Neutral citation [2006] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1073/2/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

15 November 2006

Before:

Sir Christopher Bellamy
(President)

Graham Mather
Vindelyn Smith-Hillman

Sitting as a Tribunal in England and Wales

BETWEEN:

TERRY BRANNIGAN

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 26 October 2006

JUDGMENT

I BACKGROUND

1. In this case, Mr. Terry Brannigan appeals against what he contends to be decisions of the OFT under the Competition Act 1998 (the 1998 Act) in the following circumstances, briefly summarised. Our recital of the facts, we stress, is based at this stage only on what we have been told by Mr. Brannigan. Third parties involved have not commented on the facts. We are not to be taken as making any findings on the facts, which we simply describe as they appear from the material laid before us by Mr. Brannigan.

2. In March 2003 Mr. Brannigan launched two local free newspapers known as "Lewes Life" and "Uckfield Life" in Lewes and Uckfield respectively. Mr. Brannigan tells us that, with his background in the newspaper industry and his long-standing knowledge of the area, where he was born and bred, he had researched the possibility of launching these two newspapers very thoroughly. He was convinced that there was a demand in Lewes and Uckfield for quality free local newspapers concentrating on local business and local news items. If those ventures had prospered, it would, according to Mr. Brannigan, have been possible to consider similar launches further afield. Mr. Brannigan told us that he sold his house, and put every penny he had into launching Lewes Life and Uckfield Life. He called his venture "Brannigan Publishing", but in legal terms he appears to have been a sole trader. He tells us that he had seven full-time staff, and 36 part-time staff.

3. In January 2003, before the launch, Mr. Brannigan tells us that he had reached an agreement with Mr. Kevin Baker, the print manager of Newsquest (Sussex), which publishes a number of local newspapers, including The (Brighton) Argus, for his newspapers to be printed on the Newsquest press situated close to Lewes and Uckfield. Specifications, pages, print slots, colour options and so on were agreed between Newsquest and Mr. Brannigan. According to Mr. Brannigan it was agreed that there would be a slot for printing on Thursday night each week, allowing for publication on the following day, Friday. Some personal computers were purchased by Mr. Brannigan to ensure compatibility with the Newsquest (Sussex) press.

4. In mid-March 2003 Mr. Brannigan was told that Newsquest (Sussex) was unable to print his publications, although the launch was then only a week or two away. Mr. Brannigan was told that Newsquest (Sussex) no longer had capacity, but he contends that a superior to Mr. Baker at Newsquest had told Mr. Baker not to print Mr. Brannigan's publications because he was a competitor. It was however suggested, apparently by Mr. Baker, that Newsquest (Essex) might have some spare capacity in their Colchester plant. Newsquest (Essex) agreed to print Mr. Brannigan's titles, although the print run had to start earlier, on the Thursday morning. There were also additional transport costs to and from Colchester. Mr. Brannigan had to purchase, so he tells us, some further computers which were compatible with Newsquest (Essex)'s Colchester press.

5. It appears that Mr. Baker was subsequently dismissed by Newsquest and that proceedings for unfair dismissal before an employment tribunal were settled. It is Mr. Brannigan's belief that Mr. Baker was dismissed for helping Brannigan Publishing.

6. Uckfield Life and Lewes Life were however launched at the end of March 2003 and, apparently, distributed to almost all households in the Lewes and Uckfield areas. It appears that for the first three months, to June 2003, all went well. Mr. Brannigan tells us that his publications were extremely popular with local advertisers, both as regards the newspapers themselves, and as regards leaflet advertisers, who used the newspapers as a means of delivering advertising pamphlets to local households. According to Mr. Brannigan, he achieved a turnover of some £50,000 in the first three months of trading, breaking even in some weeks. He says he was on target to achieve a turnover of over £250,000 in the first year and profitability well within that period.

