Neutral citation [2006] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1067/1/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

31 October 2006

Before:

Vivien Rose (Chairman)
Michael Blair QC
Mr Michael Davey

BETWEEN:

ACHILLES PAPER GROUP LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

Mr. Philip Collier (of Proud Goulbourn Limited, Chartered Accountants) appeared for the Appellant.

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

Heard at Victoria House on 12 September 2006.

JUDGMENT

Note: Excisions in this judgment (marked "[…][**C**]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

I INTRODUCTION

1. By a Notice of Appeal dated 1 June 2006, Achilles Paper Group Limited ("Achilles") appeals to the Tribunal against Decision no. CA/98/03/2006 taken by the Office of Fair Trading ("OFT") on 31 March 2006 ("the Decision").

2. In the Decision the OFT concluded that a number of suppliers of stock check pads had infringed the prohibition contained in section 2(1) of the Competition Act 1998 ("the Chapter I prohibition"). Those suppliers were 4imprint Group PLC (and its wholly owned subsidiary Broadway Incentives Limited); Bemrose Group Limited (and its wholly owned subsidiary BemroseBooth Limited) ("Bemrose"); and Achilles. Stock check pads are generic paper pads that are used by staff in restaurants, cafes and similar establishments to record customers' orders. They are small pads of numbered leaves of paper, with tear off sheets to assist in recording a customer's order.

3. The OFT found that the suppliers were involved in an agreement and/or concerted practice which had the object of fixing the prices at which they would sell stock check pads to their customers. They also shared the market for the supply of stock check pads in the United Kingdom in that they agreed not to try to target each other's customers.

4. The OFT imposed a penalty of £255,697.50 on Achilles for this infringement of the Chapter I prohibition. Achilles was granted a 50 per cent reduction in accordance with the OFT's leniency programme, reducing the penalty to £127,848.75.

5. In its appeal Achilles does not challenge the OFT's findings on infringement but seeks only to challenge one aspect of the OFT's calculation of the penalty imposed on it.

II THE LEGAL FRAMEWORK

The Relevant Provisions of the Competition Act 1998

6. Section 2 of the Competition Act 1998 ("the Act") provides, so far as material:

> "(1) … agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited …
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which –
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions …
>
> …
>
> (c) share markets or sources of supply;
>
> …."

7. Section 36 of the Act provides that, on making a decision that an agreement has infringed the Chapter I prohibition, the OFT may require the undertaking concerned to pay a penalty if the OFT is satisfied that the infringement has been committed intentionally or negligently. By virtue of section 36(8), no penalty fixed by the OFT may exceed 10% of the turnover of the undertaking determined in accordance with provisions specified in an order made by the Secretary of State. At the material time, that order was the Competition Act 1998 (Determination of Turnover for Penalties Order) 2000 (S.I. 2000/309) as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (S.I. 2004/1259) ("the Penalties Order"). According to that Order, the undertaking's turnover for the purposes of section 36(8) is its worldwide turnover for the business year preceding the date on which the decision of the OFT is taken.

8. Section 38 of the Act requires the OFT to publish guidance, approved by the Secretary of State, as to the appropriate amount of any penalty. Under section 38(8) the OFT must have regard to that guidance when setting the amount of the penalty. The OFT's published guidance at the material time was the *OFT's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, December 2004) ("the Guidance").

9. Any party to an agreement in respect of which the OFT has made a decision may appeal to this Tribunal against, or with respect to, that decision pursuant to section 46(1) of the Act. The powers of this Tribunal to determine appeals under section 46 are set out in paragraph 3 of Schedule 8 to the Act, which provides:

> "3.- (1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may-
>
> (a) remit the matter to the OFT
> (b) impose or revoke, or vary the amount of, a penalty,
> …
> (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
> (e) make any other decision which the OFT could itself have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.
>
> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

10. Section 60 of the Act provides, so far as material:

> "(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

(3) The court must, in addition, have regard to any relevant decision or statement of the [European] Commission."

The Relevant Provisions of the Guidance

11. The starting point for the quantification of penalties is the Guidance. The Introduction to the Guidance provides as follows:

"**Policy objectives**

1.4 The twin objectives of the OFT's policy on financial penalties are:

• to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and

• to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.

The OFT has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets and other cartel activities, and serious abuses of a dominant position. The OFT considers that these are among the most serious infringements of competition law. The deterrent is aimed at other undertakings which might be considering activities contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition, as well as at the undertakings which are subject to the decision."

12. According to the Guidance, there are five steps to be followed in determining the amount of the penalty. Step 1 sets the starting point figure based on an assessment of the seriousness of the infringement and the turnover of the undertaking in the relevant product and geographic market identified in the decision. Step 2 is an adjustment to take account of the duration of the infringement - the starting figure may be multiplied by not more than the numbers of years of the infringement, in cases where the infringement has lasted for more than one year (paragraph 2.10 of the Guidance). Step 3 is an adjustment for other factors, in particular to ensure that the penalty has the appropriate deterrent effect and to take account of any special characteristics of the undertaking in question (paragraphs 2.11 to 2.13). Step 4 is a further adjustment for aggravating or mitigating factors, examples of which are listed in paragraphs 2.14 to 2.16. Step 5 provides for an adjustment to ensure that the maximum penalty permitted under the Penalties Order is not exceeded and to avoid "double jeopardy" in

a case where a fine for the same conduct has already been imposed by the European Commission or in another Member State.

