Neutral citation [2005] CAT 25

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No:1044/2/1/04

Victoria House
Bloomsbury Place
London WC1A 2EB

6 July 2005

Before:
Sir Christopher Bellamy (President)
Professor John Pickering
Richard Prosser OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

**M.E. BURGESS, J. J. BURGESS AND S. J. BURGESS (trading as J.J. BURGESS & SONS)**

Appellants

-v-

**THE OFFICE OF FAIR TRADING**

Respondent

and

**W. AUSTIN & SONS (1)**
**HARWOOD PARK CREMATORIUM LIMITED (2)**
**THE CONSUMERS' ASSOCIATION (3)**

Interveners

Peter Roth QC and Jennifer Skilbeck (instructed by Howell & Co.) appeared for the Appellants
John Swift QC and Kassie Smith (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.
Cameron Maxwell Lewis (instructed by Brignalls Balderston & Warren) appeared for the first and second Interveners.
Andrew Macnab (instructed by the Legal Department, The Consumers' Association) appeared for the third Intervener.

Heard at Victoria House on 15 and 16 February 2005

## JUDGMENT (Non-confidential version)

Note: Excisions in this judgment relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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## I INTRODUCTION AND SUMMARY

1. By a notice of appeal dated 15 July 2004 M.E. Burgess, J.J. Burgess and S.J. Burgess trading under the name JJ Burgess and Sons ("Burgess") appeal to the Tribunal against decision no. CA 98/06/2004, dated 29 June 2004 of the OFT ("the Decision") in which the OFT found that W Austin and Sons (Stevenage) Limited ("Austins") had not abused a dominant position contrary to section 18 of the Competition Act 1998 ("the Act").

2. Section 18 of the Act sets out a prohibition on anti-competitive conduct known as the Chapter II prohibition, it provides:

> "(1) … any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in–
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage…"

3. Burgess is a firm of funeral directors in Hertfordshire. Austins is also a firm of funeral directors in Hertfordshire and, in addition, owns and controls the Harwood Park Crematorium ("Harwood Park") in Stevenage which opened in 1997. Burgess was a regular user of Harwood Park.

4. On 16 January 2002 Austins wrote to Burgess refusing Burgess access to Harwood Park with effect from 18 January 2002.

5. Burgess wrote to the OFT on 21 January 2002 alleging that the refusal of access to Harwood Park amounted to an abuse of a dominant position. This complaint was rejected by the OFT in a letter dated 28 February 2002.

6. Burgess again wrote to the OFT on 6 June 2002, providing further information, and requesting the OFT to vary its decision of 28 February 2002.

7. On 9 April 2003, the OFT withdrew the decision of 28 February 2002. The OFT then proceeded to investigate the substance of the complaint.

8. In the period between 18 January 2002 and 22 March 2004, Burgess was able to obtain access to Harwood Park, indirectly, with the assistance of another local funeral director Chas A. Nethercott & Son Ltd ("Nethercotts") who booked services at Harwood Park on behalf of Burgess' clients.

9. On 22 March 2004 Austins stopped all use by Burgess of Harwood Park whether directly, or indirectly through Nethercotts.

10. During the course of the OFT's investigation Burgess made three applications for interim measures: on 18 August 2003, 23 March 2004 and 4 May 2004. Each of these applications was rejected.

11. The OFT's rejection of Burgess' third application for interim measures dated 4 May 2004, set out in a letter from the OFT to Burgess' solicitors dated 27 May 2004, was appealed to the Tribunal on 24 June 2004 (Case 1038/2/1/04).

12. On 29 June 2004, shortly after Burgess' interim measures appeal was lodged, the OFT adopted the Decision on the substance of Burgess' complaint.

13. In a case management conference before the Tribunal held on 14 July 2004 it was agreed that the appeal relating to interim measures in Case 1038/2/1/04 would be stayed. A consent order dealing with the question of interim relief, which gave Burgess limited access to Harwood Park subject to certain conditions, was made by the Tribunal. In addition it was agreed that Burgess would submit a notice of appeal challenging the OFT's Decision of 29 June 2004.

14. The present appeal against the Decision of 29 June 2004 was lodged on 15 July 2004 (Case 1044/2/1/04). This is the Tribunal's judgment on the merits of that appeal.

15. For the reasons given below, the Tribunal proposes, first, to set aside the OFT's Decision of 29 June 2004 on the grounds that the OFT's analysis of the relevant geographic market for crematoria services, and of the issue of abuse in this case, is inadequately supported by the evidence and contains errors of fact and law, and further that the Decision should be set aside for procedural reasons.

16. Secondly, the Tribunal proposes to take its own decision, so far as necessary, pursuant to Schedule 8, paragraph 3(2) (d) and (e) of the Act, on the question of whether Austins/Harwood Park has a dominant position in a relevant geographic market for crematoria services, and/or funeral directing services and if so, whether Austins/Harwood Park abused either or both of those dominant positions in the Stevenage/Knebworth area in respect of: (i) the terms on which Burgess was allowed access to Harwood Park between 18 January 2002 and 22 March 2004; and (ii) the refusal of access to Harwood Park in respect of bookings made after 22 March 2004.

17. Thirdly, the Tribunal proposes to find:

    (a) Austins/Harwood Park has a dominant position within the meaning of the Chapter II prohibition in at least the Stevenage/Knebworth area in respect of (i) the supply of crematoria services and (ii) the supply of funeral directing services.

    (b) Both: (i) the terms on which Burgess was allowed access to Harwood Park in the period of up to 22 March 2004; and (ii) the refusal of access to Harwood Park after that date constituted an abuse within the meaning of the Chapter II prohibition of either or both of those dominant positions.

    (c) That abuse directly affected Burgess' branch in Stevenage/Knebworth.

18. Fourthly, the Tribunal proposes to consider how far that abuse is to be regarded, on the facts of this case, as extending to Burgess' branches in Welwyn Garden City and Hatfield.

19. The Tribunal notes from recent correspondence culminating in a letter from the solicitors acting for Harwood Park/Austins dated 13 May 2005 that, since the hearing of this case, unrestricted access to Harwood Park has now been agreed between the

parties. The Tribunal regards that as a positive and sensible development, particularly on the part of Harwood Park. However regrettable some aspects of this case may have been, we accept that Harwood Park may well have believed that it was acting legally in the light of the attitude taken by the OFT. The primary purpose of the present judgment is to correct what we consider the flawed approach of the OFT, and not to re-open past difficulties. We hope and expect that both parties will now adopt a constructive and restrained approach, so that normal commercial relations can steadily be resumed in a harmonious fashion.

## II FACTUAL BACKGROUND

*The sector concerned*

20. The OFT carried out a comprehensive investigation of the funerals industry in 2001. Its report *Funerals: A report of the OFT inquiry into the funerals industry*, OFT 346, July 2001 (the "OFT Funerals Report") identified a number of features of the funerals industry which meant that consumers might be vulnerable to unfair trading practices. In particular, the sensitivities arising from the nature of the purchase, and the difficult position of consumers, was emphasised:

> "A funeral is a classic 'distress' purchase – people don't know what to expect, spend little time thinking about their purchase and feel under pressure to sort everything out quickly. Those involved often have little experience of arranging a funeral and show a reluctance to shop around or seek out information. This acts as a dampener on competition…" (paragraph 1.2)
>
> "People arranging funerals are generally not aware of costs. Once they have entered a funeral director's premises they rarely make efforts to find the prices offered by other firms…" (paragraph 1.5)

21. Similar observations had been made by the Monopolies and Mergers Commission ("MMC"), in its report into the proposed merger between Service Corporation International and Plantsbrook Group plc in 1995 Cm 2880 ("*SCI/Plantsbrook*"). That merger involved two chains of funeral directors, one of which also owned a number of crematoria. The MMC noted in particular that:

- the majority of purchasers of funeral services will be suffering distress due to a recent bereavement (paragraph 2.15);

- the purchase of funeral services is an infrequent event, and one of which a purchaser will often have little or no direct experience (paragraph 2.16);
- it is also a purchase which has to be decided upon very quickly (paragraph 2.16).
- the markets for funeral directors' services are local (paragraphs 2.19 to 2.25).

22. A particular concern of the MMC in that report was the potential adverse effect on consumers of increased vertical integration in the market resulting from funeral directing businesses and crematoria being under the same ownership (e.g. paragraphs 1.8 and 1.9, 2.91). The MMC recommended that SCI should divest itself of its funeral directing business in various localities where it had more than 25 per cent of that market.

*The undertakings involved*

23. The appellant, Burgess, has been trading as a firm of funeral directors for over 160 years. Burgess currently has three offices: one in Welwyn Garden City, one in Hatfield and one in Knebworth. Burgess is run by Mrs Margaret Burgess, together with her son (Mr Justin Burgess).

24. The first intervener, Austins, is also a long established firm of funeral directors and has been trading since 1700. It has branches in Stevenage, Buntingford, Hertford, Hitchin, Welwyn and, since June 2003, in Welwyn Garden City. In addition to carrying on business as a funeral director, Austins owns and operates Harwood Park via a subsidiary company, Harwood Park Crematorium Limited, the second intervener. Harwood Park was built by the Austin family and opened in 1997. Throughout this judgment Austins and Harwood Park and the various family companies concerned will be treated as the same entity. References to Austins in this judgment should be taken to include Harwood Park unless the context otherwise requires.

25. It appears from the correspondence between the parties that Mr John Austin was Chairman of Austins and of Harwood Park in August 2001. John Austin had, by this time, retired from the day to day management of the business and his daughter, Claire Austin, was Managing Director of Harwood Park from at least January 2002. Claire

Austin is married to Mr Peter Hope, who has been the General Manager of Harwood Park since June 2001.

26. The map at Annex I to this judgment reproduces Map 8 attached to the Decision and indicates the locations of the main businesses involved.

*The development of Harwood Park*

27. In order to build Harwood Park, Austins required planning permission. Austins' initial application was refused by East Herts District Council. Austins appealed to the Planning Inspectorate. In his decision dated 26 July 1993 the planning inspector granted outline planning permission, even though that required an exception to be made from the relevant "green belt" planning policy. In considering the question of whether there was a planning need for a crematorium in the Stevenage/Knebworth area the decision states:

> "15. In assessing the degree of need, it is important to distinguish between true need in the planning sense, and mere demand based on commercial considerations. Green belt policy is that an exception should be allowed only if there are very special circumstances. I would not lightly allow an exception to strict policy, especially as the site is in the rural gap between Stevenage and Knebworth. However, the following factors impressed me as indicating a pressing local need.
>
> Stevenage, the largest town in the county with a population of 75,000, has no crematorium. The only one in Hertfordshire is near Watford, 24 miles away. Your table of "population per crematorium" (Doc 14.A6) shows the ratio for Hertfordshire to be 975,829:1, compared with figures for surrounding counties of 277,080:1 to 331,500:1. A crematorium at Stevenage could serve a catchment area of some 285,000 people.
>
> Secondly, the site for a crematorium formerly identified in Stevenage is no longer available; the Borough Plan now includes no land allocated for this purpose; its policy is to encourage some adjoining District to provide one; and Stevenage officers are not aware of any suitable crematorium site in town.
>
> Thirdly, the nearest crematorium (at Luton, 13 miles away) on the evidence was shown to have only some 20% spare capacity; no evidence was given of the likelihood of its being increased, eg by building a second chapel. Whilst other crematoria have greater spare capacity, there was no challenge to the evidence

> of Mr Austin that obtaining an appointment at any of them for a time of day convenient for local mourners (eg living in Stevenage and Welwyn Garden City) can often involve a delay of 10 to 14 days. I regard a delay of that length as unacceptable, even allowing for the fact that legal and medical formalities for a cremation take longer than for a burial.
>
> Fourthly, apart from Luton, the other crematoria are distant from Stevenage: Harlow, 22 miles; Enfield, 24 miles; West Herts, Watford, 24 miles; Bedford, 28 miles; and Cambridge, 32 miles. Many mourners tend to be elderly. For them to have to travel these distances to meet an appointment at a crematorium causes extra distress in circumstances which are already distressing. It would partly relieve the distress of local mourners to have the opportunity of arranging funerals at a crematorium closer to their homes.
>
> Fifthly, the application received support (or no opposition) from bodies and individuals who would have had special knowledge of the need for a further crematorium. They include Stevenage Borough Council, Welwyn Hatfield District Council, Hertfordshire County Council, a majority of Datchworth Parish Council, EHDC offices, and many local clergy and doctors.
>
> 16. Your clients have shown to my satisfaction a special need for a crematorium to serve the Stevenage area, to provide mourners with facilities close enough to the town to be reached conveniently..."

28. It appears that Austins assured the planning inspector that Harwood Park would be open for use by other local funeral directors. The planning inspector noted at paragraph 30 of his decision:

> "As to other matters, the fact that this would be a commercial enterprise makes it no more or less acceptable than a publicly funded project. You assured the inquiry that the facility would be open for use by funeral directors other than your clients… my concern is with local mourners, for whom nearness of a crematorium is a matter of true need."

*The exclusion of Burgess from Harwood Park Crematorium*

29. As set out above, Harwood Park opened in 1997. In 1998 Burgess opened its newest office in Knebworth, one mile from Harwood Park.

30. Relations between Austins and Burgess appear to have been strained from at least 10 August 2001 when Mrs Margaret Burgess and Mr Justin Burgess wrote to Mr John Austin, the Chairman of Austins, complaining about the alleged rudeness of the

Manager of Harwood Park (Mr. Hope) and about the placement of leaflets for the Austins' funeral plan (a pre-paid funeral package) in waiting rooms at Harwood Park used for funerals being conducted on behalf of Burgess.

31. The response of Mr John Austin of 13 August 2001 rejected Burgess' complaints and includes the following statements:

> "I spent many hours and a great amount of money in providing this area with a crematorium. Five local authorities could not agree to provide a crematorium for the 300,000 residents within 10 miles of Knebworth. This crematorium is for everyone and also very convenient for funeral directors such as yourself.
>
> I further made a promise not to open a funeral branch in opposition to any other established business in the area. This promise I have kept. You were obviously so upset by our success that you decided in your wisdom to open in Knebworth less than one mile from Harwood Park. We did not and should not have complained. However, it was extremely sad that you felt it necessary to act in this way. It is such a shame because you have such good facilities, equipment and premises and have a reputation in Hatfield, which many would wish to emulate."

32. The letter of 13 August 2001 also states:

> "Your telephone threat to discontinue your support for Harwood Park makes no difference. If you wish to advise your clients to take their business to West Herts for example then that is fine by us. We may decide that through any unfriendly gesture on your part that we will refuse to allow your branches to use Harwood Park. I am sure you will understand that this would be an extreme measure."

33. A further letter from Mr John Austin to Mr Justin Burgess dated 23 August 2001 states:

> "The statements made back in 1996 are still the same today. I stated that "the company" would not open in opposition to any existing business. In other words we would not seek to open in Hatfield, Ware, Letchworth etc. We purchased Alfred Scales of Hertford and Buntingford but that was the purchase of a business, which was being marketed. We have honoured our word…
>
> I respectfully suggest that if you have a problem with Mr Hope, then you address Mr Hope personally with that problem. If you haven't done so perhaps it would be a good time to answer his enquiries.

> Finally, I must say to you that if you feel aggrieved by this decision to place our brochures in the public areas then there is one option open to you. That is to cease trading with Harwood Park Crematorium. Please understand that this would be your decision.
>
> I am pleased to inform you that any correspondence on this matter between myself and your company is terminated on receipt of this letter."

34. Following a letter of 7 September 2001 from Harwood Park's solicitors asking for confirmation that any allegations made against Mr Hope were unfounded and withdrawn, solicitors acting for Burgess replied on 20 September 2001 to the effect that, while Burgess felt it was appropriate to raise their concerns, they did not wish to press the matter. That letter concluded:

> "Our clients have asked us to make it clear that they have no wish to get involved in further correspondence or acrimony with your client about this and, having voiced their concerns, are happy to regard the matter as closed.
>
> We sincerely hope that in the interests of both parties and, more particularly, their clients and staff, a good working relationship can now be restored."

35. It appears that on 23 October 2001, solicitors for Harwood Park wrote to the OFT. The Tribunal has not seen this letter, but it has seen the OFT's reply dated 6 November 2001. That letter appears to offer only general guidance about the scope of the Chapter II prohibition.

36. It appears, from later correspondence, that Harwood Park appears to have understood that some kind of "assurance" had been given by the OFT that the course of action apparently proposed in the letter of 23 October 2001 was in compliance with the law. In a letter of 4 March 2003, from Ms Claire Austin to Mr Davies at the OFT, Ms Austin comments as follows:

> "Firstly, before commenting on your recent correspondence, I wish to express my disappointment at finding it necessary to defend our position in this way. You will recall that it was us who, in late 2001, approached the OFT concerning this matter. The aim being to ensure that we were conducting our business affairs both ethically and legally. Having been assured that this were [sic] the case, the recent withdrawal of you [sic] decision leaves us both dismayed and annoyed."

37. On 16 January 2002 Claire Austin, in her capacity as Managing Director of Harwood Park, wrote to Burgess in the following terms:

> "The Directors of Harwood Park Crematorium Limited are aware of the deteriorating relationship between your company and Harwood Park.
>
> This cannot be allowed to continue, therefore they have decided that J.J. Burgess will not be permitted to use the facilities at Harwood Park for a period of at least six months. No telephone bookings will be accepted after 5pm on Friday 18 January 2002. Services already booked will be honoured.
>
> J.J. Burgess may make an application at the end of this period to re-establish use of the facilities at Harwood Park. Any application made will be given the most serious consideration of the Directors of Harwood Park Crematorium Limited."

38. On 17 January 2002 Burgess' solicitors wrote to Claire Austin stating that Burgess were unaware of a "deteriorating relationship", and requesting that access to Harwood Park be reinstated. Burgess considered it "highly unfair to members of the public if you enforce the prohibition that you have placed upon our clients".

39. Austins' solicitors replied on 21 January 2002. This letter stated: "Our clients do not believe that your clients have always maintained a professional and courteous relationship with our clients" and gave the following examples:

- Burgess' letter of 10 August 2001 contained allegations about the conduct of the manager of the crematorium which were not subsequently substantiated;
- Complaints had been made about plaques displayed on Harwood Park showing that it is owned by Austins;
- Burgess introduced a form inviting customers to decline receipt of memorial products offered by Harwood Park;
- Burgess had deleted clients' telephone numbers from Harwood Park administration forms;
- Delays in returning ashes to Harwood Park from Burgess;
- Burgess having insisted on the unnecessary signing of a Harwood Park form.

40. Austins solicitors' letter of 21 January 2002 points out that Burgess has access to other crematoria at Watford and Luton.

41. On 21 January 2002, Burgess made a complaint to the OFT alleging that Austins' behaviour was abusive. The OFT's investigation of the complaint is described more fully below.

42. In the meantime, Burgess was also able to come to an arrangement with another local funeral director, Nethercotts, who agreed to make bookings at Harwood Park on behalf of Burgess' clients and to carry out certain services while at Harwood Park. Another local funeral director also assisted Burgess in this manner, but only on one occasion.

43. Following correspondence from the OFT, Claire Austin wrote to the OFT on 14 February 2002 as follows:

> "Austin's Funeral Service and, therefore, the Austin Family wholly own Harwood Park. W. Austin & Sons Limited is a long established local funeral business which was originally founded in Stevenage in 1700. Over the last thirty-five years the business has been expanded by my Father, to include funeral branches in Hitchin, Buntingford, Hertford and Welwyn. Some twenty-five years ago he also identified a need for a crematorium to serve the community of Stevenage and its surrounding areas. At this time the only crematoria serving this area were West Herts in Watford and Vale Crematorium in Luton, both some thirty minutes travelling distance from Stevenage. My Father, therefore, made great efforts to persuade the Local Authority that they should provide such a facility. Unfortunately, his efforts were, for various reasons, fruitless.
>
> In 1990, however, he located a site in Stevenage, suitable for the development of a private crematorium. Although the provision of such a facility would be of benefit to both the local community and other Funeral Directors, some objections were raised by local residents. Therefore, it was not until 1996, and after much hard work, that the project was finally approved. Harwood Park Crematorium and Memorial Gardens were opened in February 1997.
>
> Although the project was entirely funded by Austin's Funeral Service, its success relied heavily on attracting other Funeral Directors in and around Stevenage. The business plan for Harwood Park, in fact, calculated that it would service the community and Funeral Directors within a ten-mile radius. This, therefore, included Hitchin, Letchworth, Baldock, Buntingford, Hertford, Welwyn Garden City and Harpenden as well as villages within the area. It was considered that communities further afield would continue to use existing, more conveniently located crematoria.

In its five years of operation, Harwood Park has proved popular with Funeral Directors and the bereaved and as such has attracted some custom from outside its, so called, 'catchment area'. The number of funerals conducted at Harwood Park by companies other than Austin's, has increased during this period, to the extent that they provide […] of our cremation turnover. We have always maintained a policy that all Funeral Directors should be treated equally with regards the service provided and the fees charged. Austin's Funeral Service has never benefited, in this respect, from its ownership of Harwood Park.

As a company and family we feel we have maintained a good working relationship with and mutual respect from, the majority of other firms within our industry. Unfortunately, however, over recent months an exception has arisen, which has lead to the exclusion of J.J. Burgess & Sons from using the facilities of Harwood Park.

J.J. Burgess & Sons have been a valued customer of Harwood Park over the last five years and have contributed greatly to its success. This said, however, there has always been an underlying attitude of J.J. Burgess & Sons to Harwood Park, which is perhaps best described as professional jealousy. Until six months ago this presented no great problem but recent actions taken by J.J. Burgess & Sons have now made the working relationship increasingly intolerable. These are documented as follows:

- A letter dated 10th August 2001, received by the Chairman of Harwood Park, making allegations concerning the conduct of the Crematorium Manager. When challenged, [Burgess were] unable to substantiate these allegations. The matter remains outstanding.
- Complaints concerning plaques displayed on the building, showing ownership of Harwood Park as Austin's.
- Company literature displayed in the waiting room at Harwood Park, found in waste bins following attendance by J. J. Burgess & Sons.
- Their introduction of a form, which invites the customer to decline receipt of literature concerning memorial products, offered by Harwood Park. This also prevents the customer from being aware of a complimentary memorial offer.
- The deletion of customers telephone numbers from Harwood Park administration forms, in order to prevent Harwood Park staff contacting them.
- In cases where families require ashes to be returned to Harwood Park from J.J. Burgess every effort is made by J.J. Burgess to delay the process. Insisting upon the unnecessary signing of a Harwood Park form.