7. It was apparently around June 2003 that things started to go wrong. First, Newsquest (Sussex), who also publish "Gatwick Life" and "Horley Life", complained that Mr. Brannigan was passing off his publications as Newsquest titles by using the word "Life", even though no other newspapers in East Sussex have the word "Life" in their title, according to Mr. Brannigan. Mr. Brannigan's solicitors pointed out to Newsquest that no one had proprietary rights to the word "Life", but this episode caused Mr. Brannigan a great deal of stress and expense in legal costs, so he tells us.

8. Next, Newsquest (Sussex) launched their own free newspaper in Uckfield called "Uckfield Leader". Mr. Brannigan told us that he believed that this publication was a "market spoiler", backed by the much larger financial resources of Newsquest. It is said by Mr. Brannigan that Newsquest offered leading advertisers free advertising in the Uckfield Leader, very often on the proviso that they did not advertise in Mr. Brannigan's publications. Some of the customers, including, it is said, the Halifax Building Society, deserted Mr. Brannigan despite having said earlier how pleased they were with his publication Uckfield Life. Mr. Brannigan alleges that Newsquest was cross-subsidising the Uckfield Leader from its neighbouring newspapers in West Sussex. Mr. Brannigan says also that Newsquest staff disparaged his publications to customers and targeted his distribution points, for example by threatening newsagents that they would withdraw Newsquest titles or end various subsidy payments if the newsagents stocked Uckfield Life. According to Mr. Brannigan, such was the flight of advertisers from Uckfield Life as a result of Newsquest's aggressive actions, that Mr. Brannigan's publications got into serious financial difficulties.

9. Those activities by Newsquest as we understand it concerned Uckfield. As far as the Lewes Life was concerned, the prominent local newspaper in Lewes is the Sussex Express, published by Johnson Press, but Newsquest's Argus is also published there. Mr. Brannigan does not, it seems, complain of predatory behaviour by Johnson Press in respect of Lewes. He has, however, alleged that there is or was some kind of local agreement between Johnson Press and Newsquest to the effect that neither would publish a free newspaper in Lewes, which was why Newsquest launched a response to Mr. Brannigan in Uckfield but not in Lewes. It is suggested by Mr. Brannigan that this is part of some kind of understanding whereby Johnson Press does not publish a free newspaper in Brighton, the home territory of the Argus published by Newsquest.

10. By September 2003 Mr. Brannigan's venture had failed despite, according to him, an estimated readership of some 45,000 persons. His 40 or so full time and temporary staff lost their jobs. Mr. Brannigan went bankrupt on 12 September 2003 with debts of over £150,000, although he has since been discharged from his bankruptcy. He was unemployed for a substantial period and latterly worked in a video shop.

The complaint to the OFT

11. On 24 October 2003, Mr. Brannigan contacted the OFT with a complaint under the 1998 Act, based on the facts which we have just recited. That complaint alleged, in effect, breaches of the Chapter II prohibition under that Act, namely an abuse of a dominant position in a market, and of the Chapter I prohibition, which prohibits agreements between undertakings which prevent, restrict or distort competition.

12. On 24 November 2003, the OFT replied to Mr. Brannigan in these terms:

> "The OFT may conduct an investigation on the Competition Act 1998 (the CA 1998) only if it has reasonable grounds for suspecting an infringement. Based on the information provided in your complaint we believe that further enquiries by the OFT are justified in order to establish whether reasonable grounds for suspecting that the Chapter II Prohibition of the CA98 has been infringed. However, due to our existing caseload, we have insufficient resources to make these inquiries at this time. As a result, we have taken the administrative decision not to proceed with further inquiries unless sufficient resources become available. We have not closed our file on your complaint…
>
> If sufficient resources do become available, we will consider whether to make further enquiries into your complaint…"

13. That letter from the OFT, and subsequent letters to the same effect, must have been frustrating to Mr. Brannigan, to say the least, since he was being told by the OFT that further enquiries by the OFT were justified, but that the OFT had, at that time, insufficient resources to undertake the enquiries in question. We note in passing that the OFT then had an annual budget of around £50 million, a substantial proportion of which was devoted to competition matters.