13. Any reduction in the penalty as a result of a leniency application is applied to the figure arrived at after the five steps described above.

14. Achilles' challenge to the OFT's calculation of the penalty imposed in this case concerns Step 3 of the assessment. The relevant extracts from the Guidance for the purposes of the present appeal provide as follows:

> "**Step 3 – Adjustment for other factors**
>
> **2.11** The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anti-competitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.
>
> **2.12** The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step.
>
> **2.13** In exceptional circumstances, where the relevant turnover of an undertaking is zero (for example, in the case of buying cartels) and the penalty figure reached after the calculation in Steps 1 and 2 is therefore zero, the OFT may adjust the amount of this penalty at this step."

The Relevant Domestic and European Case Law

(i) The role of the Guidance in the assessment of penalty by the OFT and by the Tribunal

15. This Tribunal has previously held that the OFT retains a margin of appreciation, both as to the interpretation and as to the application of the Guidance in any particular case. In *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 at paragraph 168 the Tribunal stated:

> "We observe, first, that the Guidance is what it says, namely guidance, and is not to be construed as if it were a statute. Secondly, as we have already held, the OFT has a margin of appreciation in applying the Guidance…"

at paragraph 172, the Tribunal continued:

> "In our view in all those circumstances the Tribunal should focus primarily on whether the overall penalty imposed is appropriate for the infringements in question. In our view, provided that the OFT has remained within its margin of appreciation in applying the Guidance, the Tribunal's primary task is to assess the justice of the overall penalty, rather than to consider in minute detail the individual Steps applied by the OFT, particularly as regards Step 1 and Step 3. The criticisms by the appellants in this case directed at Step 1 should not overlook the fact that, had the OFT taken a different starting point at Step 1, a different calculation could have been used in Step 3, for example."

Similarly, at paragraph 102 of the Tribunal's judgment in *Umbro & ors v Office of Fair Trading* [2005] CAT 22 the Tribunal stated:

> "in our judgment it is implicit in the fact that the Guidance is just that – i.e. guidance, rather than precise statutory rules – that the OFT retains a margin of appreciation, both as to the interpretation of the Guidance, and as to its application in any particular case."

16. The Court of Appeal in its recent judgment in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318 (dismissing appeals against the Tribunal's decisions in *Argos Limited* and *Umbro & ors* cited above) confirmed this approach stating (at paragraph 161 of the judgment) that:

> "The language of section 38(8) is general in nature. It does not bind the OFT to follow the Guidance in all respects in every case. However, in accordance with general principle, the OFT must give reasons for any significant departure from the Guidance."

17. So far as the relevance of the Guidance to the Tribunal's consideration of the penalty is concerned, in *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading* [2002] CAT 1 ("*Napp*") the Tribunal said as follows:

> "497. We observe first, that the Tribunal is not bound by the Director's Guidance. The Act contains no provision which requires the Tribunal to even have regard to that Guidance.
>
> 498. Schedule 8, paragraph 3(2) of the Act, provides that "the tribunal may confirm or set aside the decision which is the subject to the appeal, or any part of it, and may … (b) impose, or revoke, or vary the amount of, a penalty … or (e) make any other decision which the Director could have made."
>
> 499. It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed ab initio by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.
>
> 500. That said, it does not seem to us appropriate to disregard the Director's Guidance, or the Director's own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The Director's Guidance will no doubt over time take account of the various indications given by this Tribunal in appeals against penalties.
>
> 501. We emphasise, however, that the only constraint on the amount of the penalty binding on this Tribunal is that which flows from the Maximum Penalties Order… It is clear from that Order that Parliament intended that it is the overall turnover of the undertaking concerned, rather than its turnover in the products affected by the infringement, which is the final determinant for the amount of the penalty…
>
> 502. We agree with the thrust of the Director's Guidance that while the turnover in the products affected by the infringement may be an indicative starting point for the assessment of the penalty, the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is

> prepared to uphold severe penalties for serious infringements. As the Guidance makes clear, the achievement of the necessary deterrent may well involve penalties above, often well above, 10 per cent of turnover in the products directly concerned by the infringement, subject only to the overall 'cap' imposed by the Maximum Penalties Order. The position in this respect is no different in principle under Article 15(2) of Council Regulation no. 17, albeit that the applicable maximum penalty under that provision is differently calculated."

18. This passage in the *Napp* judgment was cited with approval by the Court of Appeal in the recent judgment in *Argos Limited* as being an appropriate approach for the Tribunal: see paragraphs163 and 182 of that judgment.