> Having emphasised, to you, the important contribution made by other Funeral Directors to Harwood Park, you can imagine that the decision to exclude J.J. Burgess & Sons was by no means taken lightly. The annual business supplied by J.J. Burgess to Harwood Park amounts to […] of our cremation turnover. The loss of such a percentage could inevitably result in serious consequences for the profitability of Harwood Park.
>
> The claim has been made by J.J. Burgess that, as a funeral service, we are in a dominant position and will therefore benefit from the actions we have taken. In looking at our trading areas, you will undoubtedly realise that this could not be the case. J.J. Burgess operate their business from branches in Hatfield, Welwyn Garden City and Knebworth. Austin's Funeral Service do not operate branches in any of these locations and, therefore, any loss of business by J.J. Burgess would not be of direct benefit to Austin's.
>
> Although their offices in Welwyn Garden City and Knebworth do fall within the 'catchment area' of Harwood Park, the majority of J.J. Burgesses business, an estimated 70%, is derived from the Hatfield area. It was never considered, in the planning of Harwood Park, that it would be used by the community of Hatfield. West Herts Crematorium was always the natural option and it continues to be so.
>
> Finally, although J.J. Burgess & Son state that our actions may result in their exiting the market, it must be borne in mind that, Harwood Park has been operating for only five years. J.J. Burgess & Sons were successfully trading as Funeral Directors for 158 years prior to this.
>
> I hope this clarified the circumstances under which we have found it necessary to exclude J.J. Burgess from the use of Harwood Park and our relative positions in the market place as Funeral Directors."

44. On 28 February 2002 the OFT wrote to Burgess' solicitors rejecting Burgess' complaint on the grounds that on the information then available, Harwood Park was not dominant in a relevant market.

45. Mr John Austin wrote to Nethercotts on 1 March 2002, requesting them to stop assisting Burgess to use the facilities of Harwood Park and engaging in "the deception" that was taking place. This letter included the following passage:

> "I can assure you that you do not have the whole story. This action has not been discussed with anyone except our lawyers and the Office of Fair Trading. The Office of Fair Trading was consulted on this matter approximately eight weeks prior to the action being implemented".

46. Nethercotts, however, continued to arrange funerals at Harwood Park on behalf of Burgess.

47. In March 2002 SAIF, the association which represents independent funeral directors, together with other local funeral directors, was involved in trying to find a solution to the dispute between Harwood Park and Burgess. A letter to local members dated 7 March 2002, from the CEO of SAIF, sets a date for a meeting of local funeral directors and refers to concerns that the situation "could, by establishing dangerous precedents, have an adverse impact on funeral directors and their clients in the future, both locally and nationally".

48. In a letter dated 14 March 2002, Mr Hope, writing on behalf of the Board of Directors of Harwood Park, rejected a suggestion by a local funeral director (Mr Rule) that they meet with representatives of local funeral directors. This letter further states that the exclusion of Burgess was of benefit to neither Harwood Park nor Austins, "as they do not compete for business within the same catchment area within Hertfordshire".

49. On 6 June 2002 Burgess' solicitors wrote to the OFT asking them to vary the decision of 28 February 2002 under section 47 of the Act as then enacted. That application was supported by detailed reasons and materials, including the planning inspector's decision of 26 January 1993.

50. On 12 July 2002, six months after the exclusion of Burgess from Harwood Park, Burgess's solicitors wrote to Austins' solicitors requesting that Harwood Park recommence taking funerals from Burgess. Austins' solicitors' response, dated 1 August 2002, was that the Board of Directors of Harwood Park had "decided that trading between our clients and Burgess should not resume".

51. On 16 October 2002 Austins sent a letter to Nethercotts in the following terms:

> "There is, of course no doubt in our minds that most of the funerals serviced by you here at Harwood Park are in fact generated by J.J. Burgess & Sons.
>
> We are at present very happy to receive you here in whatever guise you care to adopt.
>
> Having stated that, we are aware of the vehicles you have been bringing to Harwood Park. Your limousines are supplied by

> J.J. Burgess, as are some members of your staff. Up until now this has been permitted.
>
> Unfortunately, on Saturday 12 October you chose to use an entire fleet of Burgess's vehicles, including the hearse, this is quite unacceptable.
>
> To save you the embarrassment of any action we might take, I respectfully request that, during your visits here, you cease using all vehicles either supplied by, or bearing the mark of J.J. Burgess & Sons.
>
> Please spare me any suggestion that your hearse may have been out of commission."

52. That letter was drawn to the OFT's attention by Burgess' solicitors on 28 November 2002.

53. On 11 February 2003 the OFT consulted Harwood Park on whether the decision of 28 February 2002 should be withdrawn. Harwood Park replied on 4 March 2003.

54. On 9 April 2003 the OFT accepted Burgess' application of 6 June 2002 to vary the OFT's original decision of 28 February 2002. The OFT considered that it had reasonable grounds for suspecting an infringement of the Chapter II prohibition and would investigate the matter further.

55. The withdrawal decision of 9 April 2003 refers to the new information provided by Burgess, and also refers to Austins' own response to the OFT's consultation in a letter of 4 March 2003, in which Austins commented that a crematorium "could not viably survive if not exclusive within its catchment area" (paragraph 14).

56. In light of this new evidence, the OFT considered in the withdrawal decision that there were reasonable grounds for suspecting that the geographic market for crematoria services might be much narrower than that identified in its initial decision:

> "In the Relevant Decision, the relevant market was considered to be at least as wide as to include crematoria based in Garston on the edge of Watford (the West Hertfordshire Crematorium), Stopsley on the edge of Luton (the Vale crematorium), Enfield (the Enfield crematorium), East Finchley (the St Marylebone crematorium) and Harlow (the Parndon Wood crematorium). However, information supplied by JJ Burgess in the Application suggests that, in practice, the majority of residents in the Stevenage/Knebworth area are unwilling to use the

> services of another crematorium and will instead wish to arrange a cremation at the Crematorium [Harwood Park]. The OFT has reasonable grounds for suspecting that a market for crematoria services exists in respect of customers located very near to Harwood, in the Stevenage/Knebworth area." (Paragraph 20)

57. The OFT went on to state that it had reasonable grounds for suspecting that Harwood Park holds a dominant position within this market and for suspecting that its decision to exclude Burgess might amount to abuse. The OFT also considered that there were reasonable grounds for suspecting that the refusal to supply Burgess could amount to an abuse of a dominant position held by Austins in the market for funeral directing services in Stevenage and Knebworth:

> "27. Austins and JJ Burgess appear to compete as funeral directors in the Stevenage/Knebworth area, and customers in these areas may have a strong preference to use the Crematorium. As JJ Burgess is being denied access to the Crematorium, this would appear to reduce JJ Burgess' ability to compete with Austins for customers."

58. Burgess requested a meeting with the OFT, which took place on 3 June 2003. A note of that meeting prepared by Burgess' advisers records that the OFT indicated that its investigations were continuing and could take an additional 12 to 24 months. A note of the same meeting prepared by the OFT confirms that Mr Coombes, Director, Services Industries, Competition Enforcement Division of the OFT, "offered to discuss with JJ Burgess any potential decision before it was determined outside of the procedural process (to ensure that Burgess has an opportunity to be consulted before a decision is made)."

59. Nethercotts continued to arrange cremations at Harwood Park on behalf of Burgess while the OFT's investigation was continuing. By letter of 26 June 2003 Burgess' solicitors invited Harwood Park to reconsider their stance. By letter from their solicitors dated 1 July 2003 Harwood Park declined to do so.

60. On 18 August 2003 Burgess applied to the OFT for interim measures directions under section 35 of the Act. That request was refused by the OFT on 24 September 2003.

61. On 3 October 2003 the OFT sent a letter to Burgess, inviting comment on two matters, described as "the key areas the OFT has been focusing on in its investigation". These were:

> "the terms of access to Harwood Park Crematorium since the refusal; and
>
> the effect of the refusal on competition in and around Stevenage and Knebworth in terms of both funeral directing services and crematoria services."

62. Burgess responded to this request on 31 October 2003. In its reply Burgess confirmed that it still had access to Harwood Park via its informal arrangement with Nethercotts. Most, though not all, of Burgess' clients wishing to use the crematorium had, at that point, been able to do so. Burgess explained that the aim of the assistance provided by Nethercotts was solely to enable Burgess to maintain its business until the OFT made its decision; such assistance could not realistically be continued longer term. Burgess identified the principal effects on the market as being the inability of Burgess to offer, or of consumers to acquire, a funeral from Burgess involving a cremation at Harwood Park, and the restriction of consumer choice.

63. On 24 December 2003, Nethercotts wrote to Burgess' solicitors indicating that they were prepared to continue to arrange funerals on behalf of Burgess up to and including 30 April 2004, but that they would not be able to assist beyond that date. Nethercotts expressed the hope that the "extraordinary, unprecedented and in my opinion unjust" situation would be resolved by that date.

64. On 22 January 2004, a note taken by Burgess' counsel recorded a conversation with the case handler at the OFT:

> "I have spoken to Darren Eade who is full of apologies for the delay. The Decision is in the last stages and has obviously caused grief."

65. By letter to Burgess' solicitors of 3 February 2004, the OFT case handler indicated that:

> "I can confirm that we have concluded our investigation and have drafted a decision and are now in the final stages of clearing the decision for issue. In terms of timing, we are aiming to issue the decision, hopefully, mid-March; if not by then, as soon after that as possible. I am afraid I cannot be any more precise about timing than this at the present."

66. In a further letter, dated 1 March 2004, the OFT case handler indicated that the earlier assessment had now changed:

> "The current position is that we are still in the process of reviewing the draft decision and that it is not now likely to be issued as early as mid March and that a late March/early April date for its issue now seems more likely. We are sorry for this continuing delay. I can assure you that the case is being worked on as a matter of priority and that it is our intention to issue the decision as soon as the review process is completed."

67. On 22 March 2004, Austins wrote to Nethercotts regarding its attendance at Harwood Park on behalf of Burgess. The letter stated that:

> "It must be stressed that we are always very pleased to receive Nethercotts at Harwood Park Crematorium in their own right. Nevertheless we cannot allow the present situation to continue.
>
> Commencing today, it will be necessary for Nethercotts to submit a facsimile copy of the Form A in advance of securing a service time at Harwood Park. If it is determined that the booking emanates from Burgess & Sons a service time will not be allocated."

68. Following that letter, Burgess made a further application to the OFT for interim measures dated 23 March 2004. That request was rejected by the OFT on 15 April 2004. A further request by Burgess for interim measures was made on 4 May 2004.

69. On 6 May 2004 the Consumer's Association wrote to the OFT in support of Burgess' application for interim measures.

70. The OFT remained unconvinced of the need for interim measures and rejected Burgess' third application for interim measures on 27 May 2004, in a letter to Burgess' solicitors. That letter effectively repeated the grounds set out in the OFT's letter of 15 April 2004.

71. According to a note of a telephone conversation with the OFT prepared by Burgess' solicitors, on 1 June 2004 the OFT was still unable to give a precise indication of the timing of its final decision, stating however that the decision was likely to be ready "within a matter of weeks rather than a matter of months".

72. On 9 June 2004 SAIF also wrote to the OFT in support of Burgess. In that letter, the CEO of SAIF stated that:

> "Our member is losing substantial amounts of business over this case. You have claimed that members of the public have other crematoria to choose from, but this ignores the fact that members of the public living close to the Knebworth branch of JJ Burgess appear to only want to use Harwood Park Crematorium. We understand that there is every likelihood that the Knebworth branch may soon go out of business, a matter clearly not helped by the very considerable delay on the part of the OFT."

73. The OFT's response to SAIF from Mr Coombs, dated 10 June 2004, contained the following:

> "The reason the case has taken as long as it has to reach a conclusion is not due to any lack of manpower or absence of sufficient prioritisation. The principal reasons appear to be that the competition issues raised by the case are not entirely straightforward and the provision of new information to the OFT at various stages of the investigation by the complainant."

74. On 11 June 2004 the Consumers' Association sent a further letter to the OFT which reads as follows:

> "We fundamentally disagree with your view that the market for cremation services is wide enough to encompass the sort of drive-time that you are suggesting is reasonable. It is simply not reasonable to expect consumers to choose a crematorium some considerable distance from their home when a local one is easily accessible. This argument reminds us of a position put by a previous Director General of Fair Trading that allowing consumers to buy a car in Belgium indicated that the UK car market functioned well...
>
> The issue of irreparable harm to Burgess is obviously better dealt with by the company themselves. However, we are concerned that the OFT appears willing to have a case involving small businesses take years rather than months to resolve. Even if the impact of exclusion were relatively small – which in this case the refusal of access to the local crematorium clearly is not – the amount of time it has taken to investigate the case makes any cumulative impact ever greater. As regards the "public interest" ground for directing interim measures, we note simply that, in our view, the refusal to direct interim measures against Austin's and Harwood Park has the effect of reducing consumer choice and that is clearly not in the public interest.
>
> We do not accept that this case has no bearing on future developments in the sector. This case will clearly establish a precedent for other funeral directors/crematoria to integrate vertically. The argument that the existence of another

> crematorium in a neighbouring town is sufficient for competition to exist will be used to justify the vertical integration and segmentation of the funeral care/crematorium market. We would be interested to know at what point the OFT would find such a trend troubling and worthy of further investigation."

75. On 11 June 2004, Burgess wrote to the OFT stating that it intended to appeal the OFT's decision of 27 May rejecting Burgess' third application for interim measures to the Tribunal. This had become possible by virtue of amendments to section 47(1) of the Act which came into effect from 1 May 2004 pursuant to the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261.

76. A notice of appeal against the OFT's refusal of Burgess' third application for interim measures was lodged with the Tribunal on 23 June 2004 (Case 1038/2/1/04).

77. The OFT's Decision of 29 June 2004 on the substance of Burgess' complaint was notified to Burgess on 30 June 2004, and the notice of appeal in the present case against that Decision was lodged on 15 July 2004 (Case 1044/2/1/04).

## III THE PROCEDURE BEFORE THE TRIBUNAL

*The interim measures appeal*

78. Burgess' interim measures appeal was supported by witness statements of Mrs Margaret Burgess (dated 22 June 2004) and Mr Justin Burgess (also dated 22 June 2004).

79. An initial case management conference was held in the interim measures appeal on 6 July 2004. The case management conference was adjourned until 14 July 2004 in order to give Burgess time to finalise an appeal against the OFT's Decision on the substance, which had in the meantime been adopted on 30 June 2004, and to encourage Burgess and Harwood Park to consider whether any agreed interim arrangement could be put in place so as to avoid the need for a hearing on the issue of interim measures.

80. At the case management conference on 14 July 2004, the Tribunal encouraged further discussion between the parties and it was eventually agreed that Harwood Park would

grant limited interim access to Burgess. The terms of the interim access arrangements were recorded in an Order made by the Tribunal and took effect on 21 July 2004. The Order reads as follows:

> "Upon hearing counsel for JJ Burgess, counsel for the Office of Fair Trading and the solicitor for Harwood Park Crematorium
>
> And upon JJ Burgess undertaking on behalf of themselves and their employees not to make critical or disparaging references or remarks concerning Austins or Harwood Park Crematorium either in writing or verbally
>
> And upon JJ Burgess and Harwood Park Crematorium having agreed to the terms set out in the Schedule hereto
>
> By consent it is ordered that:
>
> 1. JJ Burgess Knebworth office may book and conduct funerals at Harwood Park Crematorium upon the terms set out in the schedule hereto.
> 2. The costs of today be reserved.
> 3. Liberty to apply.
>
> Schedule
>
> 1. JJ Burgess may book service time, deliver documents, conduct funeral services, provide staff and vehicles, administer and settle financial matters for funerals at Harwood Park Crematorium with bookings to be accepted from the 21st July 2004.
> 2. JJ Burgess may collect cremated remains from Harwood Park Crematorium for funerals which they have conducted.
> 3. The funerals which JJ Burgess may book at Harwood Park Crematorium shall be restricted to deceased or applicants within the postal codes SG1, SG2 and SG3.
> 4. No members of the Burgess family shall attend Harwood Park Crematorium."

81. On 19 October 2004, by order of the Tribunal, the interim measures appeal was stayed pending the resolution of Burgess' main appeal against the OFT's Decision of 29 June 2004.

*The main appeal*

82. An appeal on the merits of the Decision of 29 June 2004 was received by the Tribunal on 15 July 2004. The OFT filed its defence on 26 August 2004. A case management conference took place on 19 October 2004.

83. A statement of intervention from Austins and Harwood Park was lodged with the Tribunal on 14 October 2004.

84. A statement of intervention was received from the Consumers' Association on 11 October 2004. The Consumers' Association states that it intervened in the appeal in support of Burgess and in support of the interests of end-consumers who would not, otherwise, be specifically represented before the Tribunal. The Consumers' Association has indicated that to take such a position against the OFT was not a decision which was taken lightly. The OFT lodged a response to the Consumers' Association's statement of intervention on 16 November 2004.

85. The hearing took place on 15 and 16 February 2005.

## IV THE OFT'S DECISION

86. In the Decision on the substance of Burgess' complaint dated 29 June 2004 the OFT found no strong and compelling evidence that Austins had infringed section 18 of the Act (paragraph 100).

*Relevant product market*

87. In the Decision, the OFT examines two "relevant product markets", described as "crematoria services in the upstream market and funeral directing services in the downstream market" (paragraph 25). According to the OFT "Available information indicates that the characteristics of crematoria services are sufficiently distinct from alternatives to constitute a discrete product market" (paragraph 29). According to the OFT, its analysis would not change, depending on whether the funeral director or the

end customer was treated as the purchaser of crematoria services (paragraph 30 of the Decision).

*Relevant geographic market – crematoria services*

88. The OFT goes on to consider the geographic market for crematoria services. The relevant section of the Decision dealing with this issue is reproduced in full below:

> "37. The OFT's analysis of the relevant geographic market for crematoria services focuses on demand-side considerations, as scope for supply-side substitution appears limited. Accordingly, it has sought to identify substitutes which are so close that they would prevent a 'hypothetical monopolist' in one area from charging monopoly prices.
>
> 38. The process of identifying substitutes starts by looking at a relatively narrow area, which might be the area supplied by the parties to an agreement or the subject of a complaint. Examination is then broadened to consider whether consumers would switch to suppliers in neighbouring areas in response to a small increase in price. If substitution is potentially so significant that it would prevent an undertaking from raising its prices, the area is added to the market definition.
>
> 39. Accordingly, the key consideration in assessing the relevant geographic market for crematoria services is how funeral directors and end consumers would react if a hypothetical monopolist supplying crematoria services in the Knebworth/Stevenage area increased prices by a small but significant amount above competitive prices. If Harwood's customers would switch to alternative crematoria in sufficient numbers to make such a price increase unprofitable, this would suggest that the market is wider than just the Knebworth/Stevenage area and should include the areas where these competing crematoria are located.
>
> 40. Annex 2(A) identifies the crematoria used by all funeral directors in Stevenage and Knebworth and a sample of funeral directors in West Hertfordshire. All funeral directors used other crematoria in addition to Harwood.
>
> 41. Most branches of funeral directors (not including Austins) have access to alternative crematoria to Harwood, which are either closer or not significantly further away. While most cremations take place at the nearest crematorium to the deceased, funeral directors appear to be willing to use crematoria that are up to 30km or more from the branch

where the cremation is arranged. It appears therefore that Harwood faces competition from crematoria located over a relatively wide area. Accordingly, if Harwood raised prices the majority of funeral directors would be able to switch to alternative crematoria relatively easily.

42. The Burgess branch in Knebworth and the Co-operative Funeral Service (Co-op) branch in Stevenage are located closest to Harwood. In principle, if Harwood were dominant in the supply of crematoria services in Stevenage and Knebworth, it would be possible for Austins to price discriminate between these and other branches that are outside of Stevenage and Knebworth (i.e. it could increase prices for crematoria services charged to these two branches while not increasing prices charged to other branches). If Harwood could price discriminate in this way, this would suggest the possibility of a discrete market for crematoria services comprising the Knebworth and Stevenage area.

43. Whether price discrimination is possible is likely to turn on the reactions of end consumers. It may be that end consumers have a stronger preference to use the nearest crematorium than funeral directors. Alternatively their preference for using a specific funeral director may prevail.

44. Available information shows that funeral directors do not always use the same crematorium for all the cremations that they arrange from a specific branch. This indicates that end consumers are prepared to accept a crematorium other than the closest crematorium. In addition, there is no evidence to suggest that price discrimination is occurring. Austins charges the same price to all funeral directors for services provided via Harwood, irrespective of where they are located.

CONCLUSION ON THE RELEVANT GEOGRAPHIC MARKET FOR CREMATORIA SERVICES

45. On the balance of the evidence, the OFT has concluded that the relevant geographic market for crematoria services is wider than Knebworth and Stevenage. It includes, at least, the West Hertford crematorium and is likely to include all crematoria within a 30 km radius of Stevenage and Knebworth."

*Relevant geographic market – funeral directing services*

89. On the basis of a postcode analysis of deceased for whom funerals were arranged, the OFT found, first, that demand for funeral directing services provided by funeral

directors in Stevenage or Knebworth came from within Stevenage and Knebworth. This included Austin's Stevenage Branch, Burgess' Knebworth branch and The Co-op's Stevenage branch (paragraphs 48 to 50).

90. A similar analysis led the OFT to conclude that Burgess' Welwyn Garden City branch was likely to compete in a market comprising Welwyn and Welwyn Garden City (paragraphs 51 to 53).

91. The OFT made no finding in relation to Burgess' Hatfield branch, on the ground that Austins did not compete with that branch, and that that branch made little use of Harwood Park, so that "it is unlikely that this branch would be affected by Austin's alleged conduct" (paragraph 46).

