Neutral citation [2007] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1072/1/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

9 March 2007

Before:

Lord Carlile of Berriew QC (Chairman)
Dr Arthur Pryor CB
Adam Scott TD

BETWEEN:

SEPIA LOGISTICS LIMITED
(formerly known as DOUBLE QUICK SUPPLYLINE LIMITED)

and

PRECISION CONCEPTS LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

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

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

Heard at Victoria House on 15 December 2006.

JUDGMENT

I INTRODUCTION

1. By a Notice of Appeal dated 25 August 2006 and an amended Notice of Appeal dated 25 September 2006 and registered as lodged with the Tribunal on 26 September 2006, Double Quick Supplyline Limited ("DQS") and Precision Concepts Limited ("PC") appeal to the Tribunal against Decision No. CA/98/04/2006 taken by the Office of Fair Trading ("OFT") on 28 June 2006 ("the Decision"). Since lodging its appeal, DQS has changed its name to Sepia Logistics Limited.

2. In the Decision, the OFT concluded that a number of suppliers of aluminium double glazing spacer bars had infringed the prohibition contained in section 2(1) ("the Chapter I prohibition") of the Competition Act 1998 (the "1998 Act"). Those suppliers were EWS (Manufacturing) Limited ("EWS"); Ulmke Metals Limited ("Ulmke"), Thermoseal Group Limited ("Thermoseal") and DQS. The Decision was also addressed to the ultimate parent companies of EWS, Ulmke and DQS, on the basis that each of these parent companies formed part of the same undertaking as their respective subsidiaries, and was equally liable for the participation of their respective subsidiaries in the infringement. PC is the ultimate parent company of DQS.

3. The OFT found that the suppliers participated in an agreement and/or concerted practice involving (a) customer allocation/market sharing in relation to certain target customers of UKae Limited ("UKae") for aluminium spacer bars, (b) fixing a target price in relation to those target customers for the most popular sizes of aluminium spacer bars, and (c) a non-compete arrangement, which included the fixing of a minimum price, in relation to non target customers for the most popular sizes of aluminium spacer bars.

4. The OFT imposed a penalty of £180,000 on DQS for this infringement of the Chapter I prohibition. In their appeal DQS and PC do not challenge the OFT's finding that DQS infringed the Chapter I prohibition but seek only to challenge the amount of the penalty imposed by the OFT. In addition, the

appellants challenge the OFT's conclusion that DQS and PC form part of the same undertaking and contend that the Decision should have been addressed to DQS alone, and not also to PC.

5. For the reasons given below, we find that the penalty imposed is appropriate in the circumstances, and that the OFT was correct to conclude that PC and DQS form part of the same undertaking. We therefore unanimously dismiss this appeal.

6. An important part of this appeal concerned a plea for a mitigated penalty by the appellants on the grounds of financial difficulties, together with allegations that the OFT did not at the relevant time have at its disposal all the information necessary properly to address that plea. At the outset we make it clear that in our judgment, where an undertaking is making a plea for a mitigated penalty to a regulator (whether under the auspices of a formal leniency policy or otherwise, as was the case here), the onus must be on the applicant to provide the regulator with all information and/or documentation needed to assess its application and not on the regulator actively to seek out or to require production of those documents and/or that information.

II THE LEGAL FRAMEWORK

The Relevant Provisions of the Competition Act 1998

7. Section 2 of the Competition Act 1998 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 unless they are exempt in accordance with the provisions of this Part.
>
> (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;
>
> (b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

8. Section 36 of the 1998 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 per cent of the turnover of the undertaking determined in accordance with provisions specified in an order made by the Secretary of State[1].

9. Section 38 of the 1998 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").

10. 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 1998 Act. The powers of this Tribunal to determine appeals under section 46 are set out in paragraph 3 of Schedule 8 to the 1998 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,

[1] At the material time, that order was SI 2000/39 (the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000) as amended by SI 2004/1259 (the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004).

…

(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."

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 by the OFT in determining the amount of the penalty. The appellants' challenge to the OFT's calculation of the penalty imposed in this case concerns Steps 1 to 4 of the assessment (the fifth step, adjustment to ensure that the statutory maximum permissible penalty is not exceeded and to avoid double jeopardy, was not raised in this appeal). The relevant extracts from the Guidance for the purposes of the present appeal provide as follows:

"**Step 1 – Starting point**

2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to:

- the seriousness of the infringement, and
- the relevant turnover of the undertaking.

2.4 The starting point will depend in particular upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article 81 and/or the Chapter I prohibition. Conduct which infringes Article 82 and/or the Chapter II prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have a particularly serious effect on competition, for example, predatory pricing, is also one of the most serious infringements.

2.5 It is the OFT's assessment of the seriousness of the infringement which will be taken into account in determining the starting point for the financial penalty. When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertakings(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment will be made on a case by case basis for all types of infringement, taking account of all the circumstances of the case.

2.6 […]

2.7 The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.

2.8 The starting point may not in any event exceed 10 per cent of the relevant turnover of the undertaking.

2.9 Where an infringement involves several undertakings, an assessment of the appropriate starting point will be carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking.

Step 2 – Adjustment for duration

2.10 The starting point may be increased or, in exceptional circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement.

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 […]

Step 4 – Adjustment for aggravating and mitigating factors

2.14 The basic amount of the financial penalty, adjusted as appropriate at steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors.

2.15 Aggravating factors include:

- role of the undertaking as leader in, or an instigator of, the infringement
- involvement of directors or senior management […]
- […]

2.16 Mitigating factors include:

- […]
- adequate steps having been taken with a view to ensuring compliance with Articles 81 and 82 and the Chapter I and Chapter II prohibitions
- […]
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily."

(Footnotes omitted.)

The Relevant Domestic and European Case Law

13. In its judgment in *Achilles Paper Group Limited v. Office of Fair Trading* [2006] CAT 24, the Tribunal summarised the relevant domestic and European case law, including the role of the Guidance in the assessment of the penalty by the OFT and by the Tribunal (at paragraphs [15] to [18]), the importance of deterrence (at paragraphs [19] to [20]) and the relevance of financial weakness of the infringing undertaking (at paragraphs [21] to [23]). For the sake of brevity, we do not repeat those paragraphs here.

III THE FACTUAL BACKGROUND

14. At the time of the infringement, DQS, EWS, Ulmke and Thermoseal were all active in the market for the supply of aluminium spacer bars. Aluminium spacer bars are used to separate the panes of glass in a double-glazing system.

15. In March 2002, the OFT received an anonymous written complaint alleging price-fixing by manufacturers and distributors in the aluminium spacer bar market for double-glazing. The OFT began to investigate the matter and sought warrants from the High Court to enter and search the premises of EWS, Ulmke, Thermoseal and UKae under section 28 of the 1998 Act. The warrants were issued on 28 November 2002 and unannounced inspections were carried out at these premises by OFT officials on 5 December 2002. On 12 March 2003, the OFT made an unannounced site visit to the premises of DQS using its powers under section 27 of the 1998 Act to enter premises without a warrant and require production of documents.

16. Documents were found at the premises of the parties (but not UKae) which indicated that they were involved in an agreement or concerted practice to fix prices and share the market for the supply of aluminium spacer bars. Ulmke and Thermoseal also gave witness statements in support of applications for leniency under the OFT's leniency policy as was applicable at that time. Ulmke was conditionally granted total immunity from penalties in December 2002. In August 2003, a reduction in the level of financial penalty of forty per cent was conditionally granted to Thermoseal.

17. In the period from January to September 2003, the OFT exercised its powers under section 26 of the 1998 Act to require the production of documents and information relating to the matter under investigation. Between August 2003 and May 2006 the OFT sought further information from the parties.

18. The OFT issued a "Rule 14 Notice" to the parties on 7 July 2004, to which the parties responded in writing and/or orally in October of that year having had the opportunity to inspect the OFT's file. A year later the OFT issued a "Supplementary Statement of Objections" on 6 October 2005. The parties

were given a further opportunity to inspect the OFT's case file and make further written or oral representations.