(ii) The importance of deterrence

19. This Tribunal acknowledged the importance of deterrence under the Act in its judgment in *Genzyme v Office of Fair Trading* [2004] CAT 4, where it stated:

> "705. Moreover, in our view the OFT was right to consider the question of deterrence (paragraphs 427 to 428 of the decision). Enforcement by way of deterrent penalties is an important aspect of the 1998 Act: see *Napp* at [502] and *Aberdeen Journals (No.2)* at [492]."

20. Insofar as paragraph 2.11 of the Guidance reflects the policy objective that a penalty should have the "necessary deterrent effect", the Tribunal notes the judgment of European Court of Justice in the Joined Cases 100-103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825 and, in particular, paragraphs 105 and 106 which state:

> "105. …it must be remembered that the Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Articles 85 (1) or 86 of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.
>
> 106. It follows that, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary

> deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community."

(iii) The relevance of financial weakness of the infringing undertaking

21. Paragraph 2.11 of the Guidance gives the OFT discretion to decide whether to take into account a number of considerations when making an adjustment for other factors at Step 3 of the penalty calculation. One of the factors which the OFT may take into account at Step 3 is an undertaking's financial position. As regards the alleged financial weakness of the infringing undertaking, the Court of First Instance held in Joined Cases T-236/01, T-239/01, T-244/01, T-251/01 and T-252/01 *Tokai Carbon Co Ltd and others v European Commission* [2004] ECR II-1181, [2004] 5 CMLR 28 ("*Tokai Carbon*") at paragraphs 369 and 370 that cartelists could not pray in aid their economic difficulties and those of the market in seeking a reduction in the fine imposed by the Commission. The Court stated:

> "369…cartels come into being, in particular, at a time when a sector is experiencing difficulties. If that circumstance did not justify the grant of an attenuating circumstance (see paragraph 345 above), it cannot justify a reduction in the fine in the present context either.
>
> 370…According to settled case-law, the Commission is not required when determining the amount of the fine to take account of an undertaking's financial losses since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market…"

22. In *Tokai Carbon* the Court also considered the potential insolvency of one of the cartelists and held as follows (at paragraph 372):

> "the fact that a measure taken by a Community authority leads to the insolvency or liquidation of a given undertaking is not prohibited as such by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value".

23. With regard to the relevance of the judgments of the Court of First Instance to issues in this case, we adopt the approach taken by this Tribunal in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 30 namely

that although there are a number of differences of detail between the calculation of penalties by the OFT under the United Kingdom system and the calculation of penalties by the European Commission, we should not so far as possible act inconsistently with the principles applicable to comparable situations under Community law.

III THE FACTUAL BACKGROUND

24. Achilles, which is based in Oldham, is a merchant of commercial paper and also produces and sells stock check pads. The company was originally established as a private limited company on 27 November 1985 under the name Shadowmoss Limited. Shadowmoss Limited changed its name to Achilles Paper Limited on 12 February 1986. Achilles Paper Limited changed its name to Achilles Paper Group Limited on 9 April 2001.

25. Achilles acquired its check pads business on 29/30 March 2001 from Grosvenor Paper Supplies Limited ("Grosvenor"). Achilles was at all material times owned (and continues to be owned) by Kevan Winward together with members of his family. Kevan Winward is one of Achilles' directors. Between the start date of the infringement and 29/30 March 2001 Grosvenor was also owned by Kevan Winward together with members of his family. On 29/30 March 2001 Kevan Winward sold to Achilles 100 per cent of the shares of Grosvenor. Following that sale the check pads business was transferred to Achilles and Grosvenor ceased to trade.

The events leading up to the Decision

26. In December 2003, the OFT received a leniency application from Bemrose, alleging that it, and other suppliers of stock check pads, had been involved in price fixing and market sharing arrangements. In particular, Bemrose named Achilles as one of the other parties to the collusive arrangements.

27. In February 2004, the OFT decided that there were reasonable grounds for suspecting that three suppliers, including Bemrose and Achilles, had been involved in price fixing and market arrangements relating to stock check pads. At that stage, the OFT

began a formal investigation under the Act and on 6 April 2004, OFT officials carried out an unannounced visit to the premises of Achilles. At those premises, documents were found which indicated to the OFT that Achilles was involved in the agreement and/or concerted practice. On 30 April 2004, Achilles applied for leniency in relation to the suspected infringement of the Chapter I prohibition. Both Bemrose and Achilles provided general information and made key staff available for interview. Both Kevan Winward and Lynne Gallagher, an Achilles sales person with responsibility for check pads, were interviewed by the OFT. On 24 May 2004, Achilles provided the OFT with a statement of co-operation and on 28 December 2005 a statement of objections was issued by the OFT.