*Dominance: crematoria services*

92. The OFT proceeded to assess dominance on the basis that Harwood Park competes in a geographic market which includes several other crematoria, including the crematoria in West Hertfordshire, Enfield, Parndon Wood, St Marylebone and Luton, all of which it considered to be located within a 30 km radius of Harwood Park. The OFT quotes figures, attributed to the Cremation Society of Great Britain website, which, according to the OFT, show that in 2002, 1,911 cremations were conducted at Harwood Park out of a total of 12,236 conducted by all crematoria within this area (a share of 15.6%). The OFT concluded therefore that Harwood Park was unlikely to be dominant on the basis of market share alone. (paragraphs 58 to 60)

93. The OFT also notes, in paragraph 61 of its Decision, additional reasons why it considered that Austins was not dominant:

- "there are credible alternative crematoria that funeral directors can realistically access";
- "there is no evidence that Austins is price discriminating between customers".

94. The OFT therefore concluded that Austins is unlikely to be dominant in the supply of crematoria services within 30 km of Stevenage and Knebworth.

*Dominance: Funeral directing services*

95. In the markets for funeral directing services, the OFT concluded that Austins was likely to be dominant in Stevenage and Knebworth, primarily on the basis of Austins' substantial share of the funerals carried out by funeral directors in that area, amounting to [over 75%] (paragraph 63 to 65). The OFT considered whether there was any evidence to rebut the presumption of dominance arising from that market share, and identified two features which supported its conclusion that Austins was likely to be dominant:

- "a steady decline in the death rate means the only scope for growth is in the provision of higher value services. This may discourage significant new entry in a market where reputation is an important factor. This would tend to indicate that barriers to entry into the market for the supply of funeral directing services in Stevenage and Knebworth do exist."
- "there is no history of significant new entry into this market" (paragraph 66).

96. The OFT did not reach a conclusion as to whether Austins was likely to be dominant in the supply of funeral directing services in Welwyn and Welwyn Garden City.

*Abuse*

97. The OFT noted, first, that although it had found that Austins had a dominant position in the downstream supply of funeral directing services in the Stevenage and Knebworth areas, the alleged abuse related to access to Harwood Park in the upstream market for crematoria services. Accordingly the OFT considered that it would have to establish (a) that Austins was dominant in the upstream market for crematoria services and (b) that the refusal to allow Burgess access to Harwood Park was an abuse of that dominant position (paragraph 73).

98. Even though the OFT concluded that Austins was unlikely to hold a dominant position in the upstream market for the provision of crematoria services, it proceeded to consider whether Austins' behaviour could be abusive on the hypothetical assumption that Austins was dominant in that market (paragraph 74).

99. In the Decision, the OFT analysed the relevant case law on refusal to supply as follows:

"75. Refusal to supply by a dominant undertaking is not necessarily abusive. In considering such allegations of abuse, the OFT considers the effect of the refusal to supply. In particular, it considers the effect on competition rather than on individual competitors.

76. It appears from the case-law of the ECJ that a refusal to supply by a dominant undertaking can be considered to be abusive where the refusal risks eliminating all competition (*Commercial Solvents v Commission* [1974] ECR 223, paragraph 25; Case 311/84 *Centre belge d'etudes de marche – Télémarketing (CBEM) and information publicite Benelux (IPB)* [1985] ECR 3261, paragraph 27.)

77. In addition, the ECJ has found that, even in the absence of elimination of all competition, in some instances, where there is substantial harm to competition, a refusal to supply by a dominant undertaking can be considered to be an abuse (Case 27/76 *United Brands*, paragraphs 182 to 194).

78. The OFT therefore considers that, in some cases, an abuse may be found where a refusal to supply does not eliminate all competition, but is still considered to cause substantial harm to competition. Thus, a refusal to supply by a dominant undertaking may be an abuse if there is evidence of likely, substantial harm to competition and if the behaviour cannot be objectively justified.

79. Whether such conduct by a dominant undertaking is actually abusive will be a question of fact and degree taking into consideration factors such as the evidence of intention of the dominant undertaking in pursuing the conduct, the effect (both direct and indirect) of the conduct on the undertaking's competitors and customers and the extent to which the conduct is plainly restrictive of competition. (A similar approach was taken in the OFT's decision of 9 September 2003, refusal to supply unprocessed holographic photopolymer film: *E.I. du Pont de Nemours & Company and Op. Graphics (Holography) Limited*, paragraph 27).

80. It is only in exceptional circumstances that competition law should deprive an undertaking of the freedom to determine its trading partners (The issues in this section in relation to refusal to supply were considered in the Opinion of Advocate General Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG Mediaprint Zeitungs- und Zeitshriftenverlag Y Co. KG* [1998] ECR I-7791)."

100. At paragraphs 82 to 92 of the Decision, the OFT considered that the refusal to supply by Austins would not be abusive even if Austins were dominant in the supply of crematoria services. The OFT considered a number of matters.

101. First, under the heading of "intention", the OFT noted that the refusal of access followed a breakdown in the professional relationship between Austin and Burgess. The OFT identified a number of elements of this breakdown:

- Burgess objected to the placement of marketing materials for Austins' funeral plans at cremations held at Harwood Park which were arranged by Burgess;
- Burgess staff allegedly removed these materials and placed them in a bin;
- Burgess was concerned that Austins, through ownership of Harwood Park, was seeking to gain a competitive advantage in the sale of funeral plans;
- The relationship between the firms appeared to have deteriorated to the point where the staff of both firms were rude to one another;
- There was an exchange of acrimonious correspondence;
- There was a dispute as to an alleged non-payment by Burgess (paragraph 83 of the Decision).

102. The OFT concluded at paragraph 84:

> "In summary, the nature of the dispute between the firms is both a matter of personal acrimony and commercial dispute. The origins of the dispute do not appear to be competition related. In this regard, it is significant that, as far as the OFT is aware, Austins has not refused access to Harwood to any funeral directors other than JJ Burgess."

103. The OFT noted, secondly, that all Burgess branches use crematoria other than Harwood Park and that prior to the opening of Harwood Park in 1997, Burgess would have had to use other crematoria (paragraph 85).

104. The OFT considered, thirdly, that the number of funerals conducted by Burgess since the refusal of access to Harwood Park had increased. According to paragraphs 86 and 87 of the Decision:

> "86. Tables 1 and 2 in Annex 3 show the use of crematoria by JJ Burgess and the number of funerals arranged at each of its branches in 2001 and 2002. The tables show that the number of funerals arranged at JJ Burgess' Knebworth

branch in 2002, when direct access to Harwood was refused, was greater than in the previous year. Tables 1 and 2 in Annex 3 also show that the total number of cremations arranged at JJ Burgess' Knebworth branch increased, even while the number of cremations it conducted at Harwood fell.

87. The OFT recognises that since March 2004 JJ Burgess has no longer been able to obtain access to Harwood through Nethercotts. However, these Tables show that, even when access was only available through Nethercotts, JJ Burgess organised the substantial majority of its cremations at crematoria other than Harwood."

105. The OFT noted, fourthly, that Burgess' market share in Stevenage and Knebworth increased. According to paragraphs 88 and 89 of the Decision:

"88. Tables 3 and 4 in Annex 3 show the number of cremations arranged by Austin's Stevenage branch, JJ Burgess' Knebworth branch and the Co-op's Stevenage branch in 2001 and 2002. The figures in Tables 3 and 4 in Annex 3 show that competition between Austins, the Co-op Stevenage and JJ Burgess Knebworth continued and was not significantly affected by the refusal to supply. This suggests that Austin's alleged conduct did not cause substantial harm to competition in the market for the supply of funeral directing services in Stevenage and Knebworth.

89. The OFT recognises that since March 2004 Burgess has no longer been able to obtain access to Harwood through Nethercotts. However, even if Austin's refusal to supply were to lead to JJ Burgess exiting the market, Austin's largest competitor, the Co-op, would remain. The OFT notes that the Co-op's Stevenage branch is part of the largest branded funeral directors in the UK and is well represented in other parts of Hertfordshire."

106. Fifthly, the OFT concluded that[1]:

"it is not clear that Austin's alleged conduct caused substantial harm to competition in the market for the supply of funeral directing services in Welwyn and Welwyn Garden City." (paragraph 90)

107. Sixthly, the OFT concluded that the "evidence does not indicate that Burgess is likely to exit the market". At paragraph 91 the OFT stated:

[1] The OFT has submitted to the Tribunal that paragraph 90 of its Decision should not have been included in the Decision and that its inclusion was the result of a drafting error.

> "All JJ Burgess' branches have access to credible alternatives to Harwood. Accordingly, it is not clear that Burgess will exit the market for the supply of funeral directing services in the relevant markets as a result of Austin's refusal to supply access to Harwood. As noted above, even if JJ Burgess were to exit the market, Austin's largest competitor, the Co-op, would remain."

108. The OFT also noted that, so far as it is aware, Austins has not refused access to Harwood Park to any funeral director other than Burgess (paragraph 92).

109. The OFT went on to conclude at paragraph 93 of the Decision:

> "On the basis of available information, the OFT does not consider that it has strong and compelling evidence that Austin's refusal to supply JJ Burgess with access to Harwood will eliminate or cause substantial harm to competition in any relevant market. It follows that the OFT does not consider that Austin's refusal to supply JJ Burgess with access to Harwood is an abuse of a dominant position in a market."

110. The Decision deals briefly with the other allegations of abuse made by Burgess. The OFT did not consider that any of the "other" categories of behaviour cited by Burgess had caused substantial harm to competition or amounted to abuse (paragraphs 94 to 99). In particular, as to Burgess' allegation that it could not offer pre-paid funeral plans for Harwood Park, the OFT considered that Burgess had access to other crematoria.

## V THE ISSUES IN THE CASE

111. The parties' submissions cover principally (i) the standard of proof (ii) how far the Tribunal should take its own decision in this case (iii) the definition of the relevant geographic market in which Harwood Park supplies crematoria services (iv) whether Harwood Park is dominant in a relevant geographic market as correctly defined for either funeral directing services or crematoria services (v) whether the refusal of access to Harwood Park constituted an abuse, on the premise that Harwood Park was dominant in the supply of crematoria services (vi) whether that refusal of access to Harwood Park was, in any event, an abuse of Austins' dominant position in the market for funeral directing services in Stevenage and Knebworth (vii) whether in any event the facts disclose abusive discrimination on the part of Harwood Park (viii) how far a defence of objective justification is raised by the OFT or Austins/Harwood Park or, if raised,

constitutes a defence in this case (ix) whether any abuse extends to Burgess' branches in Welwyn Garden City and Hatfield and (x) whether the decision is procedurally flawed.

## VI THE STANDARD OF PROOF

*The parties' submissions*

112. Burgess submits that the standard of proof applicable in this case is the ordinary civil standard. While convincing evidence may be needed to establish an abuse, there is no need to apply a 'strong' civil standard to issues such as market definition or dominance, which involve no finding of illegality. Moreover, there is no question of a penalty in this case, by virtue of section 40 of the Act and the Competition Act (Small Agreements and Conduct of Minor Significance) Regulations 2000, SI 2000/262, the effect of which is to exclude penalties for infringement of the Chapter II prohibition where the relevant turnover of the undertaking concerned is less than £50 million.

113. The OFT submits that at the time of the decision, it relied on the Tribunal's judgment in *Napp v. Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 13, ("*Napp*") at paragraphs 108 to 109. The OFT accepts the clarification of the test of the balance of probabilities to be applied in the Tribunal's recent judgment in *JJB and Allsports v. Office of Fair Trading* [2004] CAT 17, [2005] CompAR 29, at paragraphs 197 to 208, but emphasises that the evidence must still be of sufficient weight to overcome the presumption of innocence. According to the OFT, it would be inappropriate for the standard of proof to vary according to whether or not penalties were to be imposed. The Tribunal should not apply a "bare balance of probabilities" standard.

114. Austins supports the OFT, arguing that the test set out in *Napp* should be applied.

*The Tribunal's analysis*

115. In *JJB and Allsports*, cited above, the Tribunal confirmed that the standard of proof to be applied in cases before the Tribunal is that of the balance of probabilities: paragraph 195. The Tribunal's comment in *Aberdeen Journals v OFT (No. 2)* [2003] CAT 11, at

paragraph 125, that on economic issues the Tribunal should ask itself whether the OFT's analysis "is robust and soundly based" is to be understood as requiring an infringement to be established to the civil standard – i.e. is it more probable than not: *JJB and Allsports*, cited above, at paragraph 196.

116. In *JJB and Allsports* at paragraph 197 the Tribunal added that, in cases where penalties are involved, the civil standard should be applied taking account of the gravity of what is alleged. The test is that:

> "the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking is entitled"
>
> See *JJB and Allsports*, paragraph 204.

117. In the present case there appears to be no question of a penalty since Austins/Harwood Park has a turnover of less than £50 million per annum, and thus benefits from immunity from penalty by virtue of section 40 of the Act as implemented by regulation 4 of SI 2000/262. That immunity has not been withdrawn and, as we understand it, could only be withdrawn with prospective effect: section 40(5) to (8).

118. Section 40(8) of the Act provides that:

> "In determining the withdrawal date, the OFT must have regard to the amount of time which the person or persons affected are likely to require in order to secure that there is no further infringement of the Chapter II prohibition."

119. It seems to us clear from that provision that with smaller undertakings, such as those with which this case is concerned, the priority of the legislature is to bring infringements of the Chapter II prohibition to an end in a timely way, and not to impose penalties until the undertaking concerned has had every opportunity to put its house in order.

120. In those circumstances we see no reason not to apply the civil standard of the balance of probabilities when evaluating the evidence in this case. (See also the judgment of Munby J in *R (DJ) v Mental Health Review Tribunal* [2005] EWHC 587 (Admin), 11 April 2005, at paragraphs 40 to 42, 47, 57, 75 and 90 citing with approval the Tribunal's analysis of the applicable standard of proof in *JJB and Allsports*).

## VII THE TRIBUNAL'S POWERS

*The parties' submissions*

121. Burgess submits that, contrary to its later assertions, the OFT did in fact make findings on issues such as the geographic market and whether Austins was dominant in the supply of funeral services in Stevenage/Knebworth. In any event, however, Burgess invites the Tribunal to use its powers under Schedule 8, paragraph 3 of the Act to make all the necessary findings of dominance and abuse in order to establish that an infringement of the Chapter II prohibition has in fact occurred. Burgess submits that the Tribunal has before it all the evidence necessary to make such findings, as did the OFT.

122. According to Burgess, it would be inappropriate for the matter now to be remitted to the OFT, given the inordinate delay on the part of the latter.

123. The OFT considers that the only issue it decided definitely was the issue of abuse. No findings were reached on market definition or dominance. If the Tribunal were against the OFT on the issue of abuse, the matter should be remitted to the OFT for further investigation. The function of the Tribunal being essentially appellate, the Tribunal should not lightly turn itself into a court of trial. The OFT further relies on *Freeserve v. Director General of Telecommunications* [2003] CAT 5, at paragraphs 109 and 114, and submits in particular that the Tribunal does not have the material it needs to take its own decision on the issues on dominance, abuse and objective justification. Those issues were not fully dealt with in the Decision, since the OFT did not need to do so, in view of its conclusion on the issue of abuse. In particular, the evidence is insufficient to make a clear finding on the relevant geographic market. A consumer survey would be needed, as the Consumer's Association suggests, and the evidence set out at Annex 2(A) to the Decision relates to only 75 per cent of the cremations carried out at Harwood Park. In any event, a further hearing would be necessary in order to respect Austins' rights.

124. Austins supports the position adopted by the OFT.

*The Tribunal's analysis*

125. In its judgment on the validity of the contested decision in *Freeserve* [2003] CAT 5 the Tribunal said there was in principle no difference between an appeal against an infringement decision and an appeal against a non-infringement decision: both are appeals "on the merits" pursuant to Schedule 8, paragraph 3(1) of the Act (paragraph 109). The Tribunal considered that, in complainants' appeals, the complainant would normally need to persuade the Tribunal

> "that the decision is incorrect or, at the least, insufficient, from the point of view of (i) the reasons given; (ii) the facts and analysis relied on; (iii) the law applied; (iv) the investigation undertaken; or (v) the procedure followed" (paragraph 114).

126. That in our view remains a convenient check list of matters that an appellant complainant needs to establish in a case where the OFT has taken a formal non-infringement decision, albeit that the appeal is "on the merits". The complainant is not limited to the evidence that was before the OFT (*Freeserve*, at paragraph 116). However, in this case most of the evidence relied on by the appellants was before the OFT as at 28 June 2004, the date the Decision was adopted, including the witness statements of Mrs Burgess and Mr Justin Burgess of 22 June 2004. The only new material evidence produced by the appellants are the witness statements of Mrs Burgess dated 15 and 16 February 2005, which go mainly to the effect on Burgess' business of Austins' actions.

127. For the reasons set out in this judgment, we find that the Decision must be set aside as incorrect, or at least insufficient, under each of the five heads identified in *Freeserve* namely the reasons given; the facts and analysis relied on; the law applied; the investigation undertaken; and the procedure followed. The principal respects in which the substance of the Decision is in our view deficient relate to the OFT's analysis of (a) the relevant geographic market for crematoria services, and whether Harwood Park is dominant in respect of those services in the Stevenage/Knebworth area; and (b) the issue of abuse.

128. The question that then arises is whether the Tribunal should remit "the matter" to the OFT under paragraph 3(2)(a) of Schedule 8 of the Act, or whether the Tribunal should "make any other decision which the OFT could itself have made" under paragraph

3(2)(e) of Schedule 8, taking also into account that under paragraph 3(2)(d) the Tribunal may give such directions, or take such other steps, as the OFT could itself have given or taken. At paragraph 109 of *Freeserve*, cited above, the Tribunal said:

> "To give one example, even where the Director has taken a decision of "non-infringement", it may be open to the Tribunal in an appropriate case to substitute a decision of "infringement", rather than remit the matter to the Director, provided that the Tribunal has all the necessary material before it, and the rights to be heard of all parties have been fully respected: that was the course followed by the Tribunal in *IIB and ABTA v Director General of Fair Trading* ("the *GISC* case") [2001] CAT 4, [2001] CompAR 62."

129. In deciding whether to take its own decision, the Tribunal is mindful of the fact that it is an appellate tribunal from an administrative decision and should not therefore turn itself into the primary decision-maker without good reason. On the other hand, as the Tribunal's recent judgment in *Floe Telecomm v Office of Communications* [2005] CAT 14 emphasises, the Tribunal's jurisdiction is a merits jurisdiction, and thus wider than a judicial review jurisdiction. The Tribunal referred, in particular, at paragraph 65 of that judgment, to the Ministerial statement of 18 June 1998 during the passage of the Competition Bill:

> "It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules…"

130. Indeed, in other contexts it is now commonplace for the Tribunal to act, in effect, as the decision-maker in cases where the evidence relied on by the OFT is challenged, very often on the basis of extensive new material introduced by the appellant and rebuttal evidence introduced by the OFT. For example, the Tribunal's role as, in effect, a primary decision-maker, is illustrated, albeit in a different context, by the extensive findings of fact made in the Tribunal's recent judgment on liability in *JJB and Allsports*, cited above. In an earlier interlocutory judgment in the same case, the

Tribunal emphasised the need to maintain the flexibility of the procedure before the Tribunal: see *Allsports v OFT (Application for summary judgment)* [2004] CAT 1, at paragraphs 58 to 61.

131. On the specific question that now arises – whether to remit or decide – the Tribunal said in *Freeserve* at paragraph 113:

> "Everything will depend on what is necessary to meet the justice of the individual case, bearing in mind both the overriding need for fairness, and the need for expedition and saving costs."

132. In our judgment, on the above basis the Tribunal should, if necessary, take its own decision rather than remit if (i) it has or can obtain all the necessary material (ii) the requirements of procedural fairness are respected and (iii) the course the Tribunal proposes to take is desirable from the point of view of the need for expedition and saving costs. Such an approach in our view is compatible with the overriding objective of deciding cases justly.

133. In the present case the Tribunal considers that it has all the necessary material.

134. As regards the issue of the geographic market for funeral directing services in the Stevenage/Knebworth area, in our judgment the OFT effectively decided that issue, as well as the issue of Austins' dominance in that market, at paragraphs 48 to 50, and 63 to 65 of the Decision respectively.

135. The issue of the relevant market for crematoria services and the dominance of Harwood Park in that market is not, strictly speaking, an issue which the Tribunal needs to decide since in our view this case may equally be analysed in terms of an abuse of Austins' dominant position in the market for funeral directing services. Nonetheless it is an issue which the Tribunal ought to decide, in our view, and there is ample material on which to do so.

136. As to the issue of abuse, the principal facts are largely common ground, and it seems to us to be mainly a question of applying the law to those facts, as the Tribunal did in *GISC*.

137. As to the question whether the abuse in question extended to Burgess' Welwyn Garden City and Hatfield branches, the Tribunal's approach is set out below.

138. As to procedural fairness, Austins/Harwood Park has participated fully in these proceedings and has been ably represented. At the case management conference on 19 October 2004 the Tribunal made it clear (transcript, page 14) that one option for the Tribunal was to take its own decision, and that Austins should file any evidence that it wished to file on the issues in the case. Austins, in our view, has had every opportunity to defend itself, knowing the options available to the Tribunal. In addition, as already pointed out, there is no question of a penalty being imposed upon Austins.

139. As to whether the Tribunal should proceed to take its own decision, a primary factor that weighs with the Tribunal is the regulatory delay that has already taken place. The facts of this case are not complex, but they do concern medium sized businesses serving a vulnerable class of consumer. We regard a delay of over two years in producing a decision in such circumstances as incompatible with the effective enforcement of the Act. To remit the matter now, for further investigation of indeterminate length, would not in our view be in the interests of the parties nor, more importantly, in the interests of the consumers concerned. There are also interim measures directions in place, and it is desirable that finality should be reached. In addition, as already stated, the Tribunal understands, from a letter from the solicitors acting for Harwood Park/Austins of 13 May 2005, that the issue of unrestricted access to Harwood Park has now been resolved as between the parties. In those circumstances it is highly desirable that these proceedings be concluded as soon as possible.