19. On 20 June 2006, the businesses and certain assets of DQS and Plastic Building Materials Ltd ("PBM") were sold to SIG Trading Limited ("SIG"). SIG seems to have been aware that the OFT was moving towards a decision. Ownership of the shares in DQS and PBM was unaffected by the sale of the businesses and assets and, as between the parties to the sale, most if not all of the liabilities of the companies DQS and PBM appear to have been retained by those companies.

20. The OFT's Decision was issued on 28 June 2006. No one in the PC/PBM/DQS group informed the OFT of the sale and therefore the OFT issued the Decision whilst unaware of the sale of the business.

IV THE DECISION

21. Part I of the Decision sets out detailed descriptions of the parties to the infringement, the market for the production and distribution of aluminium spacer bars in the UK, the OFT's investigation process and the evidence for the infringement.

22. The infringement is described in paragraphs 68 to 147 of the Decision. At paragraph 69 the OFT summarises the infringement as follows:

> "The OFT has decided that the Parties have infringed the Chapter I prohibition by participating in an agreement and/or concerted practice during November/December 2002 in the market for the supply of aluminium Spacer Bars in the UK comprising:
>
> (a) customer allocation/market sharing in relation to certain 'target' customers ('Target Customers') of UKae for Spacer Bars;
>
> (b) fixing a target price in relation to those Target Customers, for the most popular sizes of aluminium Spacer Bars; and
>
> (c) a non-compete arrangement, which included the fixing of a minimum price in relation to non 'target' customers ('Other Customers'), for the most popular sizes of aluminium Spacer Bars."

23. In very broad terms, the infringement centres around a meeting which took place on 20 November 2002 which was attended by Howard Worthington and

Mervyn Richards of EWS, Jim Sander and John Hesketh of DQS, Martin Riley and Chris Hollingsworth of Ulmke and Gwain Paterson and Mark Hickox of Thermoseal. The OFT sets out in its Decision the background to and preparation for this meeting, including the holding of two bilateral pre-meetings between EWS and Ulmke, and EWS and DQS, respectively. Events at the 20 November meeting are described in paragraphs 99 to 124 of the Decision. The OFT quotes from statements given by Martin Riley of Ulmke and Gwain Paterson of Thermoseal both of whom recalled John Hesketh at that meeting having and reading from a print-out of UKae customers. Following the meeting, there were further contacts between the parties confirming what had been discussed and agreed at that meeting.

24. At paragraph 22 of the Decision, the OFT described the ownership structure of the companies in the DQS/PC group as follows:

> "***Double Quick Supplyline Limited***
>
> 22. DQS is a distributor of aluminium Spacer Bars to retail double glazing suppliers and/or IG unit manufacturers. At the time of the infringement, DQS distributed aluminium Spacer Bars manufactured by EWS, as well as aluminium Spacer Bars manufactured by one of EWS' competitors, Alu-pro. The proportion of DQS' total sales of Spacer Bars manufactured by EWS in 2002 was approximately 76%.
>
> 23. DQS is wholly owned by its parent company, Plastic Building Materials Ltd ("PBM"). PBM distributes a wide range of building and roofline products. PBM is a subsidiary of Saint Gerard Holdings plc, which has a majority (80%) shareholding in PBM. The remaining 20% of PBM's shares are held by Heywood Williams Group plc. DQS, PBM and Saint Gerard Holdings plc together form part of a single economic entity ultimately controlled by Precision Concepts Limited.
>
> 24. This single economic entity can be regarded as a single undertaking for the purposes of the Act. Whilst the OFT notes DQS' comments on this issue in its representations on the Supplementary Statement (its 'Supplementary Representations'), this conclusion is not affected by the fact that Heywood Williams Group plc has a minority shareholding in PBM.
>
> 25. At the time of the infringement, Charles Alan Garnet ('Jim') Sander was a Director for DQS, PBM, Saint Gerard Holdings plc and Precision Concepts Limited. Jim Sander was also Chairman of PBM. Mark Mitchell was a Sales Manager for DQS and was also a Director for DQS and PBM. John Hesketh was a DQS Sales Manager.
>
> 26. Furthermore, Jim Sander, a Director of both DQS and Precision Concepts Limited, was directly involved in the infringement. Jim Sander attended the meeting on 20 November 2002, and Howard Worthington of EWS sent a letter to Jim Sander on 21 November 2002 confirming the actions agreed at the meeting. (see paragraph 136 below).

> 27. As such, although DQS is not a wholly owned subsidiary of Precision Concepts Limited, Precision Concepts Limited has a controlling interest in the company.
>
> 28. This Decision is addressed to both DQS and Precision Concepts Limited as the legal entities responsible, and therefore liable, for the conduct of the undertaking of which they form part. DQS and Precision Concepts Limited are therefore made jointly and severally liable for payment of the financial penalty imposed in Part III.B of this Decision in respect of the undertaking's participation in the infringement."
>
> (Footnotes omitted.)

25. Paragraphs 229 to 236 of the Decision deal with a point of contention between DQS and the OFT in this appeal. DQS argued that it did not prepare or produce at the meeting of 20 November 2002 a list of UKae customers to target. The OFT states in its Decision that it was not necessary for the finding of infringement for DQS to have "prepared" such a list nor to have "produced" it at the meeting. The OFT contends that Mr Hesketh (who was previously employed by UKae) already had a list in his possession and it was enough that he read out the names on that list, whether or not the list was actually "produced". In evidence produced to the OFT Mr Sander stated that he did not recall Mr Hesketh producing at the meeting a list of customers to target and Mr Hesketh stated that he did not take any documents to the meeting. Based on the evidence provided by the other parties, however, the OFT maintained that its version of events was correct. Nonetheless, the OFT went on to say that this aspect of the agreement was not central to the finding of an infringement. It was enough to establish DQS' involvement in the infringement that Mr Hesketh mentioned the names of potential target customers at the meeting and this is something that Mr Hesketh admitted in a written statement provided to the OFT.

26. At paragraph 533 and following of the Decision, the OFT sets out its methodology for calculating the penalties imposed on the parties. The calculation of DQS' penalty is set out at paragraphs 621 to 636:

> **"Penalty for DQS**
>
> ***Step 1 – Starting point***
>
> 621. DQS' turnover in the relevant product and geographic markets (i.e. the supply of aluminium Spacer Bars in the UK) is £1,144,784 in the undertaking's last business year (1 January 2005 to 31 December 2005). The maximum starting point is therefore £114,478.

622. The OFT conclusions regarding the seriousness of this infringement are set out at paragraphs 555 to 566 above. The OFT notes from this that DQS was a party to an overall agreement and/or concerted practice to fix prices and share the market for aluminium Spacer Bars in the UK. Taking into account the seriousness of this infringement, the potential effect of the infringement and the extent of the involvement of DQS in the infringement a starting point of £80,000 (7 per cent of relevant turnover) is considered appropriate.

Step 2 – Adjustment for duration

623. The OFT has outlined at paragraphs 574 to 576 above how it proposes to calculate any adjustment for duration. No adjustment is necessary in this case since the infringement lasted for less than one year. For the reasons set out in paragraph 576 above, the OFT does not consider it appropriate to reduce the penalty at this step to reflect the fact that the infringement lasted for less than one year. The penalty for DQS at the end of this step is therefore £80,000.

Step 3 – Adjustment for other factors

624. In previous decisions the OFT has indicated that where a party's relevant turnover represents a relatively low proportion of its total turnover, the penalty figure reached at the end of Step 2 might not represent a significant sum for that party. In such a case the OFT considers it appropriate to increase the party's penalty at this stage to a sum significant enough to the party to act as a deterrent.

625. DQS' turnover in the relevant market represents around 10 per cent of its total UK turnover, and around 10 per cent of its total worldwide turnover. The OFT therefore considers that a multiplier of 2.25 should be applied at this stage to deter both DQS and other undertakings from participating in similar infringements in the future. The basic amount therefore stands at £180,000 at the end of Step 3.

Step 4 – Adjustment for further aggravating factors

626. The OFT takes the view that, although the Meeting was organised and led by EWS, which also asked DQS to bring a list of UKae customers to the Meeting, DQS should have resisted the temptation to engage in any agreement or concerted practice with its competitors of this nature.

