it is annex 9 to the Appeal.

MR. WARD: I am grateful for that. In any event, you will see that the Rule 14 Notice of 29th March 2004, as you would anticipate says: "Part 1 Introduction", then "Part 2 The Facts", starting at p.5. "The parties", and then over the page at para.20:

"Double Quick Supplyline Limited. DQS is a subsidiary of Plastic Building Materials, (PBM) and supplies components for RG units. Its managing directors during the period covered by the alleged infringement were Mr. Ray Stock until June 2001, and Mr. Mark Mitchell from June 2001 to the present."

THE CHAIRMAN: And that is wrong, is it not?

MR. WARD: It is completely wrong.

THE CHAIRMAN: Yes.

MR. WARD: Then if you look at the Appellant's response to the Rule 14, which may be in the next tab, it is in my file, tab 10.

THE CHAIRMAN: Yes.

MR. WARD: It says at para.7: "The facts concerning DQS, as set out in Part 2 of the Notice, are agreed". So it is perhaps no small wonder that the OFT did not then grasp fully the implications of some of the various things that also came from DQS, and I have not sought to say that the OFT is free from any culpability here, but it is just important to dispel the suggestion that this point was floated in any way at the Rule 14 stage. On the contrary, the point was actually conceded the other way. Those facts were agreed. My friend has also referred you to an organisational chart which was provided later, but that chart is not accurate either. It is at annex 4, I believe, of the Notice of Appeal.

The truth is it is just totally unclear because what you see, if you look at the second page, the heading is "Hayward Williams Group t/a Double Quick Supplyline". That is obviously wrong from what we have heard now, and nowhere in this chart is it explained, as is now advanced, that there was this particular company in Hayward Williams Group and that the business was sold by one company to another company. It is not consistent either with Mr. Mitchell's sworn evidence, or the concession that was made in the response to the Rule 14 and, of course, the OFT puts its hands up and says it made a mistake here, it did not get this right. But I think it is important to dispel the suggestion that was perhaps being made, that really it was all the OFT's fault for not reading what was sent to it properly. But that is by the by in a sense.

THE CHAIRMAN: It is by the by in the sense that the question is on the Rule 14 Notice and at the administrative stage you were under a misapprehension.

MR. WARD: Yes.

THE CHAIRMAN: The misapprehension you took possibly what was told, they may have been under a misapprehension, did not understand the significance of it or whatever. So one gets to a Decision. Then it turns out that the Decision is made on the wrong basis, and the question is

whether, at that point, the right thing to do is to start again, or whether the right thing to do is to deal with it here, and we have to consider that.

Can I just ask you to possibly think about and say what your submissions are about the fact that if the situation is that you are going to start in 2002 ----

MR. WARD: 2002?

THE CHAIRMAN: I think so. Well, it is either June 2001 or January 2002.

MR. WARD: Yes.

THE CHAIRMAN: Therefore the factual basis is different.

MR. WARD: It is a subset of the existing factual basis in a sense.

THE CHAIRMAN: Well if you have to divorce yourselves, or the Decision has to divorce what happened before because it is a new company, therefore one has to look at what the position was at the time that that company started.

MR. WARD: Yes.

THE CHAIRMAN: Whether there is evidence in there which needs to be reconsidered and not just dividing up …

MR. WARD: Yes, my clients will definitely take that thought away and reflect on it after today. But if I can, and if I may, just offer a form of short answer to the point, which is this. It is actually now conceded that the DQS undertaking – if I can call it that – remained the same throughout. It was sold as a going concern, and the other side helpfully responded to our request to make clear their position. They accept it is all one undertaking. The OFT's case, however much of this it persists with in its finalised Defence, will be that you can make proper inferences about what the undertaking did after June 2001, or January 2002, based upon what the undertaking did at an earlier stage. Mr. Stock is not the undertaking, Mr. Stock was a senior figure within the undertaking for part of that period.

THE CHAIRMAN: You say the knowledge of Mr. Stock was the knowledge of the undertaking, and they continued with the undertaking and therefore they acquired the knowledge?

MR. WARD: What I would say is that whatever Mr. Stock knew the undertaking certainly knew, but once Mr. Stock had gone it does not follow by any means that the undertaking thereafter could be viewed as a completely new entity. It is not, it is just a change of ----

THE CHAIRMAN: Yes, therefore Mr. Stock's knowledge was the knowledge of the undertaking and if he goes it does not matter because the knowledge is in the undertaking?

MR. WARD: Well that is putting it rather concisely, but yes, we would say it should not be seen as the case about Mr. Stock and Mr. Mitchell, or about who owns the shares in this undertaking or whatever. It is a case about an economic entity which the other side accept is the same throughout. So that was the form of the argument that the other side will be facing, subject to

all of the areas we have reserved our position on. It is really over simplistic just to say what did the undertaking know on January 2002, as if it is something brand new. The company might be brand new, but the economic undertaking is not new at all.