## VIII THE RELEVANT GEOGRAPHIC MARKET AND DOMINANCE: THE PARTIES' SUBMISSIONS

140. It is convenient to address together the parties' submissions on the related issues of the relevant geographic market and dominance.

THE RELEVANT GEOGRAPHIC MARKET

*Burgess' submissions*

141. Burgess submits that the OFT found in the Decision that the relevant geographic markets for funeral services were the Stevenage/Knebworth and Welwyn/Welwyn Garden City areas.

142. Burgess submits that the OFT was wrong to find that the relevant geographic market for crematoria services includes the West Herts crematorium and all crematoria within a 30 kilometre radius of Harwood Park (Decision, paragraphs 35 to 45).

143. Burgess submits that the correct geographic market for crematoria services is the area in which Harwood Park is the nearest crematorium, alternatively at least the Stevenage and Knebworth area.

144. According to Burgess, the figures at Annex 2(A) to the Decision show that there is an overwhelming tendency for most consumers to choose the nearest crematorium. Of the funeral directors listed by the OFT, that was true in all but two cases, one of which is explicable by the fact that it relates to a branch of Austins (Hitchin) where Austins could naturally wish to use Harwood Park.

145. Burgess submits that the choice of crematorium is primarily that of the consumer, rather than the funeral director. Consumers tend to choose the nearest crematorium so as to reduce travelling time, because it is easier to visit the crematorium on subsequent occasions (in many cases the ashes remain at the crematorium), and because the crematorium is connected to the locality where they live. Burgess also relies on the evidence recording the reaction of consumers inquiring at Burgess' Knebworth office about the possibility of using Harwood Park set out in the application to vary of 6 June 2002 at Annex 2; its third application for interim measures of 4 May 2004 and the witness statements of Mrs Burgess dated 22 June 2004, 15 February 2005 and 16 February 2005.

146. Burgess doubts the relevance of the SSNIP[2] test used by the OFT, but points out that the available evidence about prices supports Burgess' definition of the geographic market.

147. In addition Burgess relies on: (i) the OFT Funerals Report, and the OFT's subsequent guidance; (ii) the MMC's report in *SCI/Plantsbrook;* (iii) the planning inspector's report of 26 July 2003; (iv) another planning appeal decision dated 17 February 1999 relating to South Crofty; (v) Austins' own letters to the OFT of 14 February 2002 and 4 March 2003; and (vi) the fact that, rather than switch to an alterative crematorium, Burgess felt obliged to pay Nethercotts so that its clients could continue to use Harwood Park.

*The OFT's submissions*

148. The OFT submits that it did not reach a definite conclusion on market definition in the Decision, in respect of either funeral directing services or crematoria services, and does not feel able to do so now. The appellants' approach would mean that every crematorium is dominant in its local market, a proposition that the OFT finds hard to accept.

149. As regards crematoria services, according to the OFT Annex 2(A) to the Decision shows that every funeral director uses at least one other crematorium other than Harwood Park. In Buntingford, Harpenden, Hatfield, Hitchin, Letchworth, Ware and Welwyn Garden City, only 66% of customers on average chose the nearest crematorium. The fact that Austins' customers in Hitchin and Philips' customers in Harpenden do not use the local crematorium also shows that distance is not the only factor.

150. According to the OFT, it is highly relevant that the pricing structure of Harwood Park does not discriminate against its closest customers in Stevenage, Knebworth and Welwyn. A substantial proportion (around […] per cent) of Harwood Park's business comes from outside those areas. Those latter customers from e.g. Hertford,

[2] The SSNIP test refers to a test of consumers' reactions to a Small but Significant Non Transitory Increase in Price.

Letchworth, Welwyn Garden City, Ware, Hatfield and Hitchin have a choice of crematoria. Harwood Park's prices are likely to be constrained by the fact that these customers could switch without difficulty to another crematorium. Again this suggests that the consumer's choice is based on price and quality, and not just distance.

151. According to the OFT, the evidence as to consumer preferences is inconclusive. In any event the question is not so much whether consumers have a preference, but whether consumers have a choice. In the OFT's view, consumers do have a choice in this case.

152. Similarly the OFT considers that the evidence as regards Harwood Park's prices is inconclusive. According to the OFT, the increase in Harwood Park's prices was only 9.6% more than the average price increase of other crematoria in a gradual movement over three years. The lack of consumer response to this price change could be explained by improvements in relative quality. In addition, there is evidence that Harwood Park has gained market share from neighbouring crematoria (e.g. West Herts), which suggests that Harwood Park competes in a wider geographic market. Contrary to Burgess' submission, the OFT Funerals Report shows that consumers are sensitive to cost considerations.

153. The OFT does not consider the other elements relied on by Burgess to be conclusive. In particular Burgess' decision to use Nethercotts was an independent commercial decision; and the planning inspector's report was made in a quite different context.

*Austins' submissions*

154. Austins submits that funeral directors procure cremation services on behalf of end-consumers. Given in particular that a high proportion of ashes are removed from the crematorium, there is no divergence of interests between the funeral director and the consumer.

155. Austins considers that no inference can be drawn from the price increases at Harwood Park. The price increase in the last three years is 27.5%, less than at West Herts and equivalent to the other crematoria. Unlike Luton and West Herts, Harwood Park does not charge different prices to residents and non-residents. Moreover Harwood Park's

prices include two pall bearers and a two line entry in the book of remembrance, so Burgess is not necessarily comparing like with like.

*The Consumers' Association submissions*

156. The Consumers' Association (CA) considers that the OFT's approach to the relevant market is fundamentally flawed and must be "nipped in the bud" before it becomes a precedent in the industry. According to the Consumers' Association, the OFT has ignored the interests and wishes of consumers, and its own Funerals Report at paragraphs 1.2 to 1.7 and Annex E. Consumers in this case are particularly vulnerable, and the OFT has acted positively to their detriment.

157. The CA submits that the OFT ignored relevant evidence, including Austins' comment in its letter of 4 March 2003 that a crematorium could not viably survive if not exclusive in its catchment area, Austins' letter of 14 February 2002, and the evidence as to the prices at Harwood Park.

158. The CA regards as perverse the fact that the OFT's analysis is based on the perception of the funeral director rather than the end consumer. The OFT took no evidence from end consumers and ignored the evidence produced by Burgess. The OFT did not consider the SSNIP test from the end consumer's point of view, and had no evidence from end-consumers as to how they might react to possible price discrimination. The CA also questions the relevance of the classic SSNIP test, given the circumstances in which the purchase is made in this case.

159. In so far as a SSNIP test is relevant, the evidence supports the appellants, according to the CA. The OFT's approach that, provided consumers have a choice, that is sufficient to define a wider market ignores consumer preferences and other features of the market. The fact that some consumers use another crematorium is explicable for many reasons and does not show that the local crematorium has no market power.

DOMINANCE

160. According to Burgess, it is not disputed that Austins is dominant in the supply of funeral services in the Stevenage and Knebworth area.

161. As regards Harwood Park, the appellants submit that it is dominant in the supply of crematoria services in the area in which it is the nearest crematorium, which includes Stevenage and Knebworth, Welwyn and Welwyn Garden City, and some parts of Hatfield. In support of this, Burgess relies on: (i) the high proportion of deceased who are cremated locally; (ii) Austins' business case for the crematorium and Austins' own statements; (iii) high barriers to entry in the crematorium market, and (iv) the behaviour of Harwood Park, which shows that it has the power to act independently of its competitors, customers, and consumers. There is, according to Burgess, nothing particularly surprising about a crematorium being in a position of dominance in its catchment area because of planning restraints and other reasons.

162. Burgess further submits that it is accepted by the OFT that the figure of 15.6 per cent for Harwood Park's market share cited by the OFT at paragraph 60 of the Decision is incorrect, since that figure will include many funerals outside the 30km radius used by the OFT. Furthermore, there is no reason to exclude Austins' market share from the figures. Including the Austins' figures shows Harwood Park's true share of the number of cremations in the area defined by the OFT.

163. Furthermore Burgess calculates, on the basis of the population figures used by the planning inspector, that there would be approximately 2850 deaths per year in the catchment area of Harwood Park. Of those, figures from the Cremation Society of Great Britain would indicate that approximately 2061 persons would be cremated. In 2003 Harwood Park carried out 1957 cremations, indicating a high percentage market share.

164. The OFT accepts that the figure of 15.6 per cent given in paragraph 60 of the Decision is incorrect, but points out that, according to Annex 2(A) of the Decision, Harwood Park still accounts for only 34 per cent of funerals conducted by funeral directors within 30 kilometres of Harwood Park, if cremations carried out by Austins' are ignored. Moreover, according to the OFT, Harwood Park is unlikely to be dominant if it cannot price discriminate.

165. Austins supports the position of the OFT on the issue of dominance.

## IX THE RELEVANT GEOGRAPHIC MARKET AND DOMINANCE: THE TRIBUNAL'S ANALYSIS

THE RELEVANT LAW

166. The law on dominance and relevant market has recently been summarised in the Tribunal's decision in *Genzyme v OFT* [2004] CAT 4 [2004] CompAR 358, at paragraphs 188 to 196. As usually defined, a dominant position is:

> "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by allowing it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".

See Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 38.

167. Whether such a dominant position exists may be established by many factors, including high and persistent market shares (see *Napp*, cited above, at paragraphs 157 to 160) barriers to entry, and the conduct of the parties (see *Genzyme* at paragraph 257). However,

> "such a [dominant] position does not preclude some competition … but enables the undertaking which profits by it, if not to determine, at least to have appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."

See *Hoffman-La Roche v Commission*, cited above, at paragraph 39.

168. The exercise of defining the relevant market forms part of the wider exercise of determining whether an undertaking has a dominant position for the purposes of the Chapter II prohibition.

169. The Tribunal said in *Aberdeen Journals (No. 1)*, cited above:

> "88. In order to determine whether, in any given case, an undertaking has the necessary degree of economic strength or, to use the more modern term, market power, so as to give rise to dominance, it is self-evidently necessary to define the market in which that market power is said to exist. As the Commission of the European Communities ("the Commission") has put it in

paragraph 2 of its… *Notice on Market Definition* OJ 1997 C372/5:

'Market definition is a tool to identify and define the boundaries of competition between firms… The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.'"

170. After referring to the case law of the Court of Justice, the Tribunal continued:

> "96. ...the relevant product market is to be defined by reference to the facts in any given case, taking into account the whole economic context, which may include notably (i) the objective characteristics of the products; (ii) the degree of substitutability or interchangeability between the products, having regard to their relative prices and intended use; (iii) the competitive conditions; (iv) the structure of the supply and demand; and (v) the attitudes of consumers and users.
>
> 97. However, this checklist is neither fixed, nor exhaustive, nor is every element mentioned in the case law necessarily mandatory in every case. Each case will depend on its own facts, and it is necessary to examine the particular circumstances in order to answer what, at the end of the day, are relatively straightforward questions: do the products concerned sufficiently compete with each other to be sensibly regarded as being in the same market? The key idea is that of a competitive constraint: do the other products alleged to form part of the same market act as a competitive constraint on the conduct of the allegedly dominant firm?"

(see also *Genzyme*, cited above, at paragraph 195).

171. In our view a similar approach is necessary when considering the relevant geographic market. The factors referred to in the Commission's *Notice on Market Definition* regarding the geographic dimension of the market include: changes in prices between different areas and the consequent reaction of consumers; the nature of the demand for the product, in particular since both consumer preferences, and the need for a local presence, "have a strong potential to limit the geographic scope of competition"; the views of customers and competitors; customers' geographic pattern of purchases; and the impact of transport costs and other switching costs (paragraph 44 to 50 of that *Notice*).

172. The OFT's Guideline on *Market Definition*, OFT 403, in the version published in March 1999, points out that geographic markets are defined using the same process as that used to define the product markets, including both supply-side and demand-side considerations. On the demand side, according to the OFT:

> "4.3 As with the product market, the objective is to identify substitutes which are so close that they would prevent a 'hypothetical monopolist' in one area from charging monopolistic prices. The process starts by looking at a relatively narrow area, which would normally be the area supplied by the parties to an agreement or the subject of a complaint. Examination is then broadened to consider whether consumers would switch to suppliers in neighbouring areas in response to a small increase in price. If substitution is potentially so significant that it would prevent an undertaking from raising prices, the area is added to the market definition."

173. As the 1999 version of OFT 403 states, with geographic markets both transport costs and the mobility of customers may be relevant factors. We note that the revised version of OFT 403, published in December 2004, points out that:

> "For consumer products, geographic markets may often be quite narrow e.g. where sufficient numbers of consumers are unlikely to switch to products sold in neighbouring towns or regions…" (paragraph 4.4).

THE GEOGRAPHIC MARKETS FOR FUNERAL DIRECTING SERVICES

174. In the Decision, the OFT assessed separately the geographic markets for crematorium services and funeral directing services respectively. As regards the latter, the OFT found that:

> "on balance, the OFT considers that Knebworth and Stevenage are likely to comprise a discrete geographic market for funeral directing services" (paragraph 54 of the Decision)

175. We consider that to be a clear conclusion, on the balance of probabilities, that Knebworth and Stevenage form a separate geographic market for the supply of funeral directing services. In view of the evidence set out in paragraphs 48 to 50 of the Decision, that appears to us to be the only conclusion possible. According to the OFT, that evidence shows that (i) "the vast majority" of funerals arranged by Austins are for deceased previously resident in Stevenage; (ii) the "vast majority" of funerals arranged

by Burgess are for deceased previously resident in Stevenage and Knebworth; (iii) "the majority" of funerals arranged by the Co-op branch in Stevenage are arranged for deceased previously resident in Stevenage; (iv) the Co-op regards Austins' Stevenage branch and Burgess' Knebworth branch as its closest competitors; and (v) funeral directors in the neighbouring towns arranged very few, if any, funerals for deceased previously resident in Stevenage or Knebworth (see Annex 4 to the Decision).

176. We note in addition that in 2001 and 2002 funerals for deceased residing within 4 miles (6.4 km) of the Stevenage branches of Austins and the Co-op represented 80 per cent of funerals carried out at those branches, while for Burgess' Knebworth branch the proportion was around 70 per cent. At 5 miles (8 km) the proportions rise to 85 per cent or more for Austins and the Co-op, while 75 per cent of funerals arranged by Burgess were for deceased residing within 5 miles of the Knebworth branch.

177. On that evidence in our view it is perfectly clear that there is a discrete local market for funeral directing services in the Stevenage/Knebworth area.

178. We see no reason to doubt the similar conclusion that the OFT came to in relation to the local market for funeral directing services in the area of Welwyn and Welwyn Garden City, at paragraphs 51 to 54 of the Decision.

179. In 2001 and 2002 Austins' Welwyn branch carried out more than 70 per cent of its funerals for deceased residing within 4 miles of the branch, rising to 76 per cent at 5 miles. For Burgess' Welwyn Garden City branch the respective proportions in those years were between 85 and 90 per cent. According to Map 8 annexed to the Decision, Austins' Welwyn branch and Burgess' Welwyn Garden City branch appear to be within around 3 miles of each other.

180. Although at paragraph 53 of the Decision the OFT merely states that it is "likely" that Welwyn and Welwyn Garden City comprise a discrete relevant geographic market for funeral directing services, we are satisfied on the balance of probabilities that such is the case.

181. The available information suggests a similar pattern for Burgess' Hatfield branch, but it is unnecessary for us to decide whether Hatfield too forms a discrete local market for funeral directing services.

DOMINANCE IN THE SUPPLY OF FUNERAL SERVICES IN THE STEVENAGE/KNEBWORTH AREA

182. At paragraphs 63 to 65 of the Decision, the OFT came to the conclusion that Austins was "likely" to be dominant in the supply of funeral directing services in the Stevenage/Knebworth area, given that it had [over 75] per cent of that market in 2002.

183. The OFT reinforced that conclusion by referring to likely barriers to entry in that market. First, the decline in the death rate could discourage new entry "where reputation is an important factor". Secondly, according to the OFT there was no evidence of significant new entry into that market (paragraph 66 of the Decision).

184. Again, in our view those conclusions seem to us to be findings, on the balance of probabilities, that Austins does enjoy a dominant position in funeral directing services in the Stevenage/Knebworth area.

185. Given Austins' market share, and the barriers to entry referred to by the OFT, it seems to us that no other conclusion is possible on the evidence.

186. The OFT came to no conclusion as to whether Austins was dominant in the Welwyn/Welwyn Garden City area. Austins is not active in Hatfield.

THE GEOGRAPHIC MARKET FOR CREMATORIA SERVICES

187. In the Decision, the OFT comes to the conclusion that the relevant geographic market includes all crematoria within a 30 kilometre radius of Stevenage and Knebworth.

188. We note first that although the OFT rightly distinguishes between crematoria services, and funeral directing services, there is little mention, in the Decision, of the close links between them. Thus, from the consumer's point of view, what is typically purchased is a package of services which consists both of funeral-related services (coffin, hearse,

transport etc) and the services of a crematorium, all of which is arranged by the funeral director, as agent, in accordance with the wishes of the consumer, and for which a single account is rendered. We bear in mind that, although the Decision refers to the market for crematoria services, it is characteristic of that market that the services are supplied to end-customers through funeral directors who are themselves serving customers in predominantly local markets such as e.g. Stevenage and Knebworth.

189. The fact that Austins/Harwood Park is a vertically integrated enterprise which is active in both aspects of the service provided to consumers, namely both funeral and crematoria services, is in our view a highly relevant feature of the present case.

190. We agree with the OFT that, in determining a geographic market, it is convenient to start by looking at a relatively narrow area, such as the area supplied by the parties, and then to consider whether the evidence suggests that the area should be broadened and to include other alternatives that may, geographically speaking, be substitutable from the consumer's point of view (paragraph 38 of the Decision). Accordingly we start by considering whether the Stevenage/Knebworth area is a relevant geographic market for crematoria services.

THE STEVENAGE/KNEBWORTH AREA

*The location of alternative crematoria*

191. The OFT identified the following crematoria as being within the relevant geographic market, i.e., within 30 km of Stevenage/Knebworth: West Herts, Enfield, Parndon Wood, St. Marylebone, Luton and Harwood Park. The Decision does not, however, include complete information as to distances nor any information as to driving times. According to the evidence, the distances are as follows from Stevenage/Knebworth:

| | Distance by most convenient driving route[3] (km) | |
|---|---|---|
| | OFT calculation | Burgess calculation |
| West Herts | 33.5 | 32.2 |
| Enfield | 42.1 | 31.3 |
| Parndon Wood (Harlow) | - | 28.4 |
| St. Marylebone | - | 39.9 |
| Luton | 23.3 | 21.8 |
| Harwood Park | 5.3 | - |

192. As far as driving times for a funeral cortege are concerned, Burgess' uncontested evidence is that driving times from its Knebworth branch to Harwood Park and West Herts respectively are:

| | Outward | Return |
|---|---|---|
| West Herts | 60 – 70 mins. | 45 – 55 mins. |
| Harwood Park | 5 – 20 mins. | 5 – 15 mins. |

193. The Decision does not appear to contain any reasons as to why the OFT selected a 30 km radius, as distinct from any other radius, from Stevenage/Knebworth for the purpose of defining the relevant geographic market.

*Consumer preferences*

194. In the Decision, the OFT gives no reasons for reversing the view expressed in the withdrawal decision of 9 April 2003 that the information supplied by Burgess suggests that "in practice, the majority of the residents in the Stevenage/Knebworth area are unwilling to use the services of another crematorium and will instead wish to arrange a cremation at [Harwood Park]" (paragraph 20), that "a market for crematorium services exists in respect of customers located very near to Harwood, in the Stevenage/Knebworth area" (paragraph 20), or that "customers in these areas may have a strong preference to use [Harwood Park]" (paragraph 27).

[3] Both calculations apparently use RAC Route planner software. The OFT distances are measured from the Knebworth branch of Burgess, while Burgess has measured distances from Harwood Park. The OFT figure for West Herts in Annex 2A to the Decision is mistakenly stated in miles not kilometres and has been corrected before the Tribunal.

195. However, it appears to be common ground that, as with funeral directing services, consumers have a strong preference to use local crematoria services, on grounds of convenience. Paragraph 41 of the Decision accepts that "most cremations take place at the nearest crematorium to the deceased". That is fully supported by Annex 2(A) to the Decision, which shows for 2002 details of the cremations carried out by the respective branches of Austins, Burgess and the Co-op in Stevenage/Knebworth situated between 3 and 5 kilometres from Harwood Park. On the assumption that those three branches handled virtually all the cremations arising from deaths in the Stevenage/Knebworth area in 2002, it appears that about 95 per cent of cremations arising in that area were carried out at Harwood Park.

196. The same pattern appears as regards funeral directors in other areas. Thus, according to figures in Annex 2A of the Decision – based, sufficiently in our view, on a survey of local funeral directors representing 75 per cent of funerals carried out at Harwood Park – in 2002 the proportion of cremations carried out at the nearest crematorium by funeral directors operating in the following towns were as follows:

| Town | Nearest Crematorium | Proportion of cremations at nearest crematorium |
|---|---|---|
| Ware | Harwood Park | 66 |
| Welwyn Garden City | Harwood Park | 73 |
| Letchworth | Harwood Park | 74 |
| Butingford | Harwood Park | 75 |
| Hatfield | West Herts | 78 |
| Hertford | Harwood Park | 82 |

197. The OFT draws attention, however to the fact that the same pattern is not seen as regards Hitchin and Harpenden, where only 8 per cent and 13 per cent of cremations respectively are carried out at the nearest crematorium, which was Luton. However, as regards Hitchin, that, in our view, is largely explained by the fact that the funeral director concerned is Austins, who naturally carried out the vast majority of its funerals at Harwood Park. In any event Harwood Park appears to be only just over 4 kilometres further away from Hitchin than is Luton.