28. In a letter dated 9 February 2006 Proud Goulbourn, Achilles' accountants provided figures for Achilles' relevant turnover in the supply of stock check pads for the years ended 31 March 2003 and 2005. Subsequently, by letter dated 28 February 2006, Brabners Chaffe Street, Achilles' then solicitors, informed the OFT that Achilles did not intend to make any oral representations or any further written representations, save as to the amount of penalty. Insofar as is relevant to the current proceedings, the letter stated:

> "Special characteristics
>
> As you will have seen from the financial statements that were enclosed with Proud Goulbourn Limited's letter to you of 9 February 2006, Achilles is not in a healthy position financially. Its turnover for year ended 31 March 2005 was £[...][**C**]. Achilles is, and always has been, a small family-run business. Achilles operates in a "traditional" industry with high fixed costs and low overall profitability, as will be apparent from the financial statements. Achilles' business has a high cost base, with fixed machinery and other costs. Paper purchasing and labour costs form the bulk of their variable costs. For the twelve months up to and including March 2005, Achilles recorded, for its business as a whole, a gross profit of £[...][**C**] and, after deduction of salaries, pensions, rents and other administrative costs, a net loss of £[...][**C**].
>
> Achilles therefore submits that turnover is not the only factor which should be taken into account here; when gross profit in the Relevant Market is taken into consideration, a very different picture emerges from that which might be inferred from a turnover figure.
>
> I am instructed that a fine of even in the region of, say, £30,000.00 would cripple Achilles. The effect of that would, Achilles submits, be particularly unattractive from the perspective of competition in the Relevant Market (and

indeed in related markets for paper products) because Achilles' departure from the Relevant Market would leave Booths as the single dominant operator – more or less in the same position as it was in 1996 before Achilles entered and started vigorously competing. Therefore, for the OFT to impose a hefty fine of (so I am instructed) £30,000.00 or more may mean that Achilles goes out of business…".

IV THE DECISION

29. The Decision sets out, first, the facts, including the evidence relied on (Section I); secondly, the OFT's legal and economic assessment (Section II); and thirdly, its decision and determination of the penalties (Section III).

30. At paragraph 39 of the Decision the OFT summarised the events that it considers, together, constituted an infringement:

> "39. Following a period of intense competition, the Bemrose check pads business contacted the Achilles check pads business by telephone in April 2000 to discuss conditions in the market for the supply of stock check pads and also the possibility of obtaining certain types of stock check pad from the Achilles check pads business. This initial telephone call led to a series of meetings and other ongoing contacts which, by the end of May 2000 at the latest, resulted in the Bemrose and Achilles check pads businesses agreeing to fix the prices of and share the market for the supply of stock check pads in the UK until December 2003. In particular the Bemrose and Achilles check pads businesses:
>
> • agreed not to target each other's existing customers; and
> • agreed to impose coordinated price increases for stock check pads.
>
> As part of the above, the Bemrose and Achilles check pads businesses also exchanged confidential information including customer and price lists. In particular, the parties:
>
> • agreed to a 15 per cent price rise to be implemented in October 2000;
> • agreed to a 7.5 per cent price rise to be implemented on 1 April 2001; and
> • agreed to a 3 per cent price rise to be implemented in May 2002."

31. At paragraph 233 of the Decision the OFT concludes that: "…Having considered carefully the evidence and analysed the views set out in the Parties' representations, the OFT finds that there was a single overall agreement and/or concerted practice between the Bemrose and Achilles check pads businesses that had as its object the

fixing of prices in and the sharing of the market for the supply of stock check pads in the UK".

32. The OFT then went on to consider the issue of financial penalties, generally. In that regard the Decision states:

> "237. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently, but it is under no obligation to determine specifically whether there was intention or negligence. The OFT considers that serious infringements of the Chapter I prohibition which have as their object the restriction of competition, such as price fixing and market sharing, are by their very nature committed intentionally. The intention (or negligence) relates to the facts, not the law. Ignorance or a mistake of law is thus no bar to a finding of intentional infringement.
>
> 238. In this case, the Bemrose and Achilles check pads businesses were involved in an agreement and/or concerted practice that had the object of fixing prices in and sharing the market for the supply of stock check pads in the UK. Since the introduction of the Act, the OFT has undertaken a widespread programme to educate the business community about the Act. It is well established that price fixing and market sharing between competitors is unlawful and that such activities can lead to substantial penalties.
>
> 239. The OFT considers that, in the light of these facts and on the basis of the evidence set out in this Decision, the Parties cannot have been unaware that the actions of the Bemrose and Achilles check pads businesses for which they are or were responsible had the object of preventing, restricting or distorting competition. Moreover, the OFT considers that the very nature of the agreement and/or concerted practice in this case was such that the Parties could not have been unaware that their object was to restrict competition. The OFT is therefore satisfied that the infringement was committed intentionally or, at the very least, negligently."

33. The OFT set out its calculation of the penalty to be imposed on Achilles as follows:

> "***Penalty for Achilles***
> *Step 1 - starting point*
>
> 291. Achilles' financial year runs from 1 April to 31 March. Achilles' turnover in the relevant product and geographic market in the business year preceding the date of this Decision (the year ended 31 March 2005) was £[...][**C**].
>
> 292. The OFT has analysed its findings regarding the seriousness of this infringement in accordance with paragraphs 243 to 249 above and it has fixed

the starting point for Achilles at [...][**C**] per cent of relevant turnover. The starting point for Achilles is therefore £[...][**C**].