14. In the same letter of 24 November 2003, the OFT said

> "In the meantime, notwithstanding the OFT's administrative decision not to make further enquiries, you may wish to consider a private action against Newsquest directly in the courts, particularly in relation to the matters of contractual and copyright law that you raised in your letter. In relation to the competition law matters, please note that the fact that we can see merit in considering your complaint further when resources permit, should not be interpreted as a confirmation that the

> OFT currently has reasonable grounds for suspecting an infringement of Chapter II of the CA98 or as a decision by the OFT as to whether or not there had been such an infringement."

15. The OFT's suggestion that Mr. Brannigan, a private individual then bankrupt, should take private action against a firm such as Newsquest – according to its website the second largest publisher of local newspapers in this country – does not seem to us to have been realistic.

16. On 4 December 2003, Mr. Brannigan replied to the OFT's letter of 24 November, pointing out, among other things, that he had no effective means of recourse, that, according to him, many small publishers were being pushed out of the market by larger companies in the newspaper industry, that he was concerned for the 40 or so staff who had lost their jobs, and for the interests of the 45,000 readers of his former newspapers. He asked the OFT to take action "even if it is only as an example to national companies that the OFT are not toothless and do have powers to uphold the law for us smaller independents who have no financial clout and that there is a way of competing in a fair trade, competitive market." Mr. Brannigan drew attention to the extreme personal difficulties he was experiencing, and added a plea to the OFT in capital letters: "PLEASE HELP".

17. The OFT replied to that letter on 8 December 2003 expressing its regrets but saying that it was unable to investigate the situation due to its administrative priorities as well as "our limited resources and the evidential burden placed on us". The OFT referred Mr. Brannigan to the OFT's decision in *Aberdeen Journals*, upheld by this Tribunal at [2003] CAT 11, and suggested that Mr. Brannigan might rely on that case in order to bring a private action.

18. In early 2004 Mr. Brannigan approached a firm of solicitors in Brighton, Wynne Baxter. A Mr. Karim Mohammed of that firm agreed to act on Mr. Brannigan's behalf, on a pro bono basis. Wynne Baxter in turn instructed junior counsel who agreed to advise Mr. Brannigan, apparently for a nominal fee. Counsel's opinion was duly obtained and sent by Wynne Baxter to the OFT on 5 April 2004.

19. By that stage, Mr. Brannigan had been able to assemble various market share figures based on information regarding readership of newspapers in the East Sussex area and nationally, which we revert to later in this judgment. After setting out various figures, junior counsel said at paragraph 27 of her opinion:

> "The most I am able to say at this stage is that from the above figures, it seems likely that either Newsquest or Johnson Press will occupy a dominant position in the market for the sale of advertising space, but it is not possible to determine which of the two has greater market power."

20. Counsel further reached the view that on the issue of abuse, Mr. Brannigan had a good prima facie case against Newsquest, primarily in connection with the launch of the Uckfield Leader, the alleged sale of advertising space below cost, the offer of advertising conditional on ceasing to advertise with Brannigan Publications, the possible cross-subsidy of the Uckfield Leader by other Newsquest publications, and the alleged efforts to prevent newsagents from stocking Uckfield Life. As to the allegation of a suggested agreement between Johnson Press and Newsquest, counsel was of the opinion that that would be better investigated by the OFT.

21. On 8 April 2004 the OFT replied to Wynne Baxter, saying that they were still not in a position to investigate the matter. That letter said, in closing:

> "We would also like to reiterate that the fact that we can see merit in considering your complaint further when resources permit should not be interpreted as confirmation that the OFT currently has reasonable grounds for suspecting an infringement of Chapter II of the CA98 or is a decision by the OFT as to whether or not there has been such an infringement."

The OFT did, however, indicate that they had not ruled out the possibility of making further enquiries at a later stage if sufficient resources were to become available.