627. The OFT notes that Jim Sander of DQS attended the Meeting of the Parties on 20 November 2002. DQS has submitted in its Supplementary Representations that although Jim Sander attended the Meeting, at the time of the infringement he *'was not involved in the operational and trading side of DQS' business'*. During DQS' oral representations in support of its Supplementary Representations, Jim Sander confirmed that *'Due to* [his] *lack of knowledge of the market and products* [he] *had no input into discussions in the main meeting'*.

628. The OFT takes the view that Jim Sander represented senior management of DQS. Mr Sander was a Director of Precision Concepts Limited and (together with his family) held majority shareholdings in both DQS and Precision Concepts Limited. He was also Managing Director of DQS at the time of the infringement and was responsible for the day to day running of the business. The OFT considers that even if he had relatively little knowledge of the workings of the business, his presence at the Meeting of the Parties during which the agreement was concluded, and the fact that at that

time he did not publicly distance himself from that agreement, constitutes involvement in the infringement. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an aggravating factor and increases the basic amount of the penalty by 10 per cent.

Step 4 – Adjustment for further mitigating factors

629. The OFT is normally minded to give a reduction in a penalty when a party has cooperated with its investigation. DQS has noted in its Supplementary Representations that *'All documents and additional information that the OFT has requested have been provided promptly and without delay'*. The OFT considers in the light of this mitigating factor that it is appropriate to reduce the amount of the penalty by 5 per cent.

630. DQS has made representations that since the commencement of the OFT's investigation, its holding company has issued a Compliance Booklet to all of DQS' employees and the other companies within the PBM group. It states that *'This booklet demonstrates DQS' commitment to ensuring that its employees and those of the other companies within its group comply with the Act'*. The OFT considers in the light of this mitigating factor that it is appropriate to reduce the amount of the penalty by a further 5 per cent.

631. DQS has also made representations regarding its financial position. For example, in its Supplementary Representations DQS states *'The OFT is requested to pay particular regard to the serious financial difficulties faced by DQS in recent months. DQS operates in an extremely difficult market and is suffering from a prolonged downturn in trade'* .

632. In paragraph 2.11 of the Guidance, the OFT states that consideration may be paid to the special characteristics, including the size and financial position of the undertaking in question. Whilst the OFT notes that DQS' financial position has deteriorated in the years since the infringement, at the same time its relevant turnover (upon which the penalty is based) has also reduced, from £1,492,960 in 2003 to £1,144,784 in 2005. DQS is, therefore, already benefiting from a reduction in the penalty by reason of its turnover in the relevant market having declined since the date of the infringement. Furthermore, no representations have been made regarding the financial position of DQS' ultimate parent, Precision Concepts Limited. As noted in paragraph 3 above, Precision Concepts Limited is equally liable for the participation of DQS in the infringement. The OFT does not therefore consider that any reduction in penalty to take account of DQS' financial position is appropriate in this case.

Step 4 – Conclusion

633. As a result, the total percentage added to the penalty for aggravating factors is 10 per cent. The total percentage deducted for mitigating circumstances is 10 per cent. The OFT therefore makes no adjustment to the penalty at step 4. The penalty for DQS stands at £180,000 at step 4.

Step 5 – Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

634. The penalty imposed by the OFT may not exceed 10 per cent of the worldwide turnover of the undertaking in the business year preceding the date on which the OFT makes its decision (i.e 2005) . DQS' worldwide turnover for 2005 is £13,188,833. Therefore, its penalty must not exceed £1,318,883.

> As the penalty does not exceed this amount, no adjustments are necessary in this regard.
>
> 635. In addition, in this case the penalty imposed by the OFT may not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years). In this case, as noted above in paragraph 581, the OFT has carried out a dual check against the Parties' total UK turnover figures for both 2001 and 2002. DQS' total UK turnover for 2001 was £12,430,000 and for 2002 it was £19,539,000. The penalty does not exceed 10 per cent of either of these amounts. Additionally, as noted above in paragraph 582, there is no double jeopardy in this case.
>
> 636. The financial penalty for DQS is consequently set at £180,000."
>
> (Footnotes omitted.)

V THE GROUNDS OF APPEAL

27. The appellants challenge the amount of the penalty imposed on them. The appellants also challenge the OFT's finding that DQS and PC should be held joint and severally liable for the penalty. Each of these points is considered in turn below. There is no appeal as to DQS' liability for the infringement.

The calculation of the penalty

Step 1 – the starting point

28. The appellants submit that the starting point adopted by the OFT is excessive and disproportionate. In the appellants' submission, the alleged infringement is not sufficiently serious or widespread to warrant such a high starting point percentage given DQS' limited involvement in the co-ordination of the alleged infringement and the very short duration of the infringement. DQS submits that it was not a leader or instigator in any of the agreements and/or concerted practices, that DQS' involvement in the proceedings was for the most part merely passive and that no documentation was prepared prior to the meeting of 20 November 2002.

29. The appellants submit that an infringement which does not in fact have any effect upon competition is less serious than one which does have an effect on

competition, regardless of whether the absence of effect was due to the intervention of the OFT. The appellants make an analogy to the nature of English criminal law in support of this submission and, by way of example, compare the higher penalties imposed for the offence of death by way of dangerous driving to those for dangerous driving. The appellants submit that any alleged infringement on DQS' part did not have a discernable effect on competition in the spacer bar market and point to paragraph 571 of the Decision in support of this submission. The appellants submit that the lack of effect on competition should have been taken into account in determining the starting point for the penalty.

30. The appellants submit that in determining the starting point percentage for the penalty the OFT should also have taken into account the "extremely low" profit margins in the aluminium spacer bars market, and that in focussing exclusively on DQS' turnover the OFT has erred in this regard.

31. The OFT submits that the Guidance permits it to impose a starting point of up to 10 per cent of the "relevant turnover" of an undertaking (paragraph 2.9). The OFT points out that the current guidance takes a more flexible approach that the previous version of the guidance, from March 2000, which had said that the starting point for activities involving price-fixing or market-sharing was "likely to be at or near 10% of the 'relevant turnover'". However, the OFT submits that the restrictions on competition at issue in the present case were very serious indeed, and that it was well within its margin of appreciation to provide for the starting point that it did. The OFT notes that the starting point was set at the same percentage of relevant turnover for all four undertakings involved in the infringement and submits that the use of a single starting point was proportionate in light of the fact that the OFT found the parties were involved in the same agreement(s) and/or concerted practice(s). The OFT submits that the starting point was set at an appropriate level having regard to the seriousness of the infringement and the relevant turnover of the undertakings concerned, in accordance with paragraphs 2.3 to 2.9 of the Guidance.

32. In relation to the appellants' submissions in respect of the level of DQS' involvement in the infringement the OFT relies on all the findings of fact contained within the Decision, and in particular on the finding in paragraph 233 of the Decision that DQS took a list of UKae customers to the meeting and that John Hesketh read names from the list. The OFT does not accept that DQS' involvement in the infringement was "passive" and furthermore, submits that even if the OFT had accepted DQS' evidence that Mr Hesketh had not taken a list to the meeting and had not read names from it, this would not alter the finding of an infringement and the supposedly passive nature of DQS' involvement would not justify any reduction in the penalty, whether at Step 1 or otherwise. The OFT relies on Cases 40/73 etc. *European Sugar Cartel, Re, Cooperatieve Vereniging Suiker Unie and others v. European Commission* [1975] ECR 1663, [1976] 1 CMLR 295 at paragraph [174] and Cases C-204/00P etc. *Aalborg Portland A/S v. European Commission* [2004] ECR I-123 paragraph [81] onwards and notes that DQS did not try to distance itself in any way from what was agreed at the meeting in the presence of its senior management.

33. The OFT submits that the question of whether an undertaking was leader or instigator of an infringement is relevant to Step 4 rather than Step 1. The OFT points out that the penalties of EWS and Thermoseal were increased at Step 4 by virtue of their leadership in the infringement. The OFT submits that it accepted that DQS and Ulmike did not play such a role, and applied no such increase to their respective penalties.

34. The OFT submits that the question of duration is not relevant at Step 1 and was dealt with at Step 2, in accordance with the Guidance.

35. The OFT submits that in determining the starting point it took turnover into account, as it is obliged to under Step 1 of the Guidance, and that DQS' profit margin was considered at Step 4 of the penalty calculation. The OFT further submits that on the facts of the case, the profit margins in question are in any case not "extremely low" or "unique", as the appellants contended.