Step 2 – adjustment for duration

293. In accordance with paragraph 252 above, the figure for Achilles generated at the end of Step 1 is multiplied by 3.75. The figure for Achilles at the end of Step 2 is therefore £[...][**C**].

Step 3 – adjustment for other factors

294. As noted at paragraphs 253 to 255 above, the OFT considers that it is necessary to deter undertakings (including other undertakings which might be considering activities which are contrary to the Chapter I prohibition) from engaging in anticompetitive practices. The OFT is of the view that where a party which is liable for an infringement has a large total turnover, the penalty figure reached at the end of Step 2 may not represent an adequate deterrent for that party. In such a case the OFT may consider it appropriate to increase the party's penalty at this stage to a sum significant enough to the party to act as an adequate deterrent, having regard, in particular, to its total turnover. However, the OFT considers that the figure reached at the end of Step 2 for Achilles is a significant sum in relation to Achilles because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Achilles' total turnover for the business year ended 31 March 2005.

295. Achilles has made representations concerning its financial position and has provided the OFT with details of its financial status for the business year ended March 2005; in particular, Achilles notes that it [...][**C**]. As noted at paragraph 253 above, financial position may be a relevant consideration in the context of determining whether the sum reached at the end of Step 2 is an appropriate sum for deterrence, not only in relation to the party in question but also in relation to third parties who may consider engaging in anti-competitive activities. The OFT notes that [...][**C**]. In the circumstances, therefore, the OFT does not consider that Achilles' financial position warrants a reduction of Achilles' penalty at Step 3. The OFT therefore makes no adjustment at this Step and the figure for Achilles at the end of Step 2 is £[...][**C**].

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

296. The OFT has evidence that Kevan Winward, a director of Achilles, was involved in the infringement. The OFT considers that this is an aggravating factor and increases the penalty by [...][**C**] per cent.

Mitigation

297. The OFT has evidence that since the OFT's investigation began, Achilles has undertaken competition law awareness training and implemented a competition law compliance programme. The OFT considers that in the light of these factors Achilles' financial penalty should be reduced by [...][**C**] per cent.

298. Achilles asserted that it ceased its involvement in the infringement as soon as the OFT intervened and argued that this should be a mitigating factor. However, the OFT considers that the infringement came to an end on 17 December 2003, before the OFT intervened by the use of its formal powers of investigation. Achilles does not therefore receive a reduction in penalty for ceasing its involvement in the infringement. In any event, the OFT considers that in an infringement that involves horizontal price fixing and market sharing it is not appropriate to give a party a reduction in penalty merely because it ceases its involvement in the infringement following the OFT's intervention.

299. Achilles made representations concerning its financial position. The OFT has already addressed this issue at paragraph 295 above in relation to Step 3 of the penalties calculation. The OFT also does not consider that Achilles' financial position constitutes a mitigating factor at Step 4 for the purposes of calculating a financial penalty in accordance with the guidance on penalties currently in force.

300. Achilles' representations also asserted a number of other factors that Achilles argued should be taken into account when setting a penalty for Achilles. In particular Achilles argues that:

> (i) it competed with Bemrose prior to the start of the infringement [...][**C**];
> (ii) it was not the leader or instigator of the infringement;
> (iii) its pricing levels did not exploit customers because in 2002 the prices of some products were lower than they had been 8 years previously;
> (iv) Achilles' competition with Bemrose prior to the infringement may have had a lasting structural effect on the relevant market to the benefit of consumers;
> and
> (v) it did not know that its conduct was illegal because it has no in-house legal department and nobody at the company was aware of competition law. The OFT does not consider that these representations constitute mitigating factors for the purposes of calculating a financial penalty in accordance with the guidance on penalties currently in force.

301. Finally, Achilles argued in its representations that its full cooperation with the OFT during the course of the investigation should be a mitigating factor. However, continuous and complete cooperation was one of the conditions on which leniency was granted and so the OFT makes no extra reduction for mitigation for this factor.

> 302. The total percentage added to the penalty for aggravating circumstances is [...][**C**] per cent and the total percentage deducted for mitigating circumstances is [...][**C**] per cent. As a result of Step 4, no adjustment is made to the penalty having considered aggravating and mitigating circumstances. The financial penalty for Achilles will therefore be £255,697.50 subject to Step 5 and leniency.

34. The OFT concluded that no adjustment was needed at Step 5 since the penalty calculated did not exceed the maximum and there was no element of double jeopardy. Achilles was granted a 50 per cent reduction in accordance with the leniency programme.

V THE GROUNDS OF APPEAL

35. In its Grounds of Appeal, Achilles challenges Step 3 of the OFT's calculation where the OFT declined to reduce the level of the penalty on the basis of the Achilles' weak financial position. Achilles asserts that the OFT drew certain incorrect conclusions from the details contained in Achilles' financial statements when assessing the financial position of Achilles, with the result that it made Achilles appear far stronger financially than it actually was. Achilles relies on five arguments.