22. The situation remained unchanged until 1 September 2004, when the OFT informed Mr. Brannigan that it was very unlikely that it would have sufficient resources available in the foreseeable future to enable it to investigate his complaint. The OFT therefore proposed to close the file, given that, in the OFT's view, it would not be fair to Mr. Brannigan to keep the file on his complaint open indefinitely. It was said in the OFT's letter of 1 September 2004 that the decision not to open a formal investigation did not constitute a decision as to whether or not Newsquest had or had not infringed CA1998.

Mr. Brannigan's attention was again drawn to the possibility of private action in the courts. At that point Mr. Brannigan was still bankrupt.

23. There then followed a period where Mr. Brannigan tried unsuccessfully to pursue alternative means of advancing his case. He sought unsuccessfully to obtain legal expenses insurance; he approached the Legal Services Commission for help, again unsuccessfully; and the Official Receiver was not prepared to commence civil proceedings. Mr. Brannigan's MP tried unsuccessfully to persuade the OFT to act. These efforts occupied most of 2005. On 5 September 2005 Mr. Brannigan's solicitors Wynne Baxter also closed their file.

24. On 11 September 2005 Mr. Brannigan reverted to the OFT and asked again if they would look at the merits of his case. He said that he considered that the case was of real national importance. On the 17 November 2005, the OFT wrote back saying that they had decided not to reopen his case, again because of "lack of resources".

25. It appears from documents disclosed by the OFT following a request by Mr. Brannigan under the Freedom of Information Act, that for most of 2004 Mr. Brannigan's case constituted one of the OFT's "wait and see cases", which were cases in which OFT had apparently deferred a decision as to whether fully to investigate or not, to see whether resources became available. The internal correspondence shows that this matter went to and fro within the OFT and much time was spent on the question of the internal procedures to be adopted in a case such as this.

26. On 9 January 2006 Mr. Brannigan again went back to the OFT, this time asking the OFT whether they could "please express your views on the merits of the case so I have an idea of just where I stand on my possibilities". On 10 January 2006 the OFT replied that they since had not made any formal enquiries into the complaint, they were unable to advise Mr. Brannigan as to the merits, nor was it possible for the OFT to conduct any analysis of the strengths and weaknesses of his case.

27. Mr. Brannigan replied to the OFT on 18 January 2006 as follows:

> "Thank you for your letter of the 10th of January. I feel that I remain unclear as to what has happened. You say the OFT made an administrative decision not to make further enquiries

> into my complaint. You then say that you have not made any formal inquiries into my complaint. I am at a slight loss to understand whether you are saying you have made some inquiries or you made no inquiries into my complaint at all having considered the terms of the complaint. Which is it please? If some inquiries were made, what inquiries were they?"

28. On 6 February 2006 the OFT once again replied that to the effect that they could only make formal enquiries into the complaint if they had reasonable grounds to suspect an infringement of the Act. That would depend on the OFT's assessment of the information available. That letter continues:

> "With regard to the assessment of your complaint against Newsquest, the OFT has never had reasonable grounds to suspect infringement of the Chapter I or Chapter II prohibitions under Section 25 of the Act. Therefore it has not been able to use its formal powers under Section 26 of the Act. Rather the OFT has made an informal initial assessment of your case based solely on the information you have provided. From this assessment we have taken an administrative decision not to make further enquiries into your complaint, or launch a formal investigation. To make an assessment of the strengths and weaknesses of your case would require the OFT to obtain further information through enquiries in a formal investigation. As it is not an administrative priority to launch a formal investigation to obtain such information at this time, we cannot make an analysis of the merits of your case as you had previously asked."

The appeal to the Tribunal

29. On 12 March 2006 the Registry of the Tribunal received a letter from Mr. Brannigan in these terms:

> "The OFT have stated they do not have resources available for my case, despite the national interest involved and the opinions of a specialist barrister, and my solicitor as to the merits of my case. Please could you review my case (some paperwork enclosed) as I wish to appeal against their decision to close my file. I spent two years trying to resolve this matter privately but it appears the OFT is the only course open to me due to funding. Please could you investigate whether I have good grounds to appeal and return my paperwork with your views (hopefully favourable!). Apologies for the handwritten cover letter. Printer not working. Thank you in advance, T. Brannigan."