THE CHAIRMAN: And that might apply even if you said that it was only a partial infringement?

MR. WARD: Yes. Suppose, for the sake of argument, the OFT retreated as far as saying we only wish to impose a fine upon you from January 2002 onwards, I am sure I can say with confidence that we would be arguing that part of the evidence for that is what the undertaking did in its various previous incarnations leading up to that time, because obviously one has to read the evidence that exists as to what happened in January 2002, in the light of what we would say was persistent price fixing that went on for years and years.

THE CHAIRMAN: You would be putting forward on that basis your analysis of how that works. If that had been done at the Rule 14 stage – forget about why it was done.

MR. WARD: Yes.

THE CHAIRMAN: If it had been done at the Rule 14 stage there would then be a response.

MR. WARD: Yes.

THE CHAIRMAN: You would then consider that response. You would see whether you thought what you had done was justified or not.

MR. WARD: Yes.

THE CHAIRMAN: There would then be a Decision. The Decision would say that either you stood by what you said before or you accepted the response. There would then be a possible Appeal from that Decision. We would know where we started and what the evidence was. On this basis that does not happen.

MR. WARD: No.

THE CHAIRMAN: The difficulty is we do not know where we are going.

MR. MATHER: I was simply interested at some point to go through the June 2004 exchange of correspondence which came up because I do not think we have actually the letter which was mentioned about it, it is not a direct point on where we are.

MR. WARD: I appreciate that, sir, and I hope we will never have to decide exactly it was our fault, because I hope I have accepted a little fault on the OFT's part, and shown you why in truth ----

THE CHAIRMAN: There was a misunderstanding on both sides.

MR. COOK: If it helps I accept a little fault on my part as well.

THE CHAIRMAN: A little misunderstanding on both sides!

MR. WARD: Be that as it may in a sense, what we really say to your observation, ma'am, is simply this. Of course that would have all happened if events had gone more smoothly, but we are here, the same amount of resource has already been expended on this case both legally and

administratively and in terms of management time no doubt as well on the Appellant's side. If there is a real, practical, substantive benefit to going through a further administrative change that is one thing. But if, in practice, the rights of the Defence can be observed through the mechanism of a *de novo* Appeal suitably case managed, then it is really just a waste of time and money.

THE CHAIRMAN: The problem is that today I am not sure we know which side it falls because we do not know what you are saying.

MR. WARD: I appreciate that.

THE CHAIRMAN: That is the difficulty, and it is unfortunate that we have come today, however many weeks later, and it may be because the new stuff happened to be the crucial stuff and has changed your mind, but I would have thought that on the material that you had up until last night you would have made the decision for today.

MR. WARD: All I can say in our defence, if you like, is that of course the OFT has been very conscious of exactly that issue. That is why we put in a provisional Defence in order to be as open and as helpful as we could. We are being asked to make a very big decision here in a sense, in other words whether to concede away quite a large part of this Appeal and/or to run what is undoubtedly a difficult legal argument and, of course, the OFT has to be mindful of a rather broader policy forum when it decides whether or not to ----

THE CHAIRMAN: As I said there is no judicial authority and so it is a question which is ----

MR. WARD: It is a difficult question.

THE CHAIRMAN: I appreciate that and that is one of the reasons why it might be that it needs to be considered fully at the administrative stage.

MR. WARD: What we respectfully suggest is perhaps the most efficient way of dealing with this, to avoid having to deal with it in the abstract as you say, ma'am, we are at the moment, if the OFT is ordered to put in its Defence within two weeks, my friend's clients get a chance to reply within four weeks as he has asked, then the case will be fully pleaded, and then of course the Tribunal will be able to say what is the OFT actually saying and can it fairly be dealt within the Tribunal or does it need to be remitted at that stage? At the moment, of course, it is unfortunate I cannot simply say to you "This is definitely the case that we are running". I think the parameters are reasonably clear, but I appreciate until it is on the page it is much harder to evaluate what is involved; and harder for my friend, in fact.

THE CHAIRMAN: And you need another two weeks to decide that?

MR. WARD: We would appreciate another two weeks, yes, to file the Defence – not to take a decision – to put the Defence in final form.

THE CHAIRMAN: How long do you need to take a decision?

MR. WARD: I cannot answer that on my feet without asking, but as I have said this is not a simple decision for the case team to take on its own.

THE CHAIRMAN: No.

(The Tribunal confer)

THE CHAIRMAN: How long does it take to make the decision?

MR. WARD: I am told that the practical issue is simply this, that my immediate client would wish to put this to Vincent Smith, who is the head of Competition Enforcement at the OFT, and he in fact is not even around this week, so what they would prefer to do is to work out the position, refer it to him, and then produce a Defence which reflects the internal position.