36. First, the figure quoted by the OFT in paragraph 295 of the Decision as the profit made by Achilles in the financial year ending 31 March 2002 included a substantial amount which was a dividend from Grosvenor. This dividend was simply a means of transferring the accumulated reserves of Grosvenor as part of the acquisition of Grosvenor by Achilles and was not derived from trading in the relevant products during that year. Achilles argues that the OFT should have excluded this sum from that financial year's figures and relied instead on the net profit before tax figure in the consolidated profit and loss account in that year.

37. Secondly, Achilles argues that the net profits set out in the company's financial statement should be reduced by the value of the dividends paid on the shares held by Mr Winward and his four children, all of whom work for the company. These dividends were paid to the Winwards in lieu of remuneration in order to reduce the

burden of national insurance contributions payable by Achilles. The dividends should be treated as remuneration when assessing the financial health of the company.

38. Thirdly, Achilles argues that the OFT should have had regard to the reduction in the net assets of the company over the three years ended 31 March 2005. This showed, Achilles contends, the precarious financial position of the company.

39. Fourthly, Achilles argues that the penalty set by the OFT would make Achilles insolvent. If liquidation followed, this would leave Achilles' main competitor in the stock pads market in a monopoly position. Further, Achilles was active in a market for different paper goods and the removal of Achilles from that market would also leave its main competitor in that market in a monopoly position.

40. Finally, Achilles refers to various measures which the directors of the company had adopted during the financial year ending 31 March 2005. These included loans made to the company and the drawing down of funds from those loan accounts to replace the remuneration and dividends that would otherwise have been deducted in the profit and loss account. These measures showed the considerable sacrifices made by Mr Winward and his children in an effort to keep the business going since the OFT investigation began. Further, the legal and professional fees incurred by Achilles in connection with the OFT's investigation represent, in Achilles' view, a substantial penalty in themselves, given the company's profitability and precarious financial position.

Witness evidence adduced by Achilles in support of its appeal to the Tribunal

41. In support of its appeal, and by way of explanation of the various financial statements annexed to the notice of appeal, Achilles filed with the Tribunal a witness statement, dated 20 July 2006, produced Philip Edward Collier, a Chartered Accountant of Proud Goulbourn Limited, formerly Proud Goulbourn, which have acted as accountants for Achilles since it was formed in 1985 and for Grosvenor since it was formed in 1991. Mr Collier also gave evidence at the hearing on 12 September 2006.

VI TRIBUNAL'S ASSESSMENT

42. The Tribunal must first consider to what extent an undertaking's poor financial position is relevant to the amount of the fine which should be imposed. The OFT referred us to the judgment of the Court of First Instance in Joined Cases T-236/01 etc *Tokai Carbon Co Ltd* cited above. We accept, as this Tribunal indicated in the *Argos* case ([2005] CAT 13) at paragraph 30, that we should not, so far as possible, act inconsistently with the principles applicable to comparable situations under Community law. However, as the Tribunal also pointed out in *Argos* there are a number of differences of detail between the calculation of penalties by the OFT under the United Kingdom system and the calculation of penalties by the European Commission. The OFT's Guidance as to the appropriate amount of the penalty states that considerations at Step 3 "may include" special characteristics, including the size and financial position of the undertaking in question. This is different from the wording of the Commission's 1998 Guidelines[1] on the method of setting fines in accordance with which the Commission calculated the fine in the *Tokai Carbon* case. Paragraph 5(b) of those Guidelines envisaged that the Commission should take into account only an undertaking's "real ability to pay in a specific social context".

43. Whether or not the difference in wording between OFT Guidance and the Commission Guidelines means that the OFT is under a broader duty to take financial difficulties into account, we take the view that where the OFT does in fact consider an undertaking's submission concerning financial hardship under Step 3, it must ensure that it bases that consideration on the appropriate and accurate figures.

44. The first argument made by Achilles relates to the inclusion in the operating profit figure for year ending 31 March 2002 of the dividend paid by Grosvenor.

45. We agree with Achilles that the OFT should have excluded this dividend from the profit figure which it took into account for that year in paragraph 295 of the Decision. Although as considered further below, the OFT is entitled to rely on the figures provided to it by a company in its financial statements, there was enough material on

[1] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Art 65(5) of the ECSC Treaty, OJ C 9, 14.1.1998, p.3-5.

the face of those statements to alert the OFT to the fact that the profits for that year contained this one-off item. The Company Trading and Profit and Loss Account provided to the OFT by Achilles showed clearly that the dividend received amounted to more than two thirds of the net profit for the year. The consolidated profit and loss account of the group (in which the receipt of the dividend by Achilles was cancelled out by the transfer of the dividend by Grosvenor) showed the figure excluding the dividend. Further, both the Directors' Report for Achilles and the Grosvenor's profit and loss account which were before the OFT showed that Grosvenor had not traded during the year ending 31 March 2002. The dividend figure was not therefore relevant to the assessment of the financial health of Achilles' business in the years under consideration in paragraph 295 of the Decision.

46. However, the inclusion of the correct figure would not, in our view, have made any difference to the OFT's conclusion that the level of operating profit in the years ending 31 March 2002 and 2004 did not support Achilles' request for a reduction in the fine on the grounds of financial hardship. The net profit figure arrived at once the dividend from Grosvenor is left out of account is not out of line with the figure which the OFT referred to as the profit for the financial year ending 31 March 2004. The inclusion of the dividend does not, in our opinion justify overturning the Decision or remitting the matter back to the OFT for further consideration.