198. As regards Harpenden, it appears that in 2002 the funeral director concerned organised most of the funerals concerned at West Herts. West Herts is some 8 kilometres further from Harpenden than is Luton. The Tribunal notes that West Herts, a municipal crematorium, offers a reduced rate for residents of Hertfordshire (where Harpenden is situated) whereas the reduced rate offered by Luton, also a municipal crematorium, applies only to residents of Bedfordshire. The planning inspector's report also noted capacity constraints at Luton. We have no information about the facilities available at Luton, but it may well be that an extra distance of 8 kilometres (5 miles) is not determinative from the point of view of consumer choice in that particular context. However, the Tribunal has not found it necessary to investigate the local circumstances affecting the choice of crematoria for residents of Harpenden, since this case is concerned with the position of consumers in Stevenage and Knebworth and other locations served by Burgess. The single example of Harpenden does not seem to us to undermine the totality of the evidence which reveals a strong consumer preference to use the most convenient, which is usually the nearest, crematorium.

199. It is in our view not difficult to identify why consumers would have a strong preference for using the local or most convenient crematorium. Mourners at a funeral, many of whom are likely to be elderly, would not normally wish to travel long distances if that could be avoided; many elderly mourners may not have transport available to take them longer distances; extra travel is likely to increase the time needed, and also to add to the cost of the funeral in terms of fuel and labour costs; and there may be sentimental reasons for choosing the local crematorium, for example to facilitate subsequent visits to view a memorial tablet, to visit a garden of remembrance, or because a previous family member was cremated there. Those considerations, of a common sense nature, are in our view supported by the evidence before the Tribunal.

200. Thus, in her witness statement dated 22 June 2004 Mrs Margaret Burgess refers to West Herts, which is some 32 kilometres away from Burgess' Knebworth branch, compared to Harwood Park which is less than 5 kilometres away**.** Mrs Burgess said this in relation to Burgess' Knebworth and Welwyn Garden City branches:

> "9. Harwood Park is only 1 mile away from our Knebworth office. West Hertfordshire Crematorium (Garston) is 21 miles away. Harwood Park is 8 miles away from our Welwyn Garden City branch. Garston crematorium is 14

miles from that branch. Most people who come into those two branch offices want a cremation at Harwood Park – that is what they have firmly in mind before they even walk through the door. That is what they look to us to arrange, and they are astonished that we cannot supply it.

10. The journey from Knebworth to Garston takes the cortege around an hour to make. Unsurprisingly most people wish to spend as little time as possible driving behind a hearse. Although the return journey is faster (because people are not driving behind the hearse), having to go to Garston instead of Harwood Park adds at least an hour and a half to the total time taken up by the funeral activities. Since most people who die are elderly, it will often be the case that, where a funeral is booked through the Knebworth branch, for example, there will be friends of the deceased living in Knebworth who are themselves elderly and either do not have a car or are unable to drive, and do not know anyone attending the funeral who can give them a lift. Having to take a taxi all the way to Garston and back may be prohibitively expensive for them, or seem like a very long journey for an elderly and infirm person, and may even stop them from attending the funeral. Alternatively, clients may try to take account of the needs of people without their own transport by booking additional limousines that they would not have booked had the funeral been booked at Harwood Park".

201. Mrs Burgess added, at paragraph 22 of that witness statement:

> "22. It is not realistic to run an office like Knebworth where almost every client has to be told that they cannot have a cremation at their preferred crematorium only a mile down the road. A cremation at *Harwood Park* is precisely what they have come in to arrange."

202. Mrs Burgess' evidence has not been challenged. In addition, the "diary of events" attached at Annex 2 of Burgess' application to vary of 6 June 2002, and a similar document provided to the OFT in support of Burgess' third application for interim measures dated 4 May 2004 contain evidence that customers enquiring of Burgess' Knebworth branch requested a cremation at Harwood Park.

203. In her witness statement dated 22 June 2004 Mrs Burgess states that in the period 1 April 2003 to 13 June 2003, Burgess' Knebworth office carried out […] cremations through Nethercotts, all of which were at Harwood Park. In the same period in 2004, when Burgess had no access to Harwood Park, Burgess' Knebworth office carried out

[…] cremations elsewhere. In her second witness statement dated 15 February 2005 Mrs Burgess provides figures which indicate that in the period from 22 March 2004 to 21 July 2004 (i.e. up to the Tribunal's interim measures order) Burgess' Knebworth office suffered a loss of trade in cremations of over […] per cent compared with previous years. Finally, in her third witness statement dated 16 February 2005 Mrs Burgess provides figures which show a sharp increase in cremations carried out through Burgess' Knebworth branch during the period between 21 July 2004 and 7 February 2005 when the Tribunal's interim measures directions were in force.

204. It is true that the evidence does not show that business at Burgess' Knebworth office dried up completely in the relatively short period between March and July 2004 when access to Harwood Park was denied. However, in our view, the totality of the evidence shows that there is a strong preference on the part of consumers in the Stevenage/Knebworth area for a cremation to be carried out at Harwood Park. Even, if for a while, Burgess was able to persuade some customers to accept an alternative, despite their apparently expressed wish, we are satisfied that the demand from the vast majority of customers in that area is to have the cremation at Harwood Park. When one compares, for example, the evidence as to the relevant drive times between Stevenage/Knebworth and Harwood Park and West Herts (the best part of two hours, there and back, for West Herts, compared with about half an hour or less, there and back, for Harwood Park) that does not seem to us to be a surprising conclusion to reach. Similarly there is little evidence of any consumer preference, in the Stevenage/Knebworth area, for the cremation to be carried out at Luton or Parndon Wood.

*Evidence from planning reports*

205. In addition to that evidence, the planning inspector's report of 1993, cited above, accepted that the crematoria situated at Luton, Harlow (Parndon Wood), Enfield, West Herts, Bedford and Cambridge were not acceptable alternatives to the proposed Harwood Park crematorium in Stevenage. The inspector cited (i) capacity constraints at Luton which led to unacceptably long delays in obtaining appointments for mourners living in Stevenage and Welwyn Garden City and (ii) the excessive distance from Stevenage to the other existing crematoria. The planning inspector said:

> "Many mourners tend to be elderly. For them to have to travel these distances to meet an appointment at a crematorium causes extra distress in circumstances which are already distressing. It would partly relieve the distress of local mourners to have the opportunity of arranging funerals at a crematorium closer to their homes." (paragraph 15)
>
> "There is a special need for a crematorium to serve the Stevenage area, to provide mourners with facilities close enough to the town to be reached easily…" (paragraph 16)
>
> "My concern is with local mourners, for whom nearness of a crematorium is a matter of true need." (paragraph 30).

206. Although admittedly a decision given in a different context, it seems to us that the planning inspector's report is nonetheless relevant evidence of what, in practical terms, the relevant geographic market in this case is likely to be.

207. In addition, there has been no challenge to the evidence which emerges from the planning decision of 17 February 1999 relating to South Crofty plc in Cornwall in which the planning inspector said:

> "as a rule of thumb, the industry works on the basis that a funeral party should not have to undergo more than 30 minutes drive to a crematorium."

208. Burgess' contention that 30 minutes drive time approximates to a distance of about 10 miles (16 km) for a funeral cortège has not been challenged by the OFT or Austins.

*Austins' own views*

209. That evidence is further consistent with the evidence which Austins itself gave to the OFT in its letter of 14 February 2002:

> "Although the project [i.e. Harwood Park] was entirely funded by Austin's Funeral Service, its success relied heavily on attracting other Funeral Directors in and around Stevenage. The business plan for Harwood Park, in fact, calculated that it would service the community and Funeral Directors *within a ten-mile radius*. This, therefore, included Hitchin, Letchworth, Baldock, Buntingford, Hertford, Welwyn Garden City and Harpenden as well as villages within the area. *It was considered that communities further afield would continue to use existing, more conveniently located crematoria*."
>
> (emphasis added by the Tribunal)

210. That letter further accepts that Burgess' branches in Knebworth and Welwyn Garden City are within Harwood Park's "catchment area". Mr John Austin's letter of 13 August 2001 also refers to Harwood Park serving residents "within 10 miles of Knebworth".

211. In addition, in its letter to the OFT of 4 March 2003 Austins said:

> "I understand, from your correspondence, that whether or not Harwood Park Crematorium is dominant within the market is no longer a consideration. I think it must be agreed that, a crematorium could not viably survive if not exclusive within its 'catchment area'. Perhaps this type of facility should be viewed similarly to that of a community hospital."

212. The foregoing evidence of Austins' own views strongly supports the view that Harwood Park enjoys, in practice, virtual exclusivity in relation to cremations within its catchment area. It is common ground that Burgess' Knebworth branch lies within Harwood Park's catchment area. On the basis that Harwood Park's catchment area is approximately the ten mile radius also referred to in Austins' letter of 4 March 2003, there is no other crematorium within that catchment area.

*Evidence as to prices and ability to switch*

213. In the Decision, the OFT states that "the key consideration" in assessing the relevant geographic market is how funeral directors and end consumers would react if a hypothetical monopolist supplying crematoria services in the Knebworth/Stevenage area increased prices by a small but significant amount above competitive prices (paragraph 39). The OFT reaches the conclusion "if Harwood raised prices the majority of funeral directors would be able to switch to alternative crematoria relatively easily" (paragraph 41).

214. In relation to those conclusions we note, first, that the OFT has produced no evidence to show what the reaction of consumers or funeral directors might be to a small but significant increase in price by Harwood Park despite asserting that that is "the key consideration". Moreover, as far as funeral directors in Stevenage/Knebworth are concerned, the OFT's conclusion that funeral directors would be able to switch to

alternative crematoria "relatively easily" is not supported by any evidence in the Decision, and no evidence to that effect has been produced to the Tribunal.

215. Moreover, the conclusion in paragraph 41 of the Decision that "most branches of funeral directors (not including Austins) have access to alternative crematoria to Harwood, which are either closer or not significantly further away" is simply incorrect as far as funeral directors in Stevenage/Knebworth are concerned. There is no closer alternative than Harwood Park, and all other possible crematoria are significantly further away, as the evidence already set out demonstrates.

216. In addition, as Burgess and the Consumers' Association point out, both the OFT Funerals Report and the MMC's *SCI/Plantsbrook* Report emphasise that the relevant purchase is typically made by a consumer who is in a distressed state, who has to take a decision quickly, and who has little or no previous experience of making such a purchase. Those factors – not mentioned at all by the OFT in the Decision – seem to us to point to a market which may not be particularly sensitive to small but significant changes in price. The circumstances in which the purchase is made suggest to us that, for crematoria services, a conventional SSNIP test is likely to show less sensitivity to price changes than in other consumer markets.

217. In addition, as Burgess points out, it would in our view be an oversimplification to assess changes in the relative prices of alternative crematoria without also taking into account the cost of switching from one crematorium to another. That cost is likely to be primarily the cost of fuel and labour. A funeral where the funeral director carries out a ten kilometre round trip taking 20 minutes is likely to be less expensive in terms of labour and fuel than a funeral involving a sixty kilometre round trip taking two hours. Depending on the locality, those extra costs may to some extent shield a crematorium from price pressure and give it more room for manoeuvre in raising prices. We are disappointed that there is no mention in the Decision of this somewhat obvious point, nor any discussion of the fact that the choice between alternative crematoria may have an impact on the overall cost of the funeral.

218. Be that as it may, it is further of concern to the Tribunal that the Decision does not address the evidence which Burgess supplied to the OFT showing the movement of Harwood Park's prices, relative to the prices of other crematoria, in recent years. The

OFT has not challenged the figures provided by Burgess in the notice of appeal as follows:

**Numbers of cremations and prices at the crematoria identified by the OFT**

| | Price 2001 | Price 2004 | Change in price 2004/2001 % | Number of Cremations 2001 | Number of Cremations 2003 | Change in numbers 2003/2001 % |
|---|---|---|---|---|---|---|
| Harwood Park (Stevenage) | 255 | 360 | + 41.2 | 1843 | 1957 | + 6.2 |
| Garston (W. Herts Watford) | 211 | 285 | + 35.1 | 3226 | 3258 | + 0.1 |
| St Marylebone | 255 | 320 | + 25.5 | 744 | 678 | - 8.9 |
| Parndon Wood (Harlow) | 230 | 290 | + 26.1 | 1775 | 1850 | + 4.2 |
| Enfield | 255 | 320 | + 25.5 | 2752 | 2780 | + 1.0 |
| Luton | 213 | 270 | + 26.8 | 2075 | 2010 | - 3.1 |

219. Those figures show that Harwood Park was able both to increase its prices by a higher percentage than any other relevant crematorium, and to achieve a higher percentage increase in the number of cremations than any other relevant crematorium.

220. In its skeleton argument Burgess presented the figures on a year by year basis from 1998/99 to 2003/04. A similar pattern emerges from those figures, as follows:

**Percentage change in prices and numbers of cremations at the crematoria identified by the OFT (change in numbers in brackets)**

**Years 1998/99 to 2003/04**

(figures from the Cremation Society of Great Britain: prices as at April 1st, numbers for the calendar year, changes in numbers not available for 2004.)

| | 1998/99 | 1999/00 | 2000/01 | 2001/02 | 2002/03 | 2003/04 |
|---|---|---|---|---|---|---|
| Harwood Park (Stevenage) | +7.1 (+0.7) | +8.8 (+2.8) | +4.1 (+0.5) | +15.7 (+3.6) | +10.2 (+2.4) | +10.8 |
| Garston (W. Herts Watford) | +2.6 (+0.9) | +3.0 (-3.1) | +2.4 (-1.0) | +6.2 (+2.9) | +15.2 (-1.0) | +10.5 |
| St Marylebone | +7.0 (-7.1) | +4.3 (+1.2) | +6.2 (+0.2) | +5.9 (-6.1) | +9.3 (-3.1) | +8.5 |
| Parndon Wood (Harlow) | +4.6 (+2.0) | +5.9 (+5.7) | +6.0 (-3.8) | +11.0 (-0.8) | +3.9 (+5.0) | +9.4 |
| Enfield | +6.9 (+4.8) | +4.3 (-2.0) | +4.1 (-9.5) | +9.8 (-4.5) | +5.4 (+5.7) | +8.5 |
| Luton | +7.2 (-1.8) | +5.2 (-5.0) | +4.9 (+6.1) | +4.7 (-6.3) | +9.9 (+3.3) | +10.2 |

221. Presenting the figures on that basis, Harwood Park increased its prices by 55% between 1998 and 2003, as compared with price increases of 32% by the other crematoria. Over the same period Harwood Park increased its number of cremations by 17.5%, as compared with –15% to +8% for the other crematoria.

222. While we accept that such figures need to be interpreted with caution, they do tend to show that Harwood Park does indeed have market power, in that it has apparently been able to increase its prices faster than other crematoria without losing cremations, and in fact increasing the number of cremations carried out.

223. The OFT submits that, on the figures in the notice of appeal, Harwood Park's prices have increased in percentage terms in the period 2001 to 2004 by only 9.6% more than the weighted average price increase of other crematoria. We have some difficulty in understanding that calculation since the OFT's weighted average calculations seem to give an average price increase over that period of 28.8%, as compared with Harwood Park's 41.2%, which is a difference of 12.4 percentage points. However, the ratio of 28.4% to 41.2% is 1:1.43, suggesting that Harwood Park's prices have increased to a significantly greater extent (43%) more than the weighted average price increase by the other crematoria concerned.

224. In any event, even if the OFT's figure of 9.6% was correct, in terms of a conventional SSNIP test even a price increase by Firm A of around 10 per cent above the weighted average price increase of competitors, which yields no evidence of switching away from Firm A, would normally be regarded as a strong indication that Firm A is able to exercise market power without significant competitive constraint.

225. In the present context the above evidence in our view strongly supports the conclusion that Harwood Park is shielded from competition to a material extent and operates in an identifiably separate geographic market.

226. The above figures, of course, relate to Harwood Park's pricing generally, thus demonstrating Harwood Park's ability to raise prices across its catchment area, which is wider than Stevenage and Knebworth. It is not, however, necessary at this stage of the analysis to define the precise boundary of the area in which Harwood Park has market

power. It suffices for present purposes to note that on any view that area includes Stevenage/Knebworth, where Harwood Park is a de facto monopolist.

*Willingness of funeral directors to use other crematoria*

227. As to the OFT's argument that "funeral directors appear to be willing to use crematoria that are up to 30 km or more from the branch where the cremation is arranged", that contention in our view has little weight in relation to the Stevenage/Knebworth area, where some 95 per cent of cremations organised by Austins, the Co-op and Burgess in 2002 were carried out at Harwood Park. The fact that there may have been a few exceptions, perhaps for family or other reasons, does not in our view indicate that other crematoria are effective competitors to Harwood Park as regards that area. It appears from Annex 2(A) to the Decision that the next most used crematorium after Harwood Park for residents in the Stevenage/Knebworth area in 2002 was Luton, but only 11 cremations out of a total of some 710 were arranged at Luton, approximately 1.5 per cent. Such activity in our view is entirely marginal and does not indicate that Luton and Harwood Park are in effective competition in any realistic sense. Very few cremations were arranged in any of the other crematoria identified by the OFT.

*The alleged absence of discrimination*

228. In the Decision, the OFT argues principally that if Austins were dominant in the Stevenage and Knebworth area, it would be possible for Austins to charge higher prices to customers in those areas than for customers in other areas. However, there is no evidence that such price discrimination is occurring (paragraphs 42 to 44 of the Decision).

229. In our judgment, the first and central weakness of this argument is that the fact that Austins does not in practice discriminate in its published prices against the funeral directors/consumers of Stevenage and Knebworth does not establish that Austins could not do so if it so chose. The fact that a dominant undertaking does not choose to use its market power in a particular way, for example because of custom and practice in the trade, does not mean that it is impossible to identify a discrete local geographic market.

230. Secondly, although the OFT considers that whether price discrimination is possible "is likely to turn on the reactions of end consumers", the OFT has produced no evidence as to what the reaction of end consumers would be likely to be in the postulated circumstances, and in particular whether consumers in the Stevenage/Knebworth area would be prepared to pay an increased price, relative to those residing elsewhere, to avoid the inconvenience of travelling to an alternative crematorium.

231. Thirdly the OFT's reasoning appears to rest on the contention, repeated at paragraph 44 of the Decision, that "end consumers are prepared to accept a crematorium other than the nearest crematorium". Applied to Stevenage and Knebworth, that contention is not supported by the evidence, which shows that about 95 per cent of the residents of Stevenage and Knebworth chose Harwood Park. Similarly, the fact that Burgess was constrained to use Nethercotts supports the view that alternative crematoria were not acceptable to consumers.

232. Fourthly, the OFT's argument overlooks the fact that the Chapter II prohibition itself prohibits imposing "unfair prices" or applying "dissimilar conditions to equivalent transactions with other trading parties". Raising prices to the funeral directors/consumers closest to Harwood Park would suggest that the crematorium was simply "charging what the market will bear" in a manner unrelated to costs. That in our view would raise a serious question of whether such a pricing practice was abusive contrary to the Chapter II prohibition. The fact that Harwood Park does not engage in a practice that would arguably be abusive under the Chapter II prohibition does not seem to us to demonstrate that the Stevenage/Knebworth area is not a discrete geographic market.

233. Fifthly, and still in relation to discrimination, Harwood Park has in fact shown that it is able to discriminate, both against a funeral director based in Knebworth (Burgess) and against the residents of Stevenage/Knebworth wishing to use Burgess as their funeral director. As regards Burgess, that discrimination has taken the form of: (i) an outright refusal to supply since 22 March 2004; and (ii) a refusal to allow Burgess access to Harwood Park except through Nethercotts from 21 January 2002 to 22 March 2004. The action under (ii) can in our view be characterised not only as a discriminatory, albeit indirect, refusal to supply, but also as an indirect form of price discrimination.

The latter arises because, as Harwood Park must have known, Burgess has had to pay Nethercotts to act as an intermediary on its behalf. The net result is that Burgess has only been able to obtain access to Harwood Park at a higher cost than that imposed on any other funeral director using Harwood Park. Burgess has either had to absorb that cost itself (which in practice it appears to have done) or pass the cost on to its customers.

234. Similarly, by adopting the policy it has, Harwood Park has discriminated against the end consumers in Stevenage/Knebworth wishing to use Burgess as their funeral director, thereby restricting consumer choice. That discrimination includes preventing consumers from using Burgess at all (since March 2004) or allowing Burgess to be used only on limited conditions (e.g. through Nethercotts). The practical effect of that discrimination appears also to have extended to preventing customers of Burgess from nominating Harwood Park as their preferred crematorium in funeral plans offered by Burgess, thereby further restricting the competitive activities of the latter and the choice available to consumers.

235. The fact that Harwood Park has been able to engage in such discriminatory conduct with impunity is in our view a strong indication that the Stevenage/Knebworth area is a discrete geographic market within which Austins is able to act without significant regard to the reactions of its competitors (including Burgess), and the interests of its customers (including Burgess and Burgess' customers) and ultimately consumers (residents of Stevenage/Knebworth).

*Burgess' decision to use Nethercotts*

236. Those considerations are reinforced by the fact that for over 2 years Burgess was constrained to pay Nethercotts in order to obtain access to Harwood Park. If, as the OFT contends, the use of an alternative crematorium was a viable option for Burgess' Knebworth branch, or for the residents of Stevenage/Knebworth wishing to use Burgess, Burgess would have had no reason to use Nethercotts.

237. The fact that Burgess none the less chose to do so is in our judgment a strong indication that neither Burgess itself, nor its customers resident in Stevenage/Knebworth,

considered the use of alternative crematoria to be a viable option if Burgess was to continue serving that area.

*The evidence about choice in other towns*

238. The OFT also argues, by reference to various distances and drive times referred to in the defence, that customers in Hertford, Letchworth, Welwyn Garden City, Ware, Hatfield and Hitchin have a choice of at least one other crematorium (sometimes two) at distances and drive times comparable to Harwood Park. That evidence does not seem to us helpful as far as the Stevenage/Knebworth area is concerned, which is not mentioned. We deal with Welwyn Garden City and Hatfield later in this judgment.

239. More generally, the OFT seems to argue that because Harwood Park competes for business as far as the outer reaches of its catchment area, the relevant geographic market must be wider than Stevenage/Knebworth. That argument is a non sequitur in our judgment. Where the definition of any geographic market depends on consumer preferences, distances, switching costs, and relative prices, there may well be consumers situated in the outer reaches of a particular geographic area, who have realistic alternatives open to them. However, that does not exclude that within a narrower geographical area certain consumers have little or no realistic alternative available to them. That seems to us to be the case here, as regards consumers in the Stevenage/Knebworth area.