36. As to the purported lack of effect on competition, the OFT relies on its findings at paragraphs 571, 572 and 576 of the Decision that the alleged infringement was likely to have had a significant effect on competition had it not been brought to a swift end by the OFT. The OFT submits that the fact that the OFT reached no finding as to the precise extent of the likely effect does not justify any reduction in the penalty. The OFT argued that the intervention of the OFT was of critical importance to the lack of anti-competitive effect; that having concluded that the infringement in this case had as its *object* the prevention, restriction or distortion of competition, it was immaterial whether it also had any *effect*; and that the analogy with criminal law made by the appellants was inapposite given that an effect on competition is not necessary where the infringement is constituted by the agreement and/or concerted practice itself.

Step 2 – adjustment for duration

37. The appellants submit that the penalty imposed on DQS should be significantly reduced to reflect the very short duration of DQS' involvement in the infringement. According to their submissions, the earliest possible date that DQS became involved in the alleged infringement was 20 November 2002, and the alleged infringement came to an end on 5 December 2002 (the date on which the section 28 warrants were signed). The appellants submit, therefore, that the maximum duration of DQS' involvement in the alleged infringement was 15 days, whereas the OFT in its Decision states that the infringement lasted "from at least early November 2002 […] until at the latest either 18 December 2002 […] or 14 January 2003". The appellants submit that the OFT has not taken the extremely short duration of the alleged infringement properly into account in calculating the financial penalty.

38. The appellants further submit that the OFT's decision not to apply any discount in relation to duration is clearly incorrect, and that it would be absurd to apply the same penalty to a party that had been involved in an infringement for 365 days and a party that had been involved in an infringement for 15 – or even 30 – days. The appellants refer to paragraph 2.10 of the Guidance which

states that the starting point may in exceptional circumstances be decreased to take account of the duration of the infringement and submit that if a 15-day infringement is not sufficiently short to warrant a reduction, it is difficult to envisage any situation ever arising in practice in which a duration reduction would be appropriate. The appellants submit that the OFT's finding that there was no evidence that the parties abandoned the infringement prior to the OFT's intervention was reached on the basis of incorrect facts and, in any event, is not a factor that is relevant to duration: the duration of the infringement remains the same regardless of the reasons for termination.

39. The OFT submits that it was entitled to conclude on the evidence that the infringement lasted from at least early November 2002 but that in any case, a reduction in duration by two to three weeks would not materially affect the OFT's reasoning not to reduce the penalty for duration.

40. The OFT directed the Tribunal to paragraph 2.10 of the Guidance and drew the Tribunal's attention in particular to the words "in exceptional circumstances". The OFT submits that it did not consider this to be an exceptional case because the infringement was only brought to an end by its intervention. The OFT also pointed to the final sentence of paragraph 2.10 of the Guidance which reads, "Part years may be treated as full years for the purpose of calculating the number of years of the infringement." The OFT submits that it was within its discretion to conclude that, in light of these considerations, no adjustment for duration was appropriate.

Step 3 – adjustment for other factors

41. The appellants submit that the deterrence multiplier applied by the OFT is excessive and draconian, and a substantially lower multiplier would serve as an equally effective deterrent against future infringements. In the appellants' submission, the OFT should have given greater consideration to DQS' financial position when deciding upon a suitable penalty. The appellants note that the deterrence multiplier imposed on DQS and EWS was higher than the deterrence multiplier imposed on Ulmke and Thermoseal despite, in the

appellants submission, their "more active and direct involvement" in the infringement. The appellants submit that this was disproportionate and unjust.

42. The appellants submit that the OFT should have calculated the deterrence multiplier by reference to the individual characteristics of each party, and that DQS was well aware of the seriousness of infringing the 1998 Act as it had previously received a financial penalty from the OFT for an earlier infringement. The appellants point to a competition law "Compliance Booklet" issued by PBM to all of its employees and the other companies within its group as demonstrating DQS' commitment to ensuring compliance with the 1998 Act.

43. The appellants submit that very low profit margins available in the relevant product market, the weak financial position of the appellants and an undertaking's ability to pay the penalty are relevant factors to be taken into account in calculating the penalty, that the OFT should have had more regard to the submissions made on both these points and that consequently there was no justification for imposing any deterrence multiplier. In making this submission the appellants sought to rely on the Opinion of AG Geelhoed in Case C-289/04 P *Showa Denko KK v. European Commission* delivered on 19 January 2006 and to distinguish Case T-175/95 *BASF v. European Commission* [1999] ECR 11-1581, [2000] 4 CMLR 33. The appellants submit that what remains of DQS is already strictly insolvent (because accounts receivable exceed trade creditors). A small deficiency might be covered by the business of the remaining company in the PBM/DQS group, PBM Roof Systems Limited. However, a penalty of £180,000 would be very detrimental.

44. The appellants argued that the OFT should have been more proactive at the time of the investigation in seeking financial information from the various companies. The appellants submit that it was the OFT's fault that it only had limited financial information as it had it within its powers to ask for more information and did not do so. The appellants submit that, given that additional information is now before the Tribunal, it is appropriate for the Tribunal to have regard to that information in making its assessment, regardless of whether that information was available to the OFT at the time of the Decision.

45. Finally, the appellants submit that the OFT has failed to provide proper reasons for its decision to apply this deterrence multiplier and has not set out in the Decision how this figure was calculated, and that on that basis the multiplier is arbitrary and excessive. The appellants submit that the OFT cannot hide behind a margin of appreciation in circumstances in which it has failed to provide any cogent explanation for its actions.

46. The OFT submits that it was entitled to conclude that effective deterrence required an increase in the penalty to take account of the size of the infringing undertakings and that this approach is in accordance with the paragraph 2.11 of the Guidance. The OFT notes that a multiplier for deterrence was applied to all of the parties to the Decision and that the multiplier applied to DQS is proportionate to the multipliers applied to the other parties. The OFT submits that the multiplier applied to DQS and EWS was higher than that applied to Thermoseal and Ulmke because their relevant turnover figures accounted for a much lower proportion of their respective total turnover figures. The OFT referred to paragraph 2.11 of the Guidance which, it submitted, reflects the requirement that a penalty should have the "necessary deterrent effect". The OFT relies on Cases 100/80 etc. *Musique Diffusion Française v. European Commission* [1983] ECR 1825, [1983] 3 CMLR 221 paragraphs [105] and [106], *Genzyme v. Office of Fair Trading* [2004] CAT 4, paragraph [705], and the Opinion of AG Geelhoed in Case C-289/04 P *Showa Denko KK v. European Commission* delivered on 19 January 2006 at paragraph [53]. The

OFT submits that to impose a penalty upon DQS which had no regard to the size of that undertaking would be to fail to give effect to the important policy objective of deterrence and that the OFT's decision to apply a deterrence multiplier was within its margin of appreciation.

47. The OFT submits that the application of the deterrence multiplier represented an exercise of discretion and judgment by the OFT, in order to attain the objective of deterrence, and that the appellants have not demonstrated any flaw in the OFT's exercise of that discretion and judgment.

48. The OFT submits that it considered the submissions made on financial hardship at the administrative stage of the case but that it is entitled, relying on paragraph [158] of Case T-175/95 *BASF v. European Commission*, cited above, to decide that the financial difficulties of the appellant are not a mitigating factor in the circumstances when calculating the appellant's financial penalty. The OFT further submits that it is within its discretion to conclude that no reduction in the penalty was justified by virtue of the appellants' contention as to financial hardship.

49. The OFT submits that the appellants have not demonstrated that DQS, or the combined undertaking (comprising PC, Saint Gerard Holdings plc ("SGH"), PBM and DQS) as a whole, lacks the ability to raise the necessary funds to pay the penalty. The OFT observed that, while it had concluded that DQS formed part of a larger undertaking, no accounts were provided for any entity within that larger undertaking except PBM at the stage at which it was considering DQS' financial position.

50. The OFT also noted at the hearing that (i) the appellants did not provide it with complete information at the time of the investigation, (ii) additional information has been provided to the OFT and the Tribunal during the course of these proceedings, but (iii) even the information now available to the Tribunal is in the OFT's view insufficient to allow the Tribunal to assess the financial position of the combined PC/SGH/PBM/DQS undertaking as a whole.