47. The second ground of appeal relates to the treatment of the dividends paid by Achilles to the Winward family. As Mr Collier explained in paragraph 9 of his witness statement:

> "In 2003 I discussed with the directors the possibility of reducing the remuneration levels paid to Mr Winward and his four children who all work for the company and instead taking dividends, which could result in significant savings in national insurance costs for the company and the individuals. The directors decided to implement this change and the financial statements of Achilles for the year ended 31st March 2004 reflect the change, showing directors remuneration reduced from £[...][**C**] in the year ended 31st March 2003 to £[...][**C**] in the year ended 31st March 2004 and dividends increased from £[...][**C**] in the year ended 31st March 2003 to £[...][**C**] in the year ended 31st March 2004. In their decision, the OFT referred to a profit of £[...][**C**] for the year ended 31st March 2004. However for the purpose of assessing the true profitability of the company for the year, I believe that the dividends of £[...][**C**] should be aggregated with the remuneration as a cost, with the result

that instead of there being a profit of £[...][**C**] [there would be a net loss before tax and after dividends of £[...][**C**]]."

48. Achilles argues that the OFT should have treated both remuneration and dividend payments in the same way on the basis that they were both a reward to the directors for their services to the company. This would have resulted in the OFT taking a lower net profit figure into account in assessing the amount of the penalty. The directors, Achilles says, were prepared to accept a reduction in their remuneration because of the expectation of receiving increased dividends. In the accounts, the remuneration was deducted from the gross profit to arrive at the net profit for the year. The dividends, however, were deducted (as shown in the profit and loss account) much later on, that is from profit after taxation, and before arriving at the retained profit for the year. If the dividends had been treated like remuneration, there would have been a reduction in the net profit figure and that is the figure on which the OFT should have based its assessment, rather than the one actually used in paragraph 295 of the Decision.

49. The OFT argues that it is entitled to rely on the financial information supplied by Achilles at the administrative stage. It is not suggested that the relevant turnover and profit figures relied on by the OFT at that stage did not appear in Achilles' financial statements.

50. We reject Achilles' argument that the dividends paid to the directors should be treated as remuneration for the purposes of assessing the profitability of the company. It is no doubt correct, as Achilles states in its Grounds of Appeal, that it would not have been acceptable to the Winwards to receive a reduction in their remuneration without knowing that higher dividends would be paid. But the net profit for the year is (subject to the earlier point regarding the Grosvenor dividend) the correct measure for the OFT to look at when considering whether a reduction in the fine should be made at Step 3. As Mr Collier accepted in cross-examination, the auditors, of which Mr Collier is a director, signed off the annual financial statements for Achilles stating that in their opinion the financial statements "give a true and fair view of the state of the company's and of the group's affairs" as at the particular year end. It would not be

appropriate for the OFT to treat dividends to shareholders as an overhead when arriving at the company's net profit.

51. The difficulties which would arise if the OFT were expected to unravel the figures set out in the company's financial statement are illustrated by trying to determine how much of the dividend paid in the year ending March 2004 should be treated as remuneration. Mr Collier's evidence suggests that the whole of the dividend paid to the directors should be aggregated with the directors' remuneration. But that would not make the profit figures for that year comparable with the previous years since the directors did receive substantial dividends in the year ending March 2003 before the adjustment Mr Collier describes in paragraph 9 of his statement was agreed.

52. The third and fourth arguments raised by Achilles can be considered together. Achilles points to the reduction in its total shareholders' funds over the years as evidencing the effect of the continued losses incurred in financial years 2002/3, 2003/4 and 2004/5 if one aggregates dividends with directors' remuneration in arriving a net profits before tax. Further, Achilles submitted draft financial statements for the year ended 31 March 2006 which showed continued loss-making; the losses, it argued, would result in the company becoming insolvent if the penalty imposed by the OFT (and required to be recognised in those accounts) were not to be significantly reduced.

53. Mr Collier dealt with these draft financial statements in his witness statement. After describing the loans made to Achilles by Mr Winward and his family in the financial years 2004/05 and 2005/06 he states:

> "12.Attached to this statement as annexed document C is a copy of the company's draft financial statements for the year ended 31st March 2006, as prepared by my company. It should be noted that the Directors Remuneration for the year had reduced to £[...][**C**], as shown on the Trading and Profit and Loss Account on page 14, and that there were no dividends again. For the purpose of these draft financial statements, provision has been made for the whole of the OFT penalty, £127,849, as shown in the Trading and Profit and Loss Account on page 14. The effect of the provision on the financial position of the company can be seen on the Balance Sheet on page 4, which shows that there would be net liabilities of £[...][**C**]. This means that if the penalty were to stand at

£127,849, the company would be insolvent and my advice to the directors would be to seek immediate specialist advice from insolvency practitioners. A consequence of a company going into liquidation is that the assets usually realise considerably less than their carrying value in the financial statements prepared on a going concern basis, and if this happened in the case of Achilles the OFT would receive from the liquidation considerably less than the penalty of £127,849.