240. The OFT also argues that: (i) Harwood Park needs to attract trade from consumers further afield who have a choice of crematoria available to them; (ii) Harwood Park needs to act competitively vis-à-vis those customers; (iii) since Harwood Park treats all its customers equally, the competitive constraint imposed by the need to attract the more distant customers also operates to the benefit of the residents of Stevenage/Knebworth, who have less choice of crematoria; and (iv) it follows that Harwood Park is effectively subject to a competitive constraint, even in the Stevenage/Knebworth area, and thus cannot be regarded as dominant in that area.

241. In our judgment, this theoretical argument breaks down in the face of the facts of this case. In particular: (i) Harwood Park has been able to raise prices further than other

crematoria, while increasing the number of cremations, thus indicating market power throughout its catchment area, including Stevenage/Knebworth; (ii) for the reasons already given, Harwood Park has effectively a "captive market" in the Stevenage/Knebworth area, even if it faces competition from other crematoria as regards residents in certain towns further away; (iii) the fact that Harwood Park did not discriminate against the residents of Stevenage/Knebworth does not establish that it could not do so if it chose; (iv) in fact, Harwood Park has discriminated against a funeral director (Burgess) and consumers in Stevenage/Knebworth as already set out above, and (v) that discrimination has been effective, precisely because residents of Stevenage/Knebworth have little realistic choice of alternative crematoria.

242. We stress, in that latter connection, that we do not accept the OFT's apparent submission that in defining a relevant geographic market it is sufficient that the end-consumer should have "a choice", however inconvenient the "choice" may be, and however much that "choice" may diverge from the consumer's "preference". As the Commission's *Notice on the Definition of the Relevant Market* points out at paragraph 46, it is consumer *preferences* which have a strong potential to limit geographic markets. Such preferences in our view are highly relevant to the analysis.

243. Stated in general terms the issue, it seems to us, is whether and in what circumstances a sufficient number of consumers situated in Stevenage/Knebworth may reasonably be expected to switch to an alternative crematorium in a neighbouring geographic location. In our view, the totality of the evidence considered above, viewed in the round, points overwhelmingly to the conclusion that it is difficult to envisage realistic circumstances in which a material number of consumers in the Stevenage/Knebworth area would be willing to switch to a crematorium other than Harwood Park.

244. By the same token, and having regard in particular to the evidence given by Mrs Burgess at paragraphs 32 to 37 of her witness statement of 22 June 2004 as to the costs of operating a funeral directing business, we find it hard to see how any funeral director in the Stevenage/Knebworth area could long remain in business without access to Harwood Park. That is so particularly given the importance of reputation in this industry. Any such funeral director would be in the invidious position of either being unable to fulfil the customer's wishes, or seeking to persuade the customer to accept an

alternative. The latter would hardly be an ethical approach from the customer's point of view.

245. For all those reasons we find that there is a discrete geographic market for crematoria services in at least the Stevenage/Knebworth area.

DOMINANCE OF HARWOOD PARK IN CREMATORIA SERVICES IN THE STEVENAGE/KNEBWORTH AREA

246. Within the Stevenage/Knebworth area Harwood Park carries out over 90 per cent of the cremations arising in that area. A market share of that order is, in itself, indicative of dominance. As we have already found, there is little realistic choice of alternative crematoria for persons resident in that area.

247. In addition: (i) Austins has accepted that Harwood Park is to all intents and purposes exclusive in its catchment area; (ii) there are insurmountable barriers to entry, since there is no realistic prospect of another crematorium being opened within the catchment area of Harwood Park, let alone in Stevenage/Knebworth; and (iii) Harwood Park has been able to increase its prices further than its competitors, while continuing to increase the number of cremations.

248. In addition, as already pointed out, Harwood Park has been able with impunity (i) to refuse supply to Burgess in a way likely to eliminate Burgess from offering funeral directing services in Stevenage/Knebworth; (ii) to impose upon Burgess, in effect, the cost of employing Nethercotts up to 22 March 2004 as the price of being allowed access to Harwood Park; and (iii) to prevent consumers in Stevenage/Knebworth from having Burgess as the funeral director of their choice if they wished to exercise their preference for a cremation at Harwood Park. That also applies in practice to customers of Burgess who have expressed a preference for Harwood Park in pre-paid funeral plans.

249. In effect, it seems to us, any existing supplier or new entrant to the market for funeral directing services in the Stevenage/Knebworth area effectively exists on sufferance according to the wishes of Harwood Park since the latter is, in practice, able to determine whether any such funeral director in that area stays in business or not.

250. As to the OFT's suggestion that "it cannot be right" that each crematorium is dominant in its own local area, that contention was not supported by any argument. The Tribunal is not considering, in this judgment, the position of other crematoria, which will depend largely on their particular local and geographic circumstances. However, the proposition that, for the purposes of the Chapter II prohibition a crematorium may be found, on the evidence, to be dominant in a particular local area is not one that the Tribunal finds particularly exceptionable or surprising. In *Genzyme*, cited above, at paragraph 219 the Tribunal accepted that, depending on the evidence, there may in any particular case be a number of small relevant markets. The Tribunal said "Consumers in small markets are, in our view, just as entitled to the protection of the Chapter II prohibition as are consumers in larger markets".

251. In those circumstances we have no difficulty in concluding that Harwood Park has a dominant position in the supply of crematoria services in at least the Stevenage/Knebworth area. In our judgment Harwood Park is not subject to effective competition in that area and has the power in that regard to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.

252. We do not need to decide for present purposes how far Harwood Park's dominance extends beyond Stevenage/Knebworth, although it is plain that it does so, possibly within the 10 mile (16 km) radius described by Austins as Harwood Park's exclusive catchment area. It is however plain that there is no evidence to support the 30 km radius adopted by the OFT. The OFT also accepts that its market share calculation, at paragraphs 58 to 60 of the Decision, was erroneous even in terms of its own market definition, since it wrongly included in its calculation many funerals originating from outside the area identified by the OFT.

## X REFUSAL TO SUPPLY AND DISCRIMINATION: THE PARTIES' SUBMISSIONS ON ABUSE

*Burgess' submissions*

253. Burgess refers to the definition of abuse set out by the Court of Justice in Case 85/76 *Hoffman-La Roche v. Commission* [1979] ECR 461 at paragraph 72, and to the "special

responsibility" of dominant undertakings not to impair genuine undistorted competition: Case 322/81 *Michelin v. Commission* [1983] ECR 3461 at paragraph 57.

254. In the light of the case law of the Court of Justice, and in particular *Commercial Solvents*, *Télémarketing*, and *United Brands*, cited above, Burgess submits:

- where a vertically integrated undertaking holds a dominant position in a downstream market, it is an abuse of that position for its upstream operation to terminate supply and/or to discriminate in the terms of supply of an important service to one of its competitors in the downstream market, in the absence of objective justification; and/or
- where a dominant undertaking with a reputation valued by consumers terminates supply of an important service to a long-standing customer, that constitutes an abuse, in the absence of objective justification, if it impairs free and undistorted competition in the downstream market.

255. Burgess submits that the OFT misunderstands the relevant case law in submitting that a refusal to supply is abusive only if it eliminates all competition or causes "substantial harm" to competition. According to Burgess, the *Bronner* case, cited above, concerned circumstances where the undertaking in question never intended to make its services available to third parties in the first place. The opinion of Advocate General Jacobs in that case, properly understood, supports the appellants' position.

256. Burgess submits that if it is excluded entirely from Harwood Park then Austins would be likely to carry out the majority of funerals in Stevenage and Knebworth which might otherwise have been carried out by Burgess. Within that local market, Austins currently has a dominant position. Austins would be the major beneficiary of a refusal to supply which resulted in the elimination of Burgess from its Knebworth branch.

257. Burgess submits that it is barely credible to suggest that a total exclusion from Harwood Park would not lead to, at the very least, the closure of Burgess' Knebworth office, which is located approximately 1 mile from the crematorium.

258. In the alternative, Burgess submits that even if the test is that a refusal to supply will be abusive only where there is a "significant effect on competition", as suggested by the OFT, that test is clearly met in this case.

259. Burgess also relies on the fact that it cannot offer its customers a funeral plan in which they can express a wish to use Harwood Park.

260. Burgess further submits that, in any event, Harwood Park's actions amounted to discrimination against Burgess contrary to the Chapter II prohibition.

261. Furthermore, according to Burgess, all Austins' actions can equally be analysed as an abuse of their dominant position in the market for funeral directing services in Stevenage and Knebworth, taking place in the associated upstream market of crematoria services.

262. Burgess also submits that no arguments on objective justification have been advanced by either the OFT or by Austins. However, according to Burgess, the suggestion that the refusal to supply arose out of a commercial dispute is "a sham," and that there is no evidence to suggest that Burgess are anything other than exemplary payers.

263. Finally Burgess submits that whatever the grounds for claiming an "objective justification", on any basis Harwood Park's response has been disproportionate. Burgess contends that its own responses during the "acrimonious" correspondence were never other than proportionate and reasonable.

*The OFT's submissions*

264. As set out in paragraphs 76 to 79 of the Decision, the OFT considers that a refusal to supply by a dominant undertaking will be abusive where, in the absence of objective justification:

- it risks eliminating all competition in a relevant market; or
- it would lead to substantial harm to competition in a relevant market. The question of whether there is substantial harm to competition is a matter of fact and degree taking into account such factors as the intention of the dominant undertaking in pursuing the conduct, the effect (both direct and indirect) of the conduct on the undertaking's competitors and customers and the extent to which the conduct is plainly restrictive of competition.

265. The OFT rejects any suggestion that there is a per se or automatic rule that there is an abuse where a dominant firm refuses to supply a competitor without objective justification, or where a refusal to supply by a dominant firm has the effect of excluding a competitor from the market, or where a refusal to supply has some effect on competition.

266. In the OFT's view, the appropriate approach to refusal to supply was correctly summarised by Advocate-General Jacobs in his opinion in *Bronner*, cited above. In particular:

> "… it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification." (paragraph 56)

267. The OFT considers that the freedom to choose trading partners or to choose to keep activities in house plays a key role in rivalry between firms and maintains investment incentives to maintain dynamic competition through investment and innovation. See Advocate General Jacobs in *Bronner*:

> "In the long term it is generally pro-competitive and in the interests of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities." (paragraph 57)

268. According to the OFT, acts that do not prevent effective competition should not be prohibited. See again Advocate-General Jacobs in *Bronner*, at paragraph 58.

269. According to the OFT's analysis, in *United Brands* the key consideration was that the refusal to supply was "designed to have a serious adverse effect on competition" on the relevant market, while in *Télémarketing* the conduct complained of had the effect of eliminating all competition on the market. Similarly in *Commercial Solvents*, the dominant undertaking's refusal to supply was a general policy adopted in order to facilitate its own access to the downstream market. The complainant was one of the dominant undertaking's "principal" competitors on the downstream market. This case was, according to the OFT, interpreted in Cases C-241 and 242/91P *RTE and ITP v*

*Commission* [1995] ECR I-743 ("*Magill*") as a case where all competition on the relevant market was eliminated. Similarly in *Bronner*, the Court of Justice noted (at paragraph 38) that both *Commercial Solvents* and *Télémarketing* were cases where the conduct in question was likely to eliminate all competition in the relevant market.

270. According to the OFT, the Tribunal should also consider the broader timescale. Austins took the initiative to invest in the crematorium. Austin's could theoretically have developed the crematorium entirely for its own benefit and/or built a crematorium with a much more restricted capacity. At the time of planning investment in a new product or facility, a person has a fundamental freedom to choose with whom he intends to contract.

271. The OFT submits that there is no evidence here of Austins seeking to reserve the funeral market for themselves. Indeed, given the proportion of Harwood Park's business which comes from funeral directors other than Austins, it seems unlikely that Austins would adopt a policy which would appear to be so detrimental to the profitability of the facility. The OFT emphasises that:

- Austins has not refused access to any funeral director other than Burgess. In particular, Austins has not refused access to the Co-op branch in Stevenage, so this case is quite unlike one where there is a general policy not to supply.
- All of Burgess' branches use crematoria other than Harwood Park.
- Given that all branches have credible alternatives, it is not clear that Burgess will exit the market as a result of Austins' refusal to supply.
- Even if Austins' refusal to supply were to lead to Burgess shutting down its Knebworth branch, Austins' largest competitor, the Co-op, would remain.

272. The OFT did not consider that the loss of one option (which some consumers might prefer) was itself enough to amount to a substantial effect on competition when other viable choices remain. In the OFT's view, consumers in Stevenage and Knebworth would still be left with sufficient choice of funeral director (Austins or the Co-Op) if Burgess exited the market.

273. The OFT also notes that, while access was available to Burgess via Nethercotts, i.e. during the period January 2002 to March 2004:

- The number of cremations conducted by Burgess' Knebworth branch was greater in 2002 than in 2001.
- Burgess' Knebworth branch increased its market share in 2002.

274. The OFT further argues that the local markets within which funeral directors compete are not closed to competition and there is no evidence to suggest that Austins has the power to exclude new entry. Even if, within the Stevenage and Knebworth area, the exit of Burgess would create a short term detriment to consumers, that short term detriment must be balanced against other considerations, such as respecting the commercial freedom of those who invest in building facilities.

275. Furthermore, even if access to the crematorium was found by the Tribunal to be necessary for any funeral director's business operating in Stevenage and Knebworth, the OFT submits that it would be very difficult to come to the same conclusion in respect of Hatfield or Welwyn/Welwyn Garden City.

276. As regards pre-paid funerals the OFT considers that the appellant had not suggested that it would be in breach of existing contracts. In such contracts the consumer is merely given an opportunity to express a "preference" for a particular crematorium – there is no guarantee that his wishes will be fulfilled.

277. As to discrimination, the OFT considers that there is no evidence of discrimination based on price. Furthermore, the OFT considered that it was more appropriate to treat Austin's conduct as a refusal to supply Burgess rather than a supply on unfair terms. The arrangements involving Nethercotts were entered into by Burgess, not by Austins. If it had considered discrimination separately however, then the OFT would have reached the same conclusion.

278. The OFT dismisses the appellant's complaints regarding "abuse in an associated market" (i.e. the allegation that Austin's conduct will strengthen its position on the market for funeral directing services). The OFT considers that this adds nothing to the primary complaint.

*Austins' submissions*

279. Austins supports the OFT's interpretation of the law on refusal to supply. A refusal to supply is not necessarily abusive and the OFT must consider the effect on competition rather than the effect on individual competitors.

280. In particular, the circumstances surrounding the refusal to supply in *United Brands* were entirely different from the present case. The effect of the refusal was far more severe in *United Brands* and the action taken by the supplier was clearly designed to "frighten off" other distributors from doing what the distributor, Olesen, had quite lawfully done. Furthermore, Austins does not have any equivalent brand name which is known and valued by consumers. In addition, Austins contends that in this case there was a breakdown in regular commercial practice between the parties prior to the refusal to supply.

281. The OFT was entitled to look at and take into account the events leading up to the refusal to supply by Austin's in considering whether or not there had been an abuse. In Austin's submission, the events leading up to the refusal to supply in this case are well documented and leave no room to query the OFT's finding that the refusal to supply Burgess with services arose out of a dispute which was not competition related. That dispute caused a breakdown in the relationship between two firms which necessarily had to work together in providing a service to end consumers.

282. The original exclusion was stated to be for a limited time, and it was never Austin's intention to ban Burgess from using the crematorium permanently. Austins submits that the reason that matter progressed from a tolerance of an arrangement involving Nethercotts to a total ban on access was because the involvement of third parties was making the existing situation worse, and involved misleading consumers.

283. Harwood Park relies heavily on attracting other funeral directors (in addition to the business brought in by Austin's) to use Harwood Park, as stated in Austins' letter to the OFT of 14 February 2002. Austin's actions in excluding Burgess from the crematorium were not designed to dissuade any other firms from acting in any

particular way. Nor was the decision to exclude Burgess from the crematorium taken lightly – business supplied to Harwood Park by Burgess accounted for […] of Harwood Park's turnover in 2002.

284. Austins has also provided evidence, in a witness statement prepared by Ms Claire Austin dated 16 February 2005, that its business has declined during 2004 compared with 2003. Therefore it would be difficult for the Tribunal to conclude that any drop in levels of business for Burgess results from their exclusion from the crematorium.

285. Austins also challenges Burgess' claim that its exclusion from the crematorium will enable Austins to strengthen its own position in the market for funeral directing services, rejecting the suggestion that there could be an "abuse of an associated market". In particular Austins contends that Burgess conducted more funerals from its Knebworth branch after exclusion than before, and the number of cremations it arranged increased even while its cremations at Harwood Park fell. Even when access was available through Nethercotts, the substantial majority of Burgess' cremations were at crematoria other than Harwood.

*Consumers' Association submissions*

286. The CA submits that the OFT's case on refusal to supply is "alarming". In particular, the CA considers that the logical consequence of the position taken by the OFT is that a dominant undertaking is entitled to choose its competitors and, in addition, is entitled to pick off its competitors one by one – provided it leaves one man standing. The CA contends that this harms the competitive process and is not a proper use of competition law. In the CA's view the OFT's interpretation of Community law is too restrictive and places unwarranted fetters on its power to control anti-competitive behaviour.

287. The CA considers that the following factors (among others) are relevant to assessing whether conduct amounts to abuse:

- how far the conduct in issue is of a kind which is plainly restrictive of competition;
- how far the conduct is normal industry practice;
- how far competition on the market is already weakened by dominance;

- the effect, direct and indirect of the conduct on competitors or customers;
- whether the intention of the dominant undertaking is exclusionary or constitutes a legitimate response to competition;
- whether the conduct in issue is proportionate to any legitimate interest which is being pursued and whether such conduct will limit competition more than is necessary.

288. While supporting the general considerations referred to by Advocate General Jacobs, the CA contends that this case is very different from *Bronner*. In *Bronner*, the defendant had built up a nationwide home delivery service for newspapers, at "great financial and administrative cost" for its own purposes. The third party seeking access had never been a customer of the defendant and neither it, nor anyone else, had ever been offered access to the network.

289. By contrast, planning permission was granted on the basis that Harwood Park would be open to use by other funeral directors. Harwood Park carries on business in the supply of services and Burgess is an existing customer of Harwood Park. The policy considerations are therefore very different.

290. While there is nothing wrong in an undertaking with a superior product driving out its competitors, the CA submits that the crucial point is that in that situation it is the consumer who picks the winner. The effect of the OFT's decision is that the dominant undertaking, Austins "is allowed to pick the winner, or at least influence the outcome of the fight by preventing other undertakings from competing with it".

## XI REFUSAL TO SUPPLY AND DISCRIMINATION: THE TRIBUNAL'S ANALYSIS OF ABUSE IN RELATION TO THE STEVENAGE/KNEBWORTH AREA

### THE RELEVANT LAW

291. Much of the relevant law is summarised in the Tribunal's judgment in *Genzyme v OFT*, already cited above.

292. In case 85/76 *Hoffman-La Roche v. Commission* [1979] ECR 46, the Court of Justice said at paragraph 91:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

293. In case 322/81 *Michelin v Commission* [1983] ECR 3451, the Court of Justice said at paragraph 57:

> "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."

294. See also Cases C-395/96P and 396/96P *Compagnie Maritime Belge v Commission* [2000] ECR I-1365, at paragraph 37, Case T-65/98 *Van du Bergh Foods v Commission,* judgment of 23 October 2003, at paragraph 158.

295. As the Tribunal pointed out in *Genzyme,* cited above, at paragraph 484,

> "It is thus clear from the case law from the Court of Justice and the Court of First Instance that a dominant firm may, by virtue of its "special responsibility" be deprived of the right to follow a course of conduct which would not necessarily be objectionable if that course of conduct were followed by a non-dominant undertaking: see e.g. Case T-83/91 *Tetra Pak v. Commission* [1194] ECR II-775, at paragraph 137, Case 111/96 *ITT Promedia v. Commission* [1998] ECR II-2937 at paragraph 139, and Case 65/98 *Van den Bergh Foods Limited v. Commission,* judgment of 23 October 2003, at paragraph 159.

296. As the Court of First Instance has held, a dominant firm is prohibited from eliminating a competitor and from strengthening its position by recourse to means other than those based on competition on the merits. That prohibition is also justified by the concern not to cause harm to consumers (*Van den Bergh Foods,* cited above, at paragraph 157).

297. We also accept that, in accordance with the principle that abuse is an objective concept, the subjective intention of the dominant undertaking is not, in principle, relevant to the

existence of an abuse, see Case T-65/89 *BPB Industries v Commission* [1993] ECR II – 389 at paragraphs 65 to 77.

298. A number of cases have dealt with refusal to supply in the context of an alleged abuse of a dominant position. In *Commercial Solvents*, cited above, decided in 1974, Commercial Solvents was dominant in the supply of raw materials for the production of a downstream product, ethambutol. Zoja was a producer of ethambutol who obtained its raw materials from Commercial Solvents. When Commercial Solvents decided itself to commence the downstream manufacture of ethambutol, it ceased to supply the raw materials to Zoja, thus preventing the latter from competing with Commercial Solvents in the downstream supply of ethambutol. The Court of Justice held at paragraph 25 of its judgment that Commercial Solvents had abused its dominant position:

> "25. … an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of Ethambutol in the common market. Since such conduct is contrary to the objectives expressed in Article 3(f) of the Treaty and set out in greater detail in Articles [81] and [82], it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article [82]…"

299. In *Télémarketing*, cited above, decided in 1985, Centre Belge was a telemarketing organisation which advertised on the Luxembourg television station CLT. The Centre Belge advertisements showed the Centre Belge telephone number, which customers would call if they wanted to purchase the products shown in the advertisements. After the expiry of the relevant agreement, CLT refused to accept any further advertisements involving telemarketing unless the telephone number shown was that of its own

advertising agent, Information Publicité, thereby excluding Centre Belge. The Court of Justice held at paragraph 27 of its judgment:

> "27. It must therefore be held in answer to the second question that an abuse within the meaning of Article [82] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking."

300. That case was followed in the decision of the Court of Justice in Case C-18/88 *GB Inno* [1991] ECR I-5941, where the court referred to *Télémarketing* with approval in a case where the monopoly operator of a telecommunications system effectively reserved to itself the supply and maintenance of equipment for the network.