Step 4 – adjustment for aggravating and mitigating factors

51. The appellants submit that the OFT was incorrect to state at paragraph 628 of the Decision that Mr Sander was "Managing Director of DQS at the time of the alleged infringement and was responsible for the day to day running of the business". The appellants submit that Mr Sander was not the Managing Director of DQS at the date of the meeting, but "merely Chairman of DQS", and was not involved in the operational aspects of the business.

52. DQS submits that it did not prepare a list of target customers and did not present such a list to the meeting held on 20 November 2002. DQS acknowledges that its representatives were present when market sharing and the allocation of customers were discussed. It maintains that any involvement it may have had was merely passive.

53. The appellants submit that the application of an additional 10 per cent increase in the penalty at this stage for aggravating factors is excessive and disproportionate to the nature of Mr Sander's passive involvement in the alleged infringement.

54. The appellants submit that the OFT is under an obligation under paragraph 2.11 of the Guidance to take into account as a mitigating factor representations advanced by DQS as to its financial hardship. The appellants take issue with paragraph 632 of the Decision which refers to DQS' falling turnover and states "DQS is therefore, already benefiting from a reduction in penalty by reason of its turnover in the relevant market having declined since the date of the infringement". The appellants submit that it is wholly illegitimate for the OFT to use changes in turnover since the year in which the infringement took place as a justification for refusing to make any adjustment to reflect DQS' poor financial position.

55. The OFT acknowledges that it erred in describing Mr Sander as the Managing Director of DQS at the time of the infringement but notes that he was Chairman of PC, PBM, SGH and DQS at the material time and was also a

director of DQS and PC. The OFT points to paragraph 2.15 of the Guidance which identifies the "involvement of directors or senior management" as an aggravating factor and draws attention to Mr Sander's personal involvement in the infringement. The OFT submits that its mistake as to Mr Sander's position and title is immaterial to the level of the penalty and that the position of Chairman and director is clearly a position in "senior management".

56. In respect of DQS' supposed "passive" involvement in the alleged infringement and DQS' contentions as to financial hardship, the OFT relies on its submissions on these points as set out above under Step 3.

57. The OFT submits that it was fully entitled to take account of the benefit that DQS would derive from the effective reduction in the level of its penalty as a result of the fall in its relevant turnover in the years following the infringement. The OFT submits that it was acting within its margin of appreciation in declining to make any further adjustment in response to the representations regarding financial hardship.

Overall considerations in respect of the amount of the penalty

58. The appellants rely on the Tribunal's findings in *Argos & Littlewoods v. Office of Fair Trading* [2005] CAT 13 at [172] and *Umbro, Manchester United, JJB Sports and Allsports v. Office of Fair Trading* [2005] CAT 22 at [104] (both of which judgments were subsequently upheld on appeal to the Court of Appeal: see *Argos v Office of Fair Trading*; *JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318) in submitting that the Tribunal is entitled to reach its own conclusion as to the justice of the overall penalty, and that in so doing the Tribunal should look at the matter in the round, considering whether the final figure arrived at is proportionate to the infringements involved.

59. The appellants submit that the financial penalty is excessive and grossly disproportionate to DQS' involvement in the alleged infringement, its duration and its purported impact on competition.

60. The appellants further submit that the OFT has failed to demonstrate that the financial penalty has been calculated in a fair and reasoned manner.

61. Finally, the appellants contend that the OFT has failed sufficiently to consider representations made by the appellants as to their financial position and the effect of the penalty on their business, with the result that the penalty imposed is unduly severe.

62. The OFT submits that the penalty imposed on DQS is appropriate in light of the very serious nature of the infringement; the fact that it was only brought to an end as a result of the intervention by the OFT; the involvement of Mr Sander in the infringement; the fact that the penalty was reduced by 10 per cent for various mitigating factors; and the fact that penalty represents only a small percentage of (a) DQS' overall turnover in the relevant year and (b) the PC group's overall 2004 turnover.

Joint and several liability of DQS and PC for the penalty

63. The appellants submit that the OFT was incorrect to conclude that DQS and PC form part of a single economic undertaking. The appellants submit that DQS and PC do not operate as a single economic unit and cannot be regarded as a single undertaking for the purposes of the 1998 Act. In the appellants' submissions, the autonomous management structure, and the financial arrangements between DQS, PBM and SGH demonstrate that DQS and PC did not operate as a single economic entity. The appellants rely on Case C-222/04 *Ministero dell'Economia e dell Finanze v. Cassa di Risparmio di Firenze SpA* ECR [2006] I-289.

64. The appellants give a number of reasons in support of these submissions, including that:

(i) PC is a non-trading company with no turnover of its own. PC's principal activity is that of an investment holding company which provides management services to its subsidiary companies;

(ii) PC has never paid a dividend to its shareholders;

(iii) The loss generated by PBM and DQS in the period from January 2005 to May 2006 would cancel out the net asset value of PC as shown in its balance sheet as at 31 December 2004, and no other subsidiary companies in the group were capable of earning sufficient profit to offset these losses;

(iv) PC has only an eighty per cent share in PBM (the immediate parent company of DQS), the remaining twenty per cent being held by Heywood Williams Group plc;

(v) Heywood Williams Group plc has the right to appoint a director to the board of DQS or an investor representative to attend the board meetings of DQS;

(vi) At the time of the alleged infringement, the principal financing of DQS' working capital was by way of financing facilities that were cross-guaranteed by each of DQS, PBM and PBM Roof Systems Limited but not PC, and DQS had not received any working capital from PC;

(vii) DQS had its own banking facilities and its board of directors had autonomous authority to deal with DQS' capital expenditure and cash-flow;

(viii) The directors of DQS acted autonomously without reference to PC in terms of the day to day running and the business activities of DQS. PC had no executive responsibility for DQS in this regard;

(ix) The articles of association of DQS required the consent of Heywood Williams Group plc for various significant actions, such as the sale of the business and assets of DQS;

(x) All transactions between PBM and SGH and PC took place on a strictly arms length basis.

65. The OFT notes that while the appellants challenge the finding that PC is part of the same undertaking as DQS, there is no challenge to the finding that PBM, SGH and DQS form a single undertaking. The OFT relies on paragraph [11] of Case 170/83 *Hydrotherm Gerätebau GmbH v Compact de Dott Ing Mario Andreoli & CSAS* [1984] ECR 2999, [1985] 3 CMLR 224 which states that the term undertaking designates an "economic unit for the purpose of the subject matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal". The OFT also relies on Case C-73/95 P *Viho Europe BV v European Commission (Parker Pen Ltd intervening)* [1996] ECR I-5457, [1997] 4 CMLR 419, paragraph [16] and Case C-286/98P *Stora Kopparbergs Bergslags AB v. European Commission* [2000] ECR I-9925, [2001] 4 CMLR 370 paragraph [28].

66. The OFT submits that the essential reason it concluded that DQS and PC form part of a single undertaking is that PC exercised control over DQS through Mr Sander, Chairman and director of PC, SGH, PBM and DQS. The OFT further submits that it is of critical importance that not only was Mr Sander the Chairman and director of both PC and DQS, but he was also personally implicated in the infringement. Through Mr Sander, PC knew of the infringement, and was in a position to put a stop to it. The OFT relies on Case C-248/98 P *NV Koninklijke KNP BT v. European Commission* [2000] ECR I-9641, paragraph [73] in this regard.

67. The OFT submits that DQS and PC form part of a single undertaking because:

(i) PBM is the owner of DQS, eighty per cent of PBM is owned by SGH, and SGH is a wholly owned subsidiary of PC. In the circumstances, a presumption that the parent company controls the subsidiary arises. The OFT submits that in this case, the evidence supports rather than rebuts that presumption;

(ii) The board of PC consists of Mr Sander and his wife. It appears from information provided by DQS that PC is essentially owned by members of Mr Sander's family, whether directly or by means of a trust. PC's accounts indicate that Mr Sander has "ultimate control" of PC;

(iii) Mr Sander was the Chairman of PC, PBM, SGH and DQS at the material time;

(iv) The accounts of DQS and the consolidated accounts for PC and its subsidiaries indicate that Mr Sander personally guaranteed debts of PC's subsidiary companies and the group, whilst PC also provided similar guarantees;

(v) Mr Sander was personally implicated in the infringement. He attended the meeting of 20 November 2002 and took no steps to distance himself or any of the companies of which he was Chairman from the infringement.