THE CHAIRMAN: He is not around this week?

MR. WARD: He is not around this week. Two weeks would give us ample time.

THE CHAIRMAN: To do both.

MR. WARD: To do both, and I do perhaps just reinforce this is not a simple step for the OFT at all. It goes beyond just saying what are the legal merits of the point? Obviously, there are wider ramifications to consider. But I hope, ma'am, I have given you a sense that they have not been just sitting on their hands since the last CMC.

THE CHAIRMAN: The documentation shows that nobody has been sitting on their hands.

MR. WARD: (After a pause) I am told that there are others as well who need to be consulted in the OFT hierarchy. I would also say that a few extra days are unlikely to really make a difference and if it enables us to be as helpful as possible that may save time in the long run.

THE CHAIRMAN: Right, well I think we are going to rise for a moment and consider.

(The hearing adjourned at 11.40 a.m. and resumed at 12.40 p.m.)

(For Ruling see separate transcript)

MR. COOK: Ma'am, from our point of view that seems to be a very sensible way to proceed.

THE CHAIRMAN: Mr. Ward?

MR. WARD: I hope I can echo that sentiment. Just so I am absolutely clear, and so my clients are absolutely clear on what they may or may not do if they put their Defence in. I entirely appreciate you are saying if we want to rely on new material – I assume including the new material that has come from DQS – then we need to go down the Statement of Objections route.

THE CHAIRMAN: Well I cannot tell you that because I do not know what that material is and I have specifically not looked at it for the purpose.

MR. WARD: I appreciate that. But that is more important from the point of view of my client, to understand the scope of, if you like, its permission to put in a Defence. I appreciate you are leaving it to my client to decide which of these courses to go down.

THE CHAIRMAN: If you look at *Aberdeen Journals* and *Littlewoods* it tells you.

MR. WARD: Yes, if I may make the point more concrete, just to make sure there is no later misunderstanding.

THE CHAIRMAN: Yes.

MR. WARD: If my clients choose to abandon any argument based on *Aalborg Portland* and abandon any attempt to fix liability upon DQS Ltd. for the infringements which pre-dated June 2001, but simply argued that the existing Decision demonstrates infringement on the part of DQS from June 2001 on the basis of the material annexed to that Decision, the Tribunal is content we should go forward and serve our Defence – is that correct – even though the penalty would obviously have to be recalibrated in the light of that concession?

THE CHAIRMAN: I do not think we want to comment on which way you go and why you should go. I think that is why we are saying there should be a CMC on 7th April.

MR. WARD: So if I may put it this way, you are deliberately leaving it entirely to us rather giving that guidance now?

THE CHAIRMAN: It is a matter for your decision ----

MR. WARD: Yes.

THE CHAIRMAN: -- having regard to what has been said by this Tribunal in previous cases and today, but I think it is for you to decide which way to go.

MR. COOK: From our point of view I think we would suggest that that would be clearly an SO route to go down in that context, but that is just simply for reference.

THE CHAIRMAN: We have not seen the material and we do not know what you are relying on.

MR. WARD: I wanted to establish whether the question was left open or whether it was to be inferred from what you said.

THE CHAIRMAN: No, it is to be left open.

MR. WARD: It is clearly the former, I understand.

THE CHAIRMAN: That is why there is the hearing on 7th April so that that can be challenged. Unless one knows what route you are going to take, what you are relying on, one does not know where the line falls, and even though looking at it without knowing anything it may be that it looks more obvious that there needs to be a new Decision if there is a new fine on a different basis. It may well be that that is not the position having regard to the way that you would put it – I do not know. I have not seen what you are going to say.

MR. WARD: Very well.

THE CHAIRMAN: So I think we have to leave it open.

MR. WARD: Thank you.

THE CHAIRMAN: Is that acceptable to both of you on that basis?

MR. COOK: Yes, ma'am. There is one thing before we finish, if that concludes the only matters to be dealt with?

THE CHAIRMAN: Yes.

MR. COOK: Just briefly on the timetable, if Defence is put in rather than the SO route, would it be the expectation that we should put in reply submissions before the hearing on 7th April?

THE CHAIRMAN: Yes, and what I would like to do is to give some directions now so that we have that all set out, and I need a diary for that.

MR. COOK: I am sorry, I am obviously chasing ahead.

THE CHAIRMAN: You are quite right.

MR. COOK: The question was whether we had completely finished, or whether had simply finished that part.

THE CHAIRMAN: No, we had not.

MR. COOK: I apologise.

THE CHAIRMAN: So 14 days from today, today is 8th, so 14 days is 22nd March. So Defence or Statement of Objections by 22nd March. We said the hearing is on 7th April, so I am wondering if we have exchange or consecutive – I suspect they should be consecutive, do you agree?