301. In addition, in *United Brands*, cited above, the dominant supplier of bananas refused supplies to one of its distributors Olesen, which had participated in an advertising campaign for one of its competitors. The Court of Justice said at paragraphs 182 to 183 of the judgment:

> "182. In view of these conflicting arguments it is advisable to assert positively from the outset that an undertaking in a dominant position for the purpose of marketing a product – which cashes in on the reputation of a brand name known to and valued by the consumers – cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.
>
> 183. Such conduct is inconsistent with the objectives laid down in Article 3 (f) of the Treaty, which are set out in detail in Article [82], especially in paragraphs (b) and (c), since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market."

302. In considering whether *United Brands* had acted in a proportionate way, the Court said at paragraphs 189 to 190:

> "189. Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests

> if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.
>
> 190. Even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other."

303. This branch of the law has been considered more recently by the Court of Justice in *Bronner*, cited above, decided in 1998. In that case, Oscar Bronner published a daily newspaper in Austria that had 4 to 6 per cent of the market in terms of circulation and advertising respectively. Mediaprint, the largest daily newspaper publishing group in Austria, had 47 per cent of the circulation and 42 per cent of advertising revenue, but was able to reach 71 per cent of all newspaper readers. Mediaprint operated the only home delivery system for newspapers in Austria. Bronner asked Mediaprint to undertake home delivery of its (Bronner's) daily newspapers through Mediaprint's home delivery system in return for reasonable remuneration. Bronner claimed that Mediaprint's refusal to do so was an abuse of a dominant position, since Bronner was unable, by reason of its small circulation, either alone or in combination with other newspaper publishers, to set up and operate its own home delivery scheme in economically reasonable conditions.

304. In his opinion of 28 May 1998 Advocate General Jacobs reviewed the relevant authorities extensively, with particular reference to the "essential facilities" doctrine. According to that doctrine, established in US law, a dominant undertaking which controls a facility, access to which is indispensable in order to compete on the market with the company which controls it, may not refuse access to that facility without objective justification. The essential facilities doctrine was argued by Bronner to be implicit in the judgment of the Court of Justice in *Magill*, cited above, where the Court found that it was an abuse of dominance for broadcasting companies to rely on national copyright law to prevent the publication by a third party of a weekly TV guide which would have competed with the broadcaster's own publications.

305. Referring in particular to *Commercial Solvents*, *United Brands* and *Télémarketing*, Advocate General Jacobs said at paragraph 43 that:

> "43. It is clear from the above rulings that a dominant undertaking commits an abuse where, without justification, it cuts off supplies of goods or services to an existing customer or eliminates competition on a related market by tying separate goods and services..."

306. Advocate General Jacobs then turned to consider the question that arose in that case, which was

> "whether an undertaking in Mediaprint's position commits an abuse, in the absence of any other factors such as cut-off of supplies, tying of sales or discrimination between independent customers, if it refuses to allow another newspaper publisher to have access to a distribution system which it has developed for the purposes of its own newspaper business" (paragraph 54)

307. In that context, Advocate General Jacobs commented as follows:

> "56. First, it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification.
>
> 57. Secondly, the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for it own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.
>
> 58. Thirdly, in assessing this issue it is important not to lose sight of the fact that the primary purpose of Article [82] is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant

undertaking on a downstream market in a final product, to focus solely on the latter's market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power.

…

61. It is on the other hand clear that refusal of access may in some cases entail elimination or substantial reduction of competition to the detriment of consumers in both the short and the long term. That will be so where access to a facility is a precondition for competition on a related market for goods or services for which there is a limited degree of interchangeability.

62. In assessing such conflicting interests particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment…"

308. Advocate General Jacobs concluded that, on the facts of that case, Mediaprint had no obligation to allow Bronner access to its newspaper distribution network. Bronner had numerous alternative – albeit less convenient – means of distribution available to it, and it was not established that the level of investment necessary to set up a competing distribution network was such as to deter another newspaper from entering the market in competition with Mediaprint. To accept Bronner's contention would involve large scale intervention by the authorities which "would not only be unworkable but would also be anti-competitive in the longer term and indeed would scarcely be compatible with a free market economy" (paragraphs 67 to 69).

309. In its judgment at [1998] ECR I-7791, the Court rejected Bronner's arguments. On the question whether Mediaprint's refusal to allow Bronner access to its home delivery system for newspapers was an abuse, the Court said at paragraphs 38 and 41 to 46:

"38. Although in *Commercial Solvents v Commission* and *CBEM*, cited above, the Court of Justice held the refusal by an undertaking holding a dominant position in a given market to supply an undertaking with which it was in competition in a neighbouring market with raw materials (*Commercial Solvents v Commission*, paragraph 25) and services (*CBEM*, paragraph 26) respectively, which were indispensable to carrying on the rival's business, to

> constitute an abuse, it should be noted, first, that the Court did so to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking.
>
> …
>
> 41. Therefore, even if that case law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the *Magill* judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article [82] of the Treaty in a situation such as that which forms the subject matter of the first question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home delivery scheme."

310. At paragraphs 42 to 46 of its judgment the Court held that access to Mediaprints' home delivery system was not indispensable to Bronner's business.

311. In the light of that case law, it seems to us that the following propositions may be broadly stated, at this stage of the analysis:

(1) An abuse of a dominant position may occur if a dominant undertaking, without objective justification, refuses supplies to an established existing customer who abides by regular commercial practice, at least where the refusal of supply is disproportionate and operates to the detriment of consumers: *United Brands* at paragraphs 182 to 183, and also at 189 to 194; Advocate General Jacobs in *Bronner*, at paragraph 43.

(2) Such an abuse may occur, in particular, if the potential result of the refusal to supply is to eliminate a competitor of the dominant undertaking in a neighbouring (e.g. downstream) market where the dominant undertaking is itself in competition with the undertaking potentially eliminated, at least if the goods or services in question are indispensable for the activities of the latter undertaking, and there is a

potential adverse effect on consumers: see *Commercial Solvents*, at paragraph 25; *Télémarketing* at paragraphs 26 to 27; Advocate General Jacobs in *Bronner* at paragraphs 43, and 58 to 61; and the judgment of the Court in *Bronner* at 38 and 41.

(3) It is not an abuse to refuse access to facilities that have been developed for the exclusive use of the undertaking that has developed them, at least in the absence of strong evidence that the facilities are indispensable to the service provided, and there is no realistic possibility of creating a potential alternative: the opinion of Advocate General Jacobs at paragraphs 56 to 66: the judgment of the Court in *Bronner*, at paragraphs 41 to 46.

312. The foregoing propositions suffice for the purposes of the decision in this case but are not intended to be an exhaustive statement on the issue of refusal to supply by a dominant firm under the Chapter II prohibition. For example, if a competitor is substantially weakened but not eliminated, it is not necessarily the case that no abuse has occurred, in our view.

313. We also note that in Case 333/94P *Tetra Pak v Commission* [1994] ECR II-755 the Court of Justice held that an undertaking dominant in one market may infringe Article 82 of the Treaty in an associated market, even if it is not dominant in the associated market, in circumstances where the undertaking in question has a leading position in the associated market, and there are close links between the associated market and the market in which the undertaking was dominant. In that case Tetra Pak had a dominant position in the supply of aseptic cartons used for the packaging of UHT milk, and was found to have committed an abuse by virtue of various exclusionary practices on the associated market for non-aseptic cartons for the packaging of fresh milk where Tetra Pak had a leading, albeit not a dominant, position: see paragraphs 112 to 122 of that judgment. Indeed, both *Commercial Solvents* and *Télémarketing*, as well as *GB-Inno*, are examples of an abuse taking effect on a market adjacent to the market in which the relevant undertaking was dominant.

THE ALLEGED ABUSE OF REFUSAL TO SUPPLY FROM 22 MARCH 2004

314. We deal first with Harwood Park's outright refusal to deal with Burgess from 22 March 2004, with reference to Burgess' Knebworth branch.

315. Applying the foregoing legal principles to the present case, it seems to us, first, that Burgess through its Knebworth branch was an existing customer of Harwood Park. That branch opened in 1998, not long after Harwood Park opened in 1997. Burgess thus had access to Harwood Park through its Knebworth branch since shortly after its inception up until January 2002. From January 2002 to March 2004, Burgess continued to have access to Harwood Park through Nethercotts.

316. For the reasons already given, we accept that Burgess' Knebworth branch, situated only a short distance from Harwood Park, is unlikely to be viable without access to that crematorium. In our judgment, continued refusal of access to Harwood Park will inevitably lead to the closure of Burgess' Knebworth branch, probably sooner rather than later. On any view, Burgess' ability to compete effectively in the market for funeral directing services in the Stevenage/Knebworth area is likely to be significantly weakened by a refusal of access to Harwood Park. Indeed, in our judgment it is unlikely that a funeral director in the area of Stevenage/Knebworth could compete effectively in that local market without access to Harwood Park.

317. Austins, the owners of Harwood Park, already have a dominant position in the market for funeral directing services in the Stevenage/Knebworth area. It follows in our judgment that the elimination of Burgess as an effective competitor in the Stevenage/Knebworth area would inevitably tend to have the effect of strengthening Austins' dominant position in funeral directing services in that area, and weakening effective competition in that local market. For the reasons given below, we do not consider new entry to be a likely compensating factor.

318. In our judgment, the refusal of access to Burgess by a crematorium in the position of Harwood Park may fairly be described as "recourse to methods different from those which condition normal competition" within the meaning of paragraph 91 of *Hoffman-*

*La Roche*, cited above. We are unaware of any circumstances in which it could be suggested that it was normal practice in this industry for crematoria to discriminate against particular local funeral directors, without objective justification. Mr Nethercott's view, in his letter of 24 December 2003, was that Burgess' exclusion from Harwood Park was "unprecedented".

319. It follows that the protecting or strengthening of Austins' dominant position in the market for funeral directing services in the Stevenage/Knebworth area, which inevitably tends to follow from the elimination or serious weakening of Burgess in that area, is not the result of competition "on the merits", but of Austins' refusal to allow Burgess access to Harwood Park.

320. In our view, significant consumer detriment is shown. Stevenage and the surrounding area have a population of more than 75,000. If Burgess' Knebworth branch is eliminated, the Stevenage/Knebworth area will have only two funeral directors, one of which is Austins, with more than 75 per cent of the market. Austins' only other competitor is the Co-op. Furthermore, Burgess is a relatively new entrant to the funeral directing market in the Stevenage/Knebworth area.

321. There is a demand from consumers for Burgess' services in that area, as the figures referred to in Mrs Burgess' evidence show, particularly the figures as regards the funerals conducted through Burgess' Knebworth branch since the Tribunal's interim measures order. The actions of Harwood Park tend to deprive consumers in the Stevenage/Knebworth area of a choice of funeral director if they wish to be cremated at Harwood Park. Similarly customers with pre-paid funeral plans with Burgess who have nominated Harwood Park as their preferred place of cremation are unable to have their wishes respected. According to Burgess' evidence some […] customers are in this category.

322. In those circumstances it seems to us that Harwood Park's outright refusal to permit Burgess access to Harwood Park from 22 March 2004 is properly to be characterised as an abuse of Harwood Park's dominant position in the supply of crematoria services in the Stevenage/Knebworth area, absent objective justification. There are in our view two distinct bases for that conclusion.

323. First, *United Brands* makes it clear, at paragraphs 182 to 194, that it is ordinarily an abuse to refuse to supply a long standing existing customer who abides by normal commercial practice, at least where the refusal to sell would limit markets to the prejudice of consumers and might eliminate a trading party from the relevant market. That principle was accepted by Advocate General Jacobs at paragraph 43 of his opinion in *Bronner* where the learned Advocate General held that it was "clear" that a dominant undertaking commits an abuse where, without objective justification "it cuts off supplies of goods or services to an existing customer".

324. It is true that in *United Brands* the facts were that the dominant undertaking had cut off supplies to a distributor in circumstances where the distributor had participated in an advertising campaign promoting the products of a rival firm, so the refusal to supply in that case had the further anti-competitive effect of "disciplining" a distributor for assisting a competitor, thereby protecting the dominant position of *United Brands* in the banana market. In the present case, however, the refusal to supply does not merely reduce by one the number of funeral directors served by Harwood Park, but has the additional anti-competitive effect of protecting the dominant position of Austins in the market for funeral directing services in Stevenage/Knebworth, to the detriment of consumers.

325. Secondly, for the reasons set out in more detail below, we consider that, on the evidence, there are indications that at least part of Harwood Park's reaction was in response to Burgess having protested against what Burgess saw as the unfair use of the Harwood Park crematorium to further the interests of Austins' funeral directing services. In those circumstances, it seems to us appropriate to apply the principle stated at paragraphs 182 and 183 of *United Brands* to the present case.

326. We deal separately below with the issue of whether, as Austins submit, Burgess had failed to comply with "regular commercial practice" and, if so, whether Austins' response was proportionate.

327. In any event, both *Commercial Solvents* (at paragraph 25) and *Télémarketing* (at paragraph 27) make clear that it is an abuse for an undertaking dominant in one market to refuse to supply goods or services to an undertaking with which it is in competition

in a neighbouring or associated market, with the possibility of eliminating all competition on the part of that undertaking in the latter market. That, in our view, is the situation here. Austins/Harwood Park is dominant in the supply of crematoria services in Stevenage/Knebworth, and has refused to supply those services to Burgess. The effect of that would be to eliminate competition on the part of Burgess in the closely associated market of funeral directing services where Austins is also in competition with Burgess and indeed has a dominant position in the Stevenage/Knebworth area.

328. Moreover, that seems to us to be precisely the kind of situation envisaged by Advocate General Jacobs in *Bronner* when he said that the dominant undertaking's action in the "upstream" market may not be an abuse "unless the dominant undertaking's final product [i.e. the downstream product] is sufficiently insulated from competition to give it market power" (paragraph 58) or "access to a facility is a pre-condition for competition on a related market for goods and services for which there is a limited degree of interchangeability" (paragraph 67). Here, Austins has market power in the downstream market for funeral directing services, and access to Harwood Park is a pre-condition for competition in that market in the Stevenage/Knebworth area.

329. We see no basis for the OFT's suggestion that paragraph 38 of the judgment in *Bronner* in some way cuts down the decisions in *Commercial Solvents* and *Télémarketing*. That paragraph restates the proposition that where a dominant undertaking supplies goods or services which are indispensable to a rival carrying on business in competition with the dominant undertaking in a neighbouring market, it is an abuse to refuse to supply to the extent that the conduct in question is likely to eliminate all competition *on the part of that undertaking* (emphasis added). In any event, in our view the judgment in *Bronner* is largely concerned with whether the essential facilities doctrine in Community law said to derive from *Magill* could be extended to the circumstances of that case, where Bronner was seeking to "piggy back" on the distribution system developed by Mediaprint. Those circumstances are quite different from the present case.

330. As to the various other arguments put forward by the OFT, we observe first that the Tribunal is not concerned in this case to seek to lay down any general rules as to the circumstances in which a refusal to supply by a dominant undertaking may be abusive.

We are concerned only with the facts of this particular case which have, in particular, the features that: (a) Austins/Harwood Park is a vertically integrated undertaking which is dominant in relevant respects in both the upstream market for crematoria services and the downstream market for funeral directing services in Stevenage/Knebworth area[4]; (b) barriers to entry exist in both these upstream and downstream markets; (c) the contested refusal to supply in the upstream market for crematoria services has the effect, or potential effect, of eliminating one of Austins' only two competitors in the downstream market for funeral directing services; (d) the competitor potentially eliminated is the only new entrant to that market in recent years; (e) there is no evidence that the refusal to supply here in issue represents normal competition on the merits in this industry; (f) there is no evidence that Burgess is an inefficient or failing firm; (g) by acting as it did Austins has potentially strengthened its existing dominant position, by weakening competition in the supply of funeral services in the Stevenage/Knebworth area; and (h) there is significant consumer detriment, particularly given the nature of this service, resulting from the reduction in choice in funeral directing services in that area.

331. As to the OFT's argument that the Chapter II prohibition is intended to protect competition, rather than a competitor, Advocate General Jacobs points out in *Bronner,* citing in particular Advocate General Warner in *Commercial Solvents*, that the ultimate aim of Article 82 of the Treaty, and thus in the domestic context the Chapter II prohibition, is the protection of consumers through the maintenance of effective competition. In the context of a refusal to supply, the protection of consumers is in our view underlined by the express reference to "limiting markets…to the prejudice of consumers" in Article 82 (b) of the Treaty and section 18 (1) (b) of the Act, as well as the reference to prejudice to consumers in *United Brands* at paragraph 183 of the judgment.

332. We accept therefore that the OFT is correct, up to a point, in submitting that the aim of the Chapter II prohibition is not to protect competitors, but to protect competition. On the other hand, where effective competition is already weak through the presence of a

[4] The Tribunal is content to accept the OFT's description of the market for funeral directing services as downstream from the supply of crematoria services on the basis that the funeral director is more proximate to the end consumer.

dominant firm, there are circumstances in which competition can be protected and fostered only by imposing on the dominant firm a special responsibility under the Chapter II prohibition not to behave in certain ways vis-à-vis its remaining competitors, particularly where barriers to entry are high. In such circumstances the enforcement of the Chapter II prohibition may in a sense "protect" a competitor, by shielding the competitor from the otherwise abusive conduct of the dominant firm. However, that is the necessary consequence of taking action in order to protect effective competition. In a case such as the present, intervention under the Chapter II prohibition should not therefore be seen, as the OFT seemed to suggest, as merely "protecting a competitor", but from the point of view of the wider interest of preserving effective competition for the ultimate benefit of consumers. While Burgess is not entitled to be protected against normal market forces, it is in our view entitled under the Act not to be eliminated as an efficient operator in the market by the abusive practices of a dominant firm.

333. The Tribunal also finds it impossible to accept the OFT's submission, to which paragraph 91 of the Decision also refers, that there would be no abuse even if Burgess was eliminated from supplying funeral directing services in the Stevenage/Knebworth area, because Austins and the Co-op would remain to serve consumers in that area. That approach is tantamount to saying that it is not an abuse for Harwood Park/Austins to discriminate against one of its two competitors (i.e. Burgess), so long as it does not eliminate the one remaining competitor (the Co-op). It also appears to suggest that it is not abusive to eliminate a competitor (and existing customer) from the downstream market, without objective justification, so long as at least one other competitor remains in that downstream market. In our judgment, those arguments are entirely contrary to the established case-law. The logical consequence of that argument is that Harwood Park could choose to eliminate either the Co-op or Burgess, so long as it left the other standing. In our judgment, an undertaking which is dominant in both the upstream and downstream markets is not entitled to discriminate between customers who are in equivalent positions without objective justification. To take any other view would be to tolerate the arbitrary elimination of a competitor, on the whim of the dominant firm.

334. In any event we could not accept that a market structure in which there were only two suppliers, one of which had more than 75 per cent of the market was a satisfactory market structure from consumers' point of view, especially in circumstances where a

third competitor capable of offering effective competition to the established dominant firm had recently been eliminated from the market. The OFT's approach seems to overlook the fact that one of the principal purposes of the Chapter II prohibition is precisely to protect the competitive process in which dominant firms are open to effective challenge from competitors and new entrants, including in local markets.

335. The fact that this case involves a consumer purchase which is relatively expensive for most consumers, in respect of which a purchase decision has to be taken quickly, in distressing circumstances, means that it is particularly important that such effective competition as is possible in a market of this kind is maintained.

336. At paragraphs 86 to 89 of the Decision, the OFT further argues that the refusal to supply did not cause "substantial harm" to Burgess, in that Burgess was able to remain in business and even increase the number of funerals that it carried out. That argument is not, however, relevant to the period after 22 March 2004 when access to Harwood Park was stopped altogether. In our judgment, the probability is that Burgess' Knebworth branch would have been forced to close had not the Tribunal's interim order restored some access to Harwood Park. While we are prepared to accept that a material effect on competition must be shown, we see no basis for introducing the "substantial harm" test proposed by the OFT. We would however view the elimination of one of the last two competitors, and the only new entrant in recent years, as "substantial harm."

337. As regards the OFT's reliance on the need not to discourage investment by regulatory intervention, those considerations, while possibly relevant in other cases, have little relevance to the present case. Advocate General Jacobs in *Bronner* was considering a situation where there was no cut-off of supplies to an existing customer, unlike the situation here: see paragraph 54 of his Opinion. Similarly in *Bronner* Mediaprint had developed its distribution service for its own use, whereas in this case Harwood Park was specifically developed to serve all local funeral directors: this is evident from the planning decision of 26 July 1993 and Austins' letters of 14 February 2002 and 4 March 2003 to the OFT. As to the importance of freedom of contract, it is trite law that the special responsibility of dominant firms overrides the freedom of such firms to

behave as they wish to the detriment of competition. Nor does any difficulty arise here of determining an access price, since Harwood Park deals on its published terms.

338. At paragraphs 82 to 84 of the Decision, the OFT placed emphasis on the fact that "the origins of the dispute do not appear to be competition related". In our view, since abuse is an objective concept, the fact that a dominant enterprise did not "intend" to commit an abuse is irrelevant. Further, there is no evidence in this case of any divergence from commercial norms such as non-payment of bills.

339. In any event, we are not satisfied on the evidence that the OFT is correct to state that the origin of the dispute between the parties was not "competition related".

340. Thus, Austins and Burgess are direct competitors in the Stevenage/Knebworth and Welwyn/Welwyn Garden City areas. In his letter of 13 August 2001 in response to Burgess' original complaint of 10 August 2001 about Mr Hope's alleged rudeness, Mr John Austin pointed out that he had agreed not to open a branch in competition with any other funeral director and was "extremely sad" that Burgess had chosen to open a Knebworth branch, which was "such a shame" (see also Mr John Austin's letter of 23 August 2001). We note also that during the proceedings in 2003 Austin's also opened a branch in Welwyn Garden City, in direct opposition to Burgess' branch there.