68. The OFT further submits that the considerations advanced by DQS in the Notice of Appeal in respect of the joint and several liability of DQS and PC for the penalty do not demonstrate any error by the OFT in this regard.

VI TRIBUNAL'S ASSESSMENT

69. The question of whether the OFT was correct to hold PC jointly and severally liable with DQS for the penalty has a bearing on the appropriate amount of the penalty. For that reason, we consider it first.

Joint and several liability of DQS and PC for the penalty

70. Both the Chapter I prohibition and section 36 of the 1998 Act (which provides for the imposition of penalties) contain the word "undertaking", a term which has been imported from European law. An "undertaking" is not defined anywhere in the 1998 Act or in the EC Treaty, but its meaning has been

explored in the Community jurisprudence. It is well established that an undertaking does not correspond to the commonly understood notion of a legal entity under, for example, English commercial or tax law; and that a single undertaking may comprise one or more legal or natural persons.

71. In any investigation under Chapters I or II of the 1998 Act, it is necessary in practice for the OFT to identify a legal entity or entities which comprise one or more infringing undertakings[2], so that it may address its decision to one or more appropriate persons. In this case, the OFT held PC jointly and severally liable with DQS on the basis that, together with PC's other subsidiaries, they formed a single undertaking. The question is whether it was correct to do so.

72. The European Court of Justice ("ECJ") in *Hydrotherm*, cited above, said at paragraph [11]:

> "In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal."

73. Crucial to this question is the matter of control. In Case C-73/95 P *Viho v. Commission*, cited above, at paragraph [16], the ECJ held that:

> "Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them…".

74. The appellant in Case C-286/98 *Stora Kopparbergs Bergslag AB*, cited above, claimed that the CFI had erred in finding that the conduct of one of the appellant's subsidiaries could be attributed to it. The ECJ held in that case:

> "26. It should remembered that, as the Court of Justice has held on several occasions, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, in particular, *ICI* v *Commission*, cited above, paragraphs 132 and 133); Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44, and Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15).
>
> 27. In the present case, it is common knowledge, as the Court of First Instance found in paragraph 80 of the contested judgment, that the appellant

[2] See sections 36 and 37 of the 1998 Act.

had owned the entire share capital of Kopparfors since 1 January 1987. The Court of First Instance added that the appellant had not disputed that it was 'in a position to exert a decisive influence on Kopparfors' commercial policy and that it had not submitted any evidence to support its assertion that Kopparfors had behaved autonomously.

28. Thus, contrary to the appellant's contention, the Court of First Instance did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible. It also relied on the fact that the appellant had not disputed that it was in a position to exert a decisive influence on its subsidiary's commercial policy, or produced evidence to support its claim that the subsidiary was autonomous.

29. It is also incorrect to claim that the Court of First Instance thus placed on the appellant the burden of proving that its subsidiary had acted independently. As that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct, particularly since it had found, in paragraph 85 of the contested judgment, that during the administrative procedure the appellant had presented itself as being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question. In those circumstances, it was for the appellant to reverse that presumption by adducing sufficient evidence."

75. This issue was also considered in case Cases C-189/02 P etc. *Dansk Rorindustri and others v. European Commission* [2005] ECR I-5425, where the ECJ held:

"117 In that regard, it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (see, in particular, Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27).

118 It is true that the mere fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those companies are a single economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay the fine for the other (see Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 99).

119 However, in the present case the Court of First Instance did not infer the existence of the economic unit constituting the Henss/Isoplus group solely from the fact that the undertakings concerned were controlled from the viewpoint of their share capital by a single person, in this case Mr Henss.

120 It follows from paragraphs 56 to 64 of the judgment in *HFB and Others* v *Commission* that the Court of First Instance reached the conclusion that that economic unit existed on the basis of a series of elements which established that Mr Henss controlled the companies concerned, including, in addition to the fact that he or his wife held, directly or indirectly, all or virtually all the shares, the fact that Mr Henss held key functions within the management

> boards of those companies and also the fact that he represented the various undertakings at meetings of the directors' club, as indicated at paragraph 20 of this judgment, and that the undertakings were allocated a single quota by the cartel."

76. The OFT has argued that it did not rely in its Decision on a bare presumption of control arising as between PC and DQS, but that irrespective of the minority shareholding held by Heywood Williams Group plc, PC exercised actual control through Mr Sander, director of both PC and DQS, and specifically through his direct involvement in the infringement.

77. The appellants in this case have not disputed the liability of DQS for the part it played in the infringement. The first appellant, DQS, was a wholly-owned subsidiary of PBM. Eighty per cent of the shares in PBM were held by SGH, the remainder being held by Heywood Williams Group plc. SGH was a wholly-owned subsidiary of the second appellant, PC. It therefore follows that PC can be said indirectly to have owned eighty per cent of the shares in DQS. In addition Mr Sander was at the relevant time a director and/or Chairman of each of PC, SGH, PBM and DQS and the annual report and accounts for both PC and DQS for years 2001, 2002, 2003 and 2004 state that PC was the ultimate holding company of DQS and that Mr Sander was the ultimate controlling party of PC.

78. DQS' Annual Report for 2001 showed Mr Sander as an executive director being appointed Chairman on 31 May 2001; he retained both positions throughout 2002 according to the Directors' report for 2002 though the Annual Report also lists a Mr RD Smith as Chairman; in the 2003 Report, Mr Smith is shown as Chairman in the Directors' Report and as resigning on14 July 2004 but Mr Sander is listed as Chairman amongst the Executive Directors; in the 2004 Annual Report, Mr Sander is once again listed as Chairman amongst the Executive Directors. As to PC, Mr Sander is listed as Chairman amongst the Executive Directors in each Annual Report 2001-2004. At the time of the meeting on 20 November 2002, Mr Sander was at the least Chairman of PC and an Executive Director of DQS; he was stated, in the PC Annual Report 2002, to be the ultimate controlling party with 76.43 per cent of the shares, to

have entered into guarantees in respect of amounts owed by subsidiary companies amounting to in excess of £2.4 million and to have received remuneration as chairman and highest paid director of £155,000.

79. On our careful analysis of these facts, we find that Mr Sander was at the very least a controlling mind of all the relevant entities, if not the controlling mind.

80. We agree with the OFT's conclusion on this point. Nothing in the submissions of the appellants leads us to believe that the OFT was wrong to conclude that PC, through Mr Sander, was both aware of DQS' involvement in the infringement and capable of exercising control over DQS. Mr Sander was present at the meeting, and could have put a stop to DQS' involvement in the infringement had he so wished. In addition, we note that despite claiming in their notice of appeal that the right of Heywood Williams Group plc to appoint a director to the board of DQS was indicative of a lack of control by PC, the appellants acknowledged that this appointment "did not impact on the day to day running of DQS in any way". For the above reasons, we consider that there is the clearest inferential evidence that Mr Sander, who did not give evidence before the Tribunal, could exert and should have exerted decisive influence over DQS. We unanimously confirm the OFT's decision to make PC and DQS, as a single economic entity, jointly and severally liable for the penalty. We now turn to the issue of quantum.

The amount of the penalty

81. The relevance of the Guidance to the Tribunal was considered in joined cases *Argos & Littlewoods v. Office of Fair Trading* and *JJB Sports v. Office of Fair Trading* [2006] EWCA Civ 1318 ("*Argos & Littlewoods*") in which the Court of Appeal held that the approach followed by this Tribunal in the two cases under appeal was appropriate. The Tribunal's approach, as summarised by the Court of Appeal in *Argos & Littlewoods* at paragraph [163] is to comment on the application of the Guidance by the OFT and then go on to set out our own views on the seriousness of the infringement and make our own assessment of the penalty on the basis of a broad brush approach, taking the case as a whole.

A further "cross-check" is then carried out to see whether the amount arrived at is within the parameters of the Guidance. The Court of Appeal also cited with approval paragraph [499] of *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 ("*Napp*"), which reads:

> "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."

82. We have followed that same approach in the present case, first reviewing and commenting on the application of the Guidance by the OFT, before going on to consider the amount of penalty in the round.