13. Mr. Winward and his children have made considerable sacrifices in an effort to keep the business going since the OFT investigation began. Mr Winward has invested a substantial sum from his pension savings into the company and his children have personally borrowed money to lend to the company, all of which is now at risk of not being repaid. These commitments have been made by Mr Winward and his children at the same time as they have had to reduce their remuneration and dividends from the company from an aggregate of £[...][**C**] in the year ended 31st March 2002 to £[...][**C**] in the year ended 31st March 2006.

14. It is worth noting that without the provision for the OFT penalty and the exceptional charge for Bad debts of £[...][**C**], the company would have made a small profit for the year ended 31st March 2006 . It is further worth noting that without the Legal fees of £27,737 in connection with the OFT's investigation, the loss would have only been a small loss for the year ended 31st March 2005. I believe therefore that there is still an underlying viable business."

54. The OFT disputes the way in which the OFT's fine has been accounted for in the draft financial statement prepared by Achilles for the year ending 31 March 2006. The OFT does not accept that the accounts show that Achilles would become insolvent if it had to pay the fine imposed. The OFT points to the fact that the turnover of the company has remained reasonably static over the period 2001/02 to 2004/05. In general the movement in the cost of sales mirrors the turnover figure so that the gross profit margin has remained virtually stationary at between [...][**C**] % over the period. The OFT argues that one of the principal causes of Achilles' difficulties is the manner in which the directors removed funds from the company for their own remuneration in the knowledge that this would have reduced the level of shareholder funds. They submit that the amounts taken out of the company by the directors were excessive in view of the difficulties the company was facing.

55. But in any event, the OFT submits, the fact that a fine may result in a company going into liquidation and exiting the market is something that the OFT should take into

account but is not necessarily a reason for reducing the fine. The OFT cites the *Tokai Carbon* case where the Court of First Instance stated (at paragraph 372) that

> "the fact that a measure taken by a Community authority leads to the insolvency or liquidation of a given undertaking is not prohibited as such by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible or intangible elements represented by the undertaking would also lose their value".

56. The Tribunal considers that the same principle applies here. Achilles' concern that a substantial fine would result in it becoming insolvent was raised by the company in its submissions to the OFT before the decision was adopted. In the letter of 28 February 2006 from its then solicitors Brabners Chaffe Street, the company argued that a fine even considerably lower than the fine eventually imposed "would cripple Achilles" and might mean that the company would go out of business. The OFT's decision not to reduce the fine in response to this request is, in our view, well within its margin of appreciation and is not something which this Tribunal should disturb.

57. Further, the OFT is not required to take into account the scale of legal and professional fees incurred by the undertaking in the course of the investigation when considering what level of fine should be imposed in order to provide an effective deterrent.

58. Achilles raised an additional factor which was not present in the *Tokai Carbon* case, namely that Achilles' exit from the relevant market might leave one market player with very significant market power. Mr Kennelly on behalf of the OFT responded by pointing out that there is no evidence that barriers to entry in this market are particularly high and thus no evidence to suggest that other undertakings will not intervene if the remaining undertakings were to increase their prices above competitive levels. He added that the market is under the scrutiny of the OFT in any event and there was no substantial concern that anti-competitive conduct would follow in the market if Achilles exited.

59. We accept the OFT's submission that it is difficult to predict how the market would develop in the event that Achilles does go into liquidation. Further, a principle that

the OFT must limit the fines it imposes in order to maintain a certain number of competitors in a relevant market, or any other market in which the undertaking concerned is also active, would be unworkable. Again, the OFT's consideration of how to balance the need for fines to operate as an effective deterrent against the possibility of adverse effects on the structure of the market as a result of the fines is a consideration within the OFT's margin of appreciation.

60. In the light of the conclusions set out above, it has not been necessary for us to decide whether the amounts paid to the directors of Achilles by way of remuneration and dividends together with the operation of the directors' loan accounts indicate that the directors were withdrawing excessive funds from the company, as the OFT contended, or were making considerable sacrifices in order to keep the company in business, as Achilles contended. To assess that question, even on the basis of the additional evidence before the Tribunal which was not available to the OFT, would have been difficult. This perhaps shows the problems that might arise if the OFT did not rely on the information set out in the company's financial statements when implementing the steps set out in the Guidance.

VII CONCLUSION

61. It follows from the above that Achilles' appeal against the penalty imposed by the OFT is unanimously dismissed. There will be interest on the penalty to run, subject to any further submissions the parties wish to make, at 1 per cent above the Bank of England base rate from the date set for the payment of the penalty in the Decision, namely 9 June 2006, until payment or judgment under section 37(1) of the Act. However, we note that it is open to the OFT to make such arrangements as they see fit for the payment of the fine if they foresee any risk of non-recovery of any part of the sum imposed by way of penalty and interest.

Vivien Rose Michael Blair QC Michael Davey

Charles Dhanowa 31 October 2006
Registrar