341. The present dispute, therefore, takes place in the context of what appears to be strong competitive rivalry between Austins and Burgess. Moreover, leaving aside the question of whether one side or the other was unjustifiably rude, a large part of Burgess' original complaint appears to relate to its view that Austins/Harwood Park was unreasonably using the crematorium to further its funerals business, to the competitive detriment of Burgess. Those disputed matters concerned, for example, promotional material about Austins' funerals being placed in waiting rooms at the crematorium being used by Burgess' customers; signs at the crematorium indicating that Harwood Park was owned by Austins; Burgess deleting its customers' telephone numbers on forms supplied to Harwood Park, apparently through fear that undue advantage might be taken of the customer by Austins; and Burgess' concern that Austins might take undue advantage of its customers as regards the sale of funeral plans. While the Tribunal does not in any

way condone rudeness or other inappropriate behaviour, it seems to us difficult to say that the dispute between the parties was not "competition related".

342. In Mr Justin Burgess' witness statement of 22 June 2004, he comments that: "Austin's are much bigger than we are and I firmly believe that their intention is to use their control of the Crematorium to force us out of the market in areas where we are in competition with them." Austins has not filed evidence to contradict that statement.

343. We also reject the OFT's argument that the elimination of Burgess would be of no consequence because another funeral director would enter the Stevenage/Knebworth market. The OFT itself found, at paragraphs 63 to 65 of the Decision, that there are barriers to entry at funeral directing level. Moreover, having seen the fate of Burgess, a funeral director contemplating setting up in Knebworth/Stevenage might not wish to place itself effectively at the mercy of Harwood Park. As we have already held, there is no credible alternative crematorium to Harwood Park for that area.

344. Finally we are concerned that the OFT should dismiss, apparently lightly, the fact that those of Burgess' customers with pre-paid funeral plans who had expressed a preference for Harwood Park would not be able to have their wishes fulfilled, on the grounds that Burgess would not be "in breach of contract". Competition law is there in order to protect consumer choice, and to ensure that legitimate consumer needs and preferences are not thwarted by the actions of dominant firms, particularly for vulnerable classes of consumers. We would have thought that the OFT, as a regulator with both competition and consumer functions, would have taken seriously the potential effect of Austins' actions on Burgess' customers with pre-paid funeral plans.

345. For all those reasons we consider that an abuse by Harwood Park/Austins of its dominant position in crematoria services in the Stevenage/Knebworth area in the period from 22 March 2004 is fully established on the evidence, subject to the issue of objective justification, which we will address below.

ABUSE OF AUSTINS' DOMINANT POSITION IN FUNERAL DIRECTING SERVICES IN STEVENAGE/KNEBWORTH

346. *Commercial Solvents* and *Tèlèmarketing*, cited above, show that it is an abuse of a dominant position for an undertaking dominant in one market to refuse to supply the goods or services in which it is dominant for the purpose of eliminating competition in a neighbouring or associated market. Similarly *Tetra Pak II*, cited above, shows that a dominant firm may be found to have committed an abuse in a neighbouring market in which it is not dominant if there are close links between the two associated markets.

347. In the present case, even assuming, contrary to the overwhelming evidence, that Harwood Park is not dominant in a geographic market which includes Stevenage/Knebworth, it is established that Austins is dominant in the market for funeral directing services in Stevenage/Knebworth.

348. Contrary to the view expressed by the OFT at paragraph 73 of the Decision, *Tetra Pak II* shows that, at least in certain cases, it is not necessary to show that the action which constitutes the abuse (here refusal of supply of crematoria services) takes place in the same market as the market in which the undertaking has a dominant position. In *Tetra Pak II*, the dominant position was held on the market for aseptic carton packaging, whereas the abuse took place on the separate but related market of non-aseptic carton packaging where Tetra Pak had a leading, but not dominant, position. The Court of Justice held, at paragraphs 25 to 26 of its judgment, that an abuse may take place on a market which is not the dominated market.

349. As the Court of Justice held in *Tetra Pak II*, at paragraph 24, the ambit of the special responsibility of a dominant firm depends on the circumstances of each case. Those circumstances include whether there are "close associative links" between the two markets, whether the firm that is alleged to have acted abusively is present in both markets, whether the customers of the firm are actual or potential customers in both markets, whether the firm has a high market share in both markets, and whether its position in the dominated market would increase its ability to act independently on the other market (*Tetra Pak II*, at paragraphs 27 to 31).

350. Here the abuse which we have found to exist (refusal of supply of crematoria services) has had the inevitable effect of tending to strengthen Austins' dominant position in funeral directing services in the Stevenage/Knebworth area. To put the matter round the other way, Austins, with a dominant position in funeral directing services in the Stevenage/Knebworth area, has used its control over the crematorium at Harwood Park to weaken a competitor in the supply of funeral directing services in that area. As already seen, the links between crematoria services and funeral directing services are very close, both services being supplied to the consumer on the same occasion as part of the single package. The consumer in effect buys both services at the same time through a single transaction via the funeral director. Harwood Park/Austins is present in both markets.

351. In our view, Austins' position in the market for funeral directing services in Stevenage/Knebworth would have enabled it to view with relative equanimity the prospect of losing Burgess as a customer at Harwood Park, since Austins with a strong reputation and dominant position in that area, could reasonably expect to inherit a substantial part of the business lost by Burgess from its Knebworth branch.

352. In those circumstances it seems to us that the criteria set out in *Tetra Pak II* are met, and that Austins' actions may equally be analysed as an abuse of its dominant position in funeral directing services in Stevenage/Knebworth, even on the unlikely assumption that Harwood Park is not dominant in the supply of crematoria services in that area.

ABUSE IN THE PERIOD JANUARY 2002 TO MARCH 2004

353. The OFT's principal submission is that in this period there is no "substantial harm" to competition. Burgess continued in business in the Stevenage/Knebworth area and its level of business in fact increased in 2002 as compared with 2001.

354. According to Burgess' evidence to the OFT on 31 October 2003, during this period Burgess itself was denied direct access to Harwood Park, but the latter apparently tolerated funerals for customers of Burgess being booked through Nethercotts. The bookings were made on Nethercotts' behalf, and all communications were between Harwood Park and Nethercotts, the latter being responsible for organising dates, times,

etc. Mr Justin Burgess did not attend the crematorium, although on occasions Burgess staff attended and Burgess cars were used. The arrangement was an entirely temporary and unenforceable one, designed to maintain Burgess' business until the OFT's decision. Burgess paid Nethercotts to act on its behalf. During this period, Burgess could not sell pre-paid funeral plans on the basis that they could honour customers' wishes to be cremated at Harwood Park.

355. By letter of 16 October 2002, Austins objected to Nethercotts using Burgess' vehicles including the hearse. However, Austins knew that Burgess was using Nethercotts right up to March 2004, as is apparent from Austin's letter of 22 March 2004.

356. We accept that, on the evidence before us, Burgess' Knebworth office, operating via Nethercotts, was able to conduct more cremations in 2002 than in 2001. Similarly the figure we have for cremations from that office in 2003 is up on that for 2001, albeit lower than the figure for 2002. On the other hand, those figures do not necessarily show what business Burgess would have achieved in normal circumstances in the period 2002 to 2004. Mrs Burgess' third witness statement appears to show that since the Tribunal's interim measures order of 21 July 2004 the level of business at Knebworth has been significantly higher than in previous years.

357. More generally, however, we reject the OFT's argument that, because Burgess continued to operate in Knebworth during this period, there was no abuse. The arrangement through Nethercotts was always no more than a "holding operation" to maintain Burgess in business until the OFT's decision was available. It seems to us incorrect in principle to find that there is no abuse because a company has managed temporarily to protect itself while the OFT's investigation is completed. Moreover, the OFT's argument is circular, because it pre-supposes the continuation of the temporary arrangement, whereas the temporary arrangement was only intended to continue until the OFT was in a position to decide whether or not abuse was shown. A dominant firm whose conduct would otherwise be abusive cannot in our view avoid a finding to that effect on the basis that the intended victim has managed to remain in business while the investigation is carried out.

358. In the present case, access to Harwood Park by Burgess itself was denied for a period of more than two years between January 2002 and March 2004. Burgess had to pay Nethercotts to act on its behalf, thereby incurring extra costs. Burgess could not make the funeral arrangements itself, and could not maintain the reputational advantage of its own presence at cremations during this period. In principle, we regard that as a refusal to supply by Austins/Harwood Park which calls for an objective justification if it is not to be regarded as an abuse.

359. Moreover, for the reasons already given, Harwood Park's conduct during this period appears to us to constitute the application of dissimilar conditions to equivalent transactions, thereby placing Burgess at a competitive disadvantage, vis-à-vis its competitors Austins and the Co-op, in the Stevenage/Knebworth area. As already indicated, Burgess indirectly had to pay more for using the facilities of Harwood Park, since it had to pay Nethercotts. It could not use its own vehicles, its proprietors could not be present, and all arrangements had to be made through Nethercotts. Such discrimination by a dominant firm in our view is an abuse, unless objectively justified.

360. For those reasons we consider that the actions of Austins/Harwood Park in the period January 2002 to March 2004 equally constituted an abuse of the dominant position of the latter in the markets for either or both of crematoria services or funeral directing services in the Stevenage/Knebworth area, subject to the issue of objective justification.

361. On 22 March 2004 Harwood Park declined to accept any further bookings through Nethercotts on behalf of Burgess. We note that by this stage the OFT had indicated to Burgess that its final decision was likely to be taken by mid-March, although there was later some slippage.

## XII OBJECTIVE JUSTIFICATION

362. It does not appear to the Tribunal that the OFT relies, as such, on objective justification in the Decision. To the extent that the OFT submits that the origin of the dispute was not "competition-related" we have already dealt with that submission above.

363. As regards Austin's submissions that the fact of the original dispute amounts to "objective justification", and that Burgess did not abide by regular commercial practice within the meaning of *United Brands*, we have no evidence that Burgess are bad payers or the like. The evidence we have as to the original incident in 2001 relates to an allegation of rudeness made by Burgess about the Manager of Harwood Park, following which Burgess said in a solicitor's letter of 20 September 2001 that they did not wish to be involved in acrimony and that they regarded the matter as closed. There was also tension about Austins using Harwood Park for promoting its own funeral plan and other matters. At a later stage, there is an allegation that Burgess staff were rude, and that leaflets promoting Austins' funeral plan were placed in waste bins. In recent correspondence which was copied to the Tribunal, the matters which appear to have caused friction appear to have been resolved. In particular Burgess has made an apology to Mr Hope as regards its original complaint in August 2001.

364. In our judgment, focussing on the original dispute, we do not exclude the possibility that certain of Harwood Park's grievances may have had some justification. However, in our view the various matters referred to in the evidence fall far short of "objective justification" for the purposes of the Chapter II prohibition.

365. First of all, as already stated, the original dispute was not confined to personal relations, but also related to the competitive relationship between Austins and Burgess. Secondly, while this is an industry in which personal relations have importance, if difficulties are encountered in that regard it is not in our judgment a proportionate response for a dominant firm to cut off access to its facilities to a smaller rival with which it is in competition in a neighbouring market where it is also dominant. Senior management should, in our judgment, ordinarily be able to find other solutions.

366. Thirdly, we do not see how the original "falling out" in August 2001 could have justified the outright refusal to supply in March 2004, nor do we accept that Austins can fairly characterise Burgess' use of Nethercotts as a "subterfuge" since they were aware of what Burgess was doing and it was their own actions which had compelled Burgess to have resort to Nethercotts.

367. As regards the period 2002 to 2004, we similarly take the view that to prevent Burgess from having access to Harwood Park in its own right for the period of over two years, compelling them to use Nethercotts, was not proportionate to the original incidents. We note that during that period Burgess twice asked Austins to reconsider, in July 2002 and June 2003, but Austins declined to do so, despite having indicated that such an application after 6 months would be given "serious consideration".

368. It follows in our judgment that there is no objective justification for the abuse of dominant position which we have found to exist.

## XIII WELWYN/WELWYN GARDEN CITY AND HATFIELD

*Welwyn/Welwyn Garden City: funeral directing services*

369. As regards funeral directing services, Austins has a branch in Welwyn and opened a further branch in Welwyn Garden City in 2003. Burgess has a branch in Welwyn Garden City. We are told that two other funeral directors have branches in Welwyn Garden City, but the OFT did not obtain any information from those funeral directors.

370. According to Annex 2(A) of the Decision, in 2002 Austins' Welwyn branch conducted about […] times the number of funerals as Burgess' Welwyn Garden City branch. In the absence of figures from the two other funeral directors in Welwyn Garden City, we are unable to find, one way or the other, whether Austins has a dominant position in funeral directing services in the Welwyn/Welwyn Garden City area. We leave that point open.

371. However, given that Austins has a strong position in Welwyn, and since 2003 a branch in Welwyn Garden City, we are able to find that Austins has a strong position in the supply of funeral directing services in that area. Furthermore, Austins is in direct competition to Burgess in that area, and is by a considerable margin larger than Burgess in that regard.

*Crematoria services: Welwyn/Welwyn Garden City*

372. Turning to crematoria services, in our view there is considerable evidence that would support a finding that Harwood Park is dominant in the supply of crematoria services in the Welwyn/Welwyn Garden City area.

373. As far as consumer preferences are concerned, in 2002 not only the vast majority of Austins' customers in Welwyn, but also over 70 per cent of Burgess' customers in Welwyn Garden City were supplied with cremations at Harwood Park. The latter figure supports Mrs Burgess' evidence in her witness statement of 22 June 2004 to the effect that most customers coming into the Welwyn Garden City branch have firmly in mind that they want a cremation at Harwood Park.

374. There is also evidence in Mrs Burgess' witness statements of a loss of business at Burgess' Welwyn Garden City branch in the period since the end of March 2004, when access to Harwood Park was denied, of the order of around […] per cent. The Tribunal's interim measures order of 14 July 2004 did not apply to Burgess' Welwyn Garden City branch so that, in contrast to the situation in Knebworth, the Welwyn Garden City branch of Burgess saw no upturn in business following the making of that order.

375. Even assuming that the figures for Burgess' Welwyn Garden City branch may have been affected by other factors, such as a general decline in the level of business done by funeral directors in the area as suggested by Austins, we accept the evidence that Burgess has lost business to a material extent in Welwyn Garden City as a result of Burgess' exclusion from Harwood Park. The fact that Austins/Harwood Park, by excluding access, is able to inflict considerable commercial damage on a competitor in the Welwyn/Welwyn Garden City area is in our view a strong indication that Harwood Park has market power in that area. If consumers in that area had considered West Herts, for example, to be an acceptable substitute, no such damage to Burgess' business in Welwyn Garden City would have occurred.

376. In addition, it appears that Welwyn Garden City is within a ten mile radius of Harwood Park, and thus within Harwood Park's catchment area, that is to say within the area that Austins regarded as Harwood Park's "exclusive" area: see Austins' letter of 4 March 2003. The planning inspector's report of 26 July 1993 makes reference to mourners from Welwyn Garden City as being among those intended to be served by the crematorium Austins was proposing to build.

377. The OFT argues that there is a credible alternative to Harwood Park, in that West Herts is only marginally further away in distance from Burgess' Welwyn Garden City branch. Burgess, however, responds that the driving times are substantially longer. The driving time to Harwood Park is 20 to 35 minutes, with the return trip being 15 to 25 minutes. The driving time to West Herts is 45 to 60 minutes with the return trip being 35 to 45 minutes. On that uncontested evidence, it would appear that the crematorium at West Herts would involve material extra travelling time compared with Harwood Park. West Herts also appears to lie outside the industry "rule of thumb" of 30 minutes travelling time from Welwyn Garden City. We further note the OFT's evidence that Harwood Park appears to be able to maintain a substantial price premium over West Herts (£360 as against £285) even allowing for some difference in what is included in the charges.

378. We consider that that evidence, taken as a whole, points strongly towards the conclusion that Harwood Park's dominance in crematoria services extends to the Welwyn/Welwyn Garden City area. However, since we lack comprehensive market share data (including the number of funerals taking place at Harwood Park and organised by the other two funeral directors in Welwyn Garden City) we do not feel justified in making a formal finding to that effect.

379. In these circumstances, it would be open to the Tribunal to remit the matter to the OFT for the necessary market share data to be obtained, or for the Tribunal to investigate the matter itself. However, we do not consider it necessary to follow either course since it seems to us that the principle of *Tetra Pak II* applies as regards the Welwyn/Welwyn Garden City area.

380. As already pointed out above, in *Tetra Pak II* the Court of Justice held that the extent of the special responsibility of the dominant firm has to be decided in the circumstances of

the particular case. In particular, an abuse which takes place in a neighbouring market in which the undertaking in question is dominant may fall within the Chapter II prohibition if the links between the dominant position and the alleged abuse are close enough.

381. In the present case, the act which constitutes the abuse, namely the refusal to supply/discrimination in question, was a unitary course of action, by which we mean that, in acting as they did, Austins/Harwood Park did not distinguish between the various different branches of Burgess. Harwood Park's refusal to supply/discrimination applied to Burgess generally. We have already found that that refusal to supply/discrimination was an abuse of Harwood Park's dominant position in the supply of crematoria services in the Stevenage/Knebworth area. We find it difficult to see any reason in principle why that abuse should not extend to the refusal to supply/discrimination in its entirety, even if the effect of the abuse is felt in part outside the geographic area in which the undertaking in question is dominant, at least in so far as a material effect on competition is shown.

382. However, for the purposes of this judgment we do not need to go as far as that. In this case, Harwood Park is dominant in the supply of crematoria services in the Stevenage/Knebworth area and has, at the very least, a leading position in the supply of crematoria services in the adjacent area of Welwyn/Welwyn Garden City. In addition Austins is dominant in the supply of funeral services in the Stevenage/Knebworth area, and has a strong position in the supply of funeral services in the Welwyn/Welwyn Garden City area. Burgess is in competition with Austins in both Stevenage/Knebworth and in Welwyn/Welwyn Garden City. The effect of the action of Harwood Park is to weaken substantially competition in the Stevenage/Knebworth area to the point of potentially eliminating Burgess from that area, while at the same time materially weakening Burgess' ability to compete with Austins in Welwyn/Welwyn Garden City. In that latter area Austins is already substantially larger than Burgess. Austins has, in addition, opened a branch in Welwyn Garden City in direct opposition to Burgess.

383. In addition, to the extent that Harwood Park's actions eliminate or seriously weaken Burgess' ability to compete in the Stevenage/Knebworth area, that tends to weaken

Burgess generally, by depriving Burgess of whatever economies of scale and/or scope there may be between its different branches. The closure of Stevenage/Knebworth for example could mean that Burgess then has fewer activities capable of making a contribution to central overheads, and less scope for utilising assets such as hearses and funeral cars in an efficient way as between its different branches. That, in turn, is capable of affecting adversely Burgess' ability to compete effectively against Austins in other areas such as Welwyn/Welwyn Garden City. In addition, it is evident that, by denying Burgess access to Harwood Park, Austins/Harwood Park has imposed on Burgess a substantial competitive disadvantage in competing with Austins in the Welwyn/Welwyn Garden City area, with the likelihood of substantial adverse effects on Burgess' reputation in that area as well.

384. In those circumstances, in our judgment, the links between Austins/Harwood Park's dominant position in at least the Stevenage/Knebworth area and the effects of its actions in the Welwyn/Welwyn Garden City area are sufficiently close for Austins/Harwood Park's special responsibility not to distort competition to apply to the latter.

385. On that basis, in our judgment the Chapter II prohibition extends to cover the actions of Austins/Harwood Park having material effects on competition in the supply of funeral directing services in the Welwyn/Welwyn Garden City area, even assuming that Austins/Harwood Park has merely a leading, but not a dominant, position in the latter area.

386. As far as Hatfield is concerned, it is common ground that West Herts is the nearest crematorium, although parts of the Hatfield area are on the edge of a ten mile radius from Harwood Park. Austins is not present in Hatfield in the supply of funeral directing services. The evidence as to Burgess' loss of business in Hatfield is in our view inconclusive, although we cannot rule out some effect on Burgess' business in that area.

387. In view of the findings we have already made, the only circumstances in which we would need to decide whether the "special responsibility" of Harwood Park extended to include Burgess' Hatfield branch would be if Austins/Harwood Park maintained the

right to refuse to supply Burgess in Hatfield, irrespective of the position as regards Stevenage/Knebworth and Welwyn/Welwyn Garden City. Given, as we understand it, that an agreement has now been reached between the parties restoring unrestricted access to Harwood Park, we see no present need to decide whether the infringement of the Chapter II prohibition which we have found in relation to Burgess' branches in Stevenage/Knebworth and Welwyn/Welwyn Garden City extends to Burgess' Hatfield branch.

## XIV PROCEDURE

388. In *Pernod-Ricard* [2004] CAT 10, decided on 10 June 2004, the Tribunal held that the OFT should have given Pernod, the complainant, the opportunity to comment before it closed its file in that case: see paragraphs 232 to 235 and 239 to 245 of that judgment. The present Decision, adopted on 29 June 2004, gave no opportunity for Burgess to comment before its adoption, notwithstanding what was apparently an informal promise to do so made during the meeting of 3 June 2003.

389. Had it been necessary, we would have been minded to decide that it was, in any event, necessary to set aside the Decision because of that procedural failure.

390. We observe, finally, in the procedural context that this case involved small or medium sized businesses operating in local markets. Competition issues arising in such markets can be important for the participants and for local consumers. Often the OFT represents the only viable route for enforcing the Act in such contexts, given the difficulty for smaller undertakings of obtaining the necessary market information or supporting the costs of legal proceedings. We hope the OFT may take the opportunity to review its procedures to ensure that such cases can be dealt with within an acceptable time frame.

## XV CONCLUSIONS

391. For the reasons given in this judgment

(1) The OFT's decision no. CA98/06/2004 of 29 June 2004 is set aside.

(2) The Tribunal finds that Harwood Park and Austins infringed the Chapter II prohibition from 18 January 2002 to 22 March 2004 by refusing access to Harwood Park except through Nethercotts for cremations to be carried out by the Knebworth and Welwyn Garden City branches of Burgess, and from 22 March 2004 by refusing all access to Harwood Park in respect of cremations to be carried out by those branches.

(3) To that extent, the appeal is allowed.

Christopher Bellamy John Pickering Richard Prosser

Charles Dhanowa
Registrar 6 July 2005