MR. COOK: Well, the first question for us is whether we are going to say "This is completely wrong", based on the guidance the Tribunal gave the last time round, this should not be a Defence at all, and that will be a set of written submissions, and obviously that would be something where, if we were taking that point, it would be necessary for us to do it first so the OFT would know what they were addressing.

THE CHAIRMAN: That is right.

MR. COOK: The alternative is for us to write a letter back effectively saying: "Seeing how you are now putting your case we accept that it is probably a matter that should continue in this Tribunal", and whether we then have a suitable window there – it is a very tight one – for us to actually formally to reply in. What I am concerned is, and I am reluctant to suggest we could do so, but I think probably I ought to suggest we can do so in that window. All I am concerned about is another CMC where, with all due respect, not a great deal happens.

THE CHAIRMAN: We would not need one, would we? Well we would need one about evidence?

MR. COOK: Well our reply would be crucial to determine exactly ----

THE CHAIRMAN: Yes, Defence or Statement of Objections by 22nd March. If Defence then reply and/or written submissions, yes – because you could do it at the same time? You would not need additional time to do that, when you are doing the Reply you could make your submissions.

MR. COOK: I am sorry, ma'am I was simply thinking about first, timetable, whether that would be realistic time-wise to do both simultaneously, and also whether one ought to go to the trouble and effort of making reply submissions?

THE CHAIRMAN: No, Reply and/or, so it gives you the scope. Reply and/or written submissions – 27th is Easter weekend – what about doing it by Friday 1st April.

MR. COOK: Certainly, ma'am, we will put it in before midday – we will send a version through before midday anyway, it may not be the real version! [Laughter]

THE CHAIRMAN: Let us just work this out. By 1st April, if we gave you by midday on 5th.

MR. WARD: I am not actually clear what we are being asked to do.

THE CHAIRMAN: Well if what happens is that they object, if you put in a Defence and they object, then we are going to have to have hearings to decide what you asked me before.

MR. WARD: If the hearing is to be on 7th then it will have to be by ----

THE CHAIRMAN: By 5th. So written submissions of OFT by 5th April, and then we have the CMC on 7th April.

MR. WARD: Yes.

THE CHAIRMAN: And we can then decide whether we need evidence. It think it is premature today to fix a date for the hearing because although that would be nice to do we do not really know where we are going and it may be that that course is not the course that you decide to go down.

MR. WARD: May I raise one point about the form of the order?

THE CHAIRMAN: Yes.

MR. WARD: It is very much a formalistic point, not a point of substance, those behind me wonder whether strictly the Tribunal has power to order the OFT to issue a Statement of Objections. It is only a point of form, not substance, because we are very happy to undertake to do so, but nevertheless if the form of the order could reflect that to preserve that question.

THE CHAIRMAN: What, "On the undertaking …"

MR. WARD: I suppose it may be "On the undertaking of the OFT to either serve the Defence or a Statement of Objections by 22nd March", and then the rest follows, because I emphasise there is no point of substance here at all.

THE CHAIRMAN: Would you like to draft the order.

MR. WARD: Yes, certainly.

THE CHAIRMAN: I think that is acceptable if you do it that way.

MR. WARD: So we undertake to do one or the other and the rest follows.

THE CHAIRMAN: One or the other.

MR. WARD: Upon the service of the Defence.

THE CHAIRMAN: Yes. And it is Reply and/or written submissions of the Appellant by 1st April. Your written submissions by the 5th, CMC adjourned to the 7th.

MR. WARD: And it is midday in the case of both the 1st and the 5th April. My friend volunteered midday!

THE CHAIRMAN: I think we want it at 2 o'clock so it is after midday – having regard to what the 1st April is!

MR. WARD: Yes, quite.

THE CHAIRMAN: Midday on 1st April, yes.

MR. WARD: Fine.

THE CHAIRMAN: And midday on the 5th April, that will be very good, and 10.30 on 7th April.

MR. WARD: We will draw up the order and circulate it to the other side.

THE CHAIRMAN: Thank you very much.

MR. COOK: Ma'am, before you go, I am actually going to ask for the costs of this hearing. The OFT has simply come to another hearing where really nothing has happened, and the OFT has not made any decision at all. Whatever may be its internal structure it has had material before it for a long period of time and this is the second hearing where, in effect we are asked to wait and see what their position would be. My client has incurred costs and in my submission it is appropriate the OFT should pay those.

MR. WARD: We asked for disclosure on 10th February immediately after the hearing. We followed it up with a request on 11th February. We got documents on 24th and 25th February and 2nd March, and a further tranche of documents last night at 4 p.m. The OFT has not been unduly slow in dealing with this.

(The Tribunal confer)

THE CHAIRMAN: We will adjourn that matter until 7th April and see what the outcome is.

MR. WARD: Thank you.

THE CHAIRMAN: Costs reserved. Thank you very much.

(The hearing concluded at 1.00 p.m.)