Seriousness of the infringement

83. The OFT's Guidance states at paragraph 2.3 that the starting point is to be calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.

84. The appellants have submitted that a "discount" should have been applied to the starting point because the agreement had no discernable effect on competition. At the hearing, this was expressed in terms of a "two-step" approach in fixing the starting point for the penalty, considering first the seriousness of the infringement in the abstract, then applying an appropriate discount in cases where the infringement had no effect. We have found nothing in the OFT's Guidance to support the approach advocated by the appellants.

85. The OFT has consistently taken the position that price fixing and market sharing agreements are among the most serious infringements of the Chapter I prohibition and will attract higher penalties. The appellants cannot expect any other approach to be employed in their case. Indeed, we note that there have

been a number of cases in which this Tribunal has endorsed an outcome involving the application by the OFT of a higher starting point (as a percentage of relevant turnover) than the figure of 7 per cent used in this case (see, for example, *Argos & Littlewoods v. Office of Fair Trading* [2005] CAT 13 or *Umbro, Manchester United, JJB Sports and Allsports v. Office of Fair Trading* [2005] CAT 22).

86. The argument that a lack of effect on competition should equate to a lower starting point, and the related analogy made to the criminal law in general, appear to us to ignore the fact the Chapter I prohibition catches both "object" and "effect" type agreements and concerted practices. For this reason, we agree with the OFT that the analogy made by counsel for the appellants is inapposite.

87. The argument that the OFT erred in applying its own Guidance by focussing entirely on the relevant turnover of DQS as opposed to the profit margins attainable in the aluminium spacer bars market is also rejected. The Guidance makes clear that relevant turnover is the appropriate factor to be taken into account in so far as Step 1 of the penalty calculation is concerned. To the extent that profit margins may be relevant, our view is that the appropriate stage at which they should be considered by the OFT would be Step 3 of the penalty calculation (and also, so far as the Tribunal's review on appeal is concerned, when considering the overall appropriateness of the amount of the penalty).

88. For these reasons we conclude that the starting point chosen by the OFT was well within their discretion.

Duration

89. In our judgment, the exact duration of the agreement is not material. Both parties agree that it was a very short infringement. The appellants point out that paragraph 2.10 of the OFT's Guidance, dealing with duration, allows the OFT to decrease the starting point for the calculation of a penalty "in

exceptional circumstances". They argue that this infringement lasted for only fifteen days and that, if such a short duration is not an exceptional circumstance, it is difficult to imagine what would be. However, we note that the principal reason for the short duration (whether it was 15 days as claimed by the appellants or a slightly longer period as claimed by the OFT) was the timely intervention of the OFT.

90. DQS participated in a serious attempt to distort the market for the supply of aluminium spacer bars. The objective of the parties was to produce a long term impact on competition in that market. Had the OFT not intervened at an early stage, the evidence supports the inference that the infringement would have continued, and might have become more widespread. In our judgment it would be incorrect for a penalty levied on an undertaking to be reduced simply because the conspiracy of which that undertaking was part was discovered at an early stage.

The penalty in context

91. The deterrence multiplier applied to the penalties of DQS and EWS at Step 3 was higher than that applied to those of the other two parties. The appellants have raised the question of proportionality and argued that the multiplier applied to them was excessive and draconian.

92. As is clear from the Guidance, one of the underlying objectives of the OFT's policy on financial penalties is to act as a deterrent, both to the undertakings involved in the infringement under investigation and to other undertakings who might be considering anti-competitive activities. Paragraph 2.11 of the Guidance explicitly states that penalties may be increased at Step 3 of the process in order to achieve this policy objective.

93. We are of the view that the most appropriate way to consider the deterrence multiplier is to consider whether it leads to an unfair result in the round. In this regard, we take support from the statement of the Court of Appeal in *Argos & Littlewoods* (cited above) at paragraph [199] that "account must be

taken of the total effect of all the various steps in the calculation, rather than considering the effect of each step separately". We consider the overall proportionality of the penalties levied on the parties in paragraphs [111] to [113] below, and for that reason we say no more on this matter for now.

94. The financial position of an undertaking may be taken into account at Step 3 of the OFT's process (see paragraph 2.11 of the Guidance). It is, in our view, important to note that the wording of the Guidance in this regard is that "considerations at this stage *may* include, for example, … [the] financial position of the undertaking in question" (emphasis added). This makes it clear that it is within the OFT's margin of appreciation to take the financial position of an undertaking into account but that there can be no expectation that a penalty will be adjusted on this account. In this case, the OFT did consider the representations made as to financial hardship, and concluded that it was not appropriate in the circumstances of the case to make any adjustment to the penalty. In coming to this view the OFT noted, amongst other factors, that the fact that DQS' turnover had decreased since the period of the infringement conferred an indirect benefit on DQS in the form of a lower starting point than would otherwise have been the case.

95. In support of their decision not to reduce the penalty because of financial difficulties asserted by the appellants, the OFT sought to rely on Case T-175/95 *BASF v. European Commission*, cited above. In that case the Court of First Instance held that "to have done so would have been tantamount to conferring on the applicant an unjustified competitive advantage in relation to undertakings better adapted to market conditions." The appellants sought to distinguish this case on the basis that it deals with a situation in which the undertaking in question was less profitable than its competitors whereas in the present case, the Decision of the OFT indicates that all of the companies involved had similar gross margins. We are not convinced by this argument. The Tribunal considered the extent to which an undertaking's poor financial position is relevant to the amount of the penalty which should be imposed in *Achilles v. OFT*, cited above. The Tribunal applied the principles in joined cases T-236/01 etc. *Tokai Carbon Co Ltd and Others v. European*

Commission ECR [2004] II-1181, [2004] 5 CMLR 28 to Achilles' submissions that a substantial penalty would result in it becoming insolvent and held at [56] that:

> "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 something that this Tribunal should not disturb."

96. The appellants also sought to rely on the reference by AG Geelhoed at paragraph 53 of his Opinion in Case C-289/04 P *Showa Denko v. Commission* to the principle that "different financial resources require different fines if they are to have an equivalent deterrent effect" as authority for their submissions in relation to financial hardship. However, the issue of financial difficulties was not addressed in that Opinion; the principle referred to above was deployed in support of the assertion that a deterrence multiplier can be applied to the penalties imposed on large undertakings to ensure that those penalties have sufficient deterrent effect.

97. A further point to note is that what is relevant here is the financial position of the undertaking as a whole. The OFT argued that while it did have regard to the information that was provided in respect of the financial hardship submissions, the information provided was only partial and not sufficient to enable the OFT to conclude that the relevant undertaking as a whole was in severe financial difficulty. A letter sent by the solicitors for the appellants to the Tribunal on 8 December 2006 neatly summarises the relevant point of contention. It states:

> "We did not provide any information relating to Precision Concepts Limited ("PC") or Saint Gerard Holdings PLC ("SGH") as we did not believe that it was relevant – our opinion was, and still is, that Double Quick Supplyline Limited ("DQS") and PC/SGH are not part of a single undertaking – and this fact was continually stated within our written and oral representations."

98. As we have already indicated above, we support the OFT's finding that PC, SGH, PBM and DQS all form part of a single undertaking, and that the OFT was within its rights to hold DQS and PC jointly and severally liable for the penalty. It follows naturally that in order to assess the financial situation of that undertaking, the OFT would have required information on each of the companies which form part of that undertaking.

99. The appellants have submitted that it was incumbent on the OFT, in circumstances where it was considering the financial position of an undertaking, to ensure that it had at its disposal all the necessary information to enable it properly to make that assessment. The appellants suggest that the OFT should have made an information request or at least have informed the undertaking of what it was doing and allowed it the opportunity to provide further information.

100. We do not agree with the appellants' submissions on this point. The financial position of the undertaking in question is not something that the OFT *must* consider in all cases, but rather is something that the OFT *may* consider, upon the application of the undertaking. In making such an application, it seems to us that the onus must be on the applicant to provide the regulator with all information and/or documentation it wishes to have taken into account. A parallel can be drawn between this type of application and an application under Part 3 of the Guidance for lenient treatment for undertakings coming forward with information. In both cases, the undertaking is seeking more lenient treatment than would otherwise be the case because of special circumstances. When invoking these provisions, the usual evidential burden is reversed. It is for the applicant to satisfy the OFT that they are eligible for a reduction in penalty, and not for the OFT to disprove that application.

101. Given that in this case the OFT did not have at the time it took its Decision sufficient information to assess the financial position of the undertaking as a whole, we think it was reasonable for the OFT to conclude that a reduction in the level of penalty on the grounds of financial hardship was not justified.

102. We note in this regard that there appears to have been a sustained difference in approach between the OFT (as, for instance, expressed in their Statement of Objections of 6 October 2005) and the appellants (as, for instance, stated in their representations to the OFT of 22 December 2005) in relation to the relevant undertaking – a difference that led to the appellants' narrower focus on what constituted the economic entity for the purpose of financial hardship.

103. During the initial procedure before the Tribunal, the appellants provided the Tribunal with material about the situation of the business in the run up to the sale in June 2006 and with the sale agreement. This was material that the appellants could have made, but did not make, available to the OFT before they took their Decision. The Tribunal was also provided with some material on the situation since the sale including additional financial information concerning DQS, PBM and PC. We were told that the combined losses of DQS and PBM in recent years outweighed the net assets of PC; that the loss-making DQS and PBM businesses had since been sold; and that no other companies within the group made sufficient profits to make up those losses. A witness, Mr Jones, was able to provide some commentary but not to present an overall picture that embraced the financial situation of the whole undertaking as he knew about DQS but not about PC.

104. So, we then come to the question of whether the Tribunal, in considering the financial position of the undertaking, should have regard to the information provided to the Tribunal which was not available to the OFT at the time it took its Decision. We return again to the Tribunal's comments in paragraph [499] of *Napp*, cited above, that "the Tribunal has a full jurisdiction to assess the penalty to be imposed" and that "the 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."

105. We therefore considered it was appropriate to review the additional information provided to us notwithstanding the fact that this information had not been made available to the OFT at the appropriate stage of their investigation. The OFT pointed to a number of "gaps" in the information provided and submitted that in its view, the information available to the Tribunal was not sufficient to conclude that the PC/DQS undertaking could not afford to pay the penalty. Upon closer examination at the hearing, two points became apparent: first, that it was not the case that the appellants were unable to raise funds to pay the penalty, but rather that it would make their financial position more difficult; and second, that the appellants were still

approaching this point on the basis that DQS was to be responsible for paying the penalty alone rather than DQS and/or PC under joint and several liability.

106. Having considered all of the information put to us we have come to the conclusion that there are still certain grey areas in relation to the financial circumstances of and financial arrangements entered into between the various companies which form part of the relevant undertaking. As we have held above, we support the view of the OFT that DQS and PC form part of the same undertaking, together with SGH and PBM. It is therefore the ability of that undertaking as a whole to pay the penalty that must be considered. In our judgment the penalty of £180,000 imposed by the OFT, though painful, is appropriate and proportionate, having regard to the seriousness of the infringement and the need for deterrence.

Aggravating factors

107. Paragraph 2.15 of the Guidance states that aggravating factors include, amongst other things, the involvement of directors or senior management in the infringement. The appellants do not deny that Mr Sander attended the meeting of 20 November 2002 and it is admitted that Mr Sander was a director of both DQS and PC at the time. An analysis of the successive relevant annual reports of PC and DQS shows Mr Sander to have been in effective financial control of all material entities, with substantial and controlling liabilities and benefits. Effectively they were his companies. While it is unfortunate that the OFT made an error in its Decision by naming Mr Sander as Managing Director of DQS, this error is not such that the Guidance can be said to have been misapplied. The attendance of Mr Sander at the meeting did, in our view, amount to the "involvement of directors or senior management", and so the OFT was right to treat this as an aggravating factor.

108. Despite conflicting evidence as to the precise nature of the roles played by Mr Sander and Mr Hesketh of DQS in the meeting on 20 November 2002, the appellants have not challenged the finding of infringement, nor the presence of an executive director of both DQS and PC, Mr Sander, at that meeting. In our

judgment the OFT was correct in its conclusions of fact as to the effect of DQS' conduct and presence at the meeting of 20 November 2002. This was based on evidence provided by other parties to the infringement and an admission by Mr Hesketh that he mentioned the names of potential target customers at that meeting. In addition, the OFT has rightly pointed out in its Decision that the exact matter of the disputed evidence was not central to the finding of an infringement. Representatives of DQS admitted that they were present at the meeting of 20 November 2002 at which potential target customers were discussed. DQS did not, on our reading of the evidence before us, attempt to distance itself from the unlawful activities sufficiently so as to claim that its involvement in the infringement was merely passive. In our judgment the OFT reached correct conclusions on the effect of DQS' participation.

Overall considerations in respect of the amount of the penalty

109. As we have already noted at paragraph [81], this Tribunal looks at the level of the overall penalty in the round and decides for itself whether or not it is fair in the circumstances. The Tribunal is not bound by the Guidance but has full jurisdiction to assess itself the penalty to be imposed, if necessary regardless of the way in which the OFT has approached the matter in application of the Guidance (see *Napp* at [499], cited above).

110. There is no doubt in our mind that hard-core cartel activities constitute a very serious infringement of the competition rules. In our judgment none of the individual grounds relating to the OFT's method of calculating the penalty have succeeded.

111. We now turn to the question of proportionality. We address this point from two angles, whether there was proportionality as between the amounts of the penalties imposed on the four undertakings, and whether the amount of the penalties was proportionate to the type and seriousness of infringement.

112. In considering the first of these points we have started by looking at the size of the penalties as a percentage of (i) the undertakings' worldwide turnover in 2005, (ii) the undertakings' UK turnover in 2001 (the financial year preceding the events giving rise to the infringement) and 2002, and (iii) the undertakings' turnover in the relevant market in 2005. For this purpose, the relevant figure is the size of the penalty before any reduction made by the OFT by virtue of its leniency policy contained at Part 3 of the Guidance. As one would expect given the methodology applied by the OFT in calculating the penalties, these percentages vary from one undertaking to the next. However, in this case, we have found that the relevant figures for the four undertakings in question all fall within relatively narrow ranges. In each case, the penalty as a percentage of the undertakings' worldwide 2005 turnover is within a range of 1–4 per cent; as a percentage of the undertaking's UK turnover in 2001 and 2002 the penalty is within a range of 1–5 per cent; and as a percentage of the undertakings' 2005 turnover in the relevant market the penalty is within a range of 10–20 per cent. In the circumstances of this case, this is sufficient to satisfy us that the penalty imposed on the appellants was proportionate vis-à-vis the penalties imposed on the other undertakings party to the infringement. In addition, it is worth noting that on none of these measures was the penalty calculated for the appellants proportionately the highest, and furthermore, on some bases the appellants' penalty was proportionally lower than that for each of the other three undertakings.

113. As to proportionality of the penalties overall considering the type and seriousness of infringement established, the penalties ranged from £180,000 for DQS to £490,050 for EWS. Price-fixing and market-sharing count amongst the most serious infringements of UK competition law. Having regard to the circumstances of the case and the relative levels of penalty imposed we are satisfied that the penalty of £180,000 imposed on the appellants was proportionate.

114. The appellants have submitted that the penalty is excessive given the size of the company, the short duration of the infringement, the limited effect on competition and other factors. However, when considering the matter in the

round we feel it is appropriate to remind ourselves that the OFT has established the existence of a very serious infringement, the appellants have not appealed against the finding of an infringement and the OFT has correctly applied its published Guidance. Moreover, penalties are not supposed to be painless and are intended to have a deterrent effect, both on the parties to the infringement and on other undertakings who may be considering entering into some other conspiracy. In these circumstances, and taking into account all of the above, the Tribunal considers the penalty appropriate.

VII CONCLUSION

115. It follows from the above that the appellants' 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 one per cent above the Bank of England base rate from the date set for the payment of the penalty in the Decision, namely 29 August 2006, until payment or judgment under section 37(1) of the 1998 Act. However, we note that it is open to the OFT to make such arrangements as it sees fit for the payment of the fine if it foresees any risk of non-recovery of any part of the sum imposed by way of penalty and interest.

Lord Carlile of Berriew QC Dr Arthur Pryor CB Adam Scott TD

Charles Dhanowa 9 March 2007
Registrar