That letter enclosed Mr. Brannigan's correspondence with the OFT and various documents outlining the matters to which we have already referred above.

30. On 30 March 2006 the Registrar of the Tribunal wrote to the OFT to the effect that the Tribunal proposed to hold a hearing with Mr. Brannigan and the OFT pursuant to Rule 10 of the Tribunal's Rules (SI 2003/1372) to determine whether what appeared to be an appeal made by Mr. Brannigan should be rejected pursuant to Rule 10(1) of those Rules. Rule 10(1) provides that "the Tribunal may, after giving the parties an opportunity to be heard, reject an appeal in whole or in part at any stage of the proceedings if – (a) it considers that the notice of appeal discloses no valid ground of appeal…"

31. The Tribunal decided at that stage that it was not yet appropriate to publish a summary of the appeal under Rule 15 (which deals with interventions) or to hear the appeal in open court, although the Tribunal also pointed out to the OFT and Mr. Brannigan that the proceedings could be adjourned into open court, and that any decision of the Tribunal is required by Rule 54 of the Rules to be delivered in public. Similarly, at that point the Tribunal did not assign the matter with a case number, nor formally enter the case in the Tribunal's register.

32. A private hearing took place before the Tribunal on 28 April 2006. That hearing focused notably on whether there was an appealable decision before the CAT in respect of which the Tribunal would have jurisdiction under section 47 of the 1998 Act. At that hearing Mr. Brannigan was represented, again pro bono, by Edwin Coe, solicitors, and Mr. Rayment of counsel. The OFT was represented by Miss Howard of counsel. Mr. Vincent Smith, then Director of Competition Enforcement at the OFT, also attended to assist the Tribunal. In the course of the hearing, Mr. Smith very properly gave the Tribunal the following undertaking

> "Rather than engage Mr. Brannigan and his resources in further expense at this stage, can I undertake to the Tribunal that I will have Mr. Brannigan's compliant revisited and that we will reach a view on whether or not at the very least there is reasonable grounds to suspect an infringement as a result of the material that Mr. Brannigan has put to us."

33. At the close of that hearing the Tribunal took the view that it was not at that stage prepared to strike out the appeal under Rule 10, but that in the light of the undertaking given by Mr. Smith, the Tribunal was prepare to adjourn the matter to enable Mr. Smith's undertaking to the Tribunal to be given effect. The transcript of the hearing of 28 April 2006, together with other relevant documents, is now to be published on the Tribunal's website at the same time as this judgment.

34. Following that hearing, on 31 May 2006, Mr. Brannigan submitted a revised complaint to the OFT. That complaint was made against Newsquest (Sussex) and reiterated with further supporting detail the allegations we have already summarised above.

II THE OFT'S DOCUMENTS OF 9 JUNE 2006

35. On 9 June 2006 Mr. Smith wrote to Mr. Brannigan enclosing two documents described in these terms:

> "(a) Assessment of complaint by Brannigan against the OFT's current administrative priority criteria and
>
> (b) assessment of whether the OFT believes there are reasonable grounds to suspect an infringement of competition law under Section 25 of the Competition Act 1998 (the Act)."

Mr. Smith said in that letter:

> "In summary, the OFT will not be investigating the complaint further. We have assessed Brannigan's complaint against the six criteria we use to prioritise the complaints we receive, and we do not consider that the complaint is an administrative priority for the OFT. Consequently the OFT will not be devoting further resources to investigating Brannigan's complaint.
>
> Nevertheless, following the commitment I provided you at the hearing (and your personal circumstances) we have assessed whether, on the information available to us, there are reasonable grounds to suspect an infringement of competition under Section 25 of the Act. We also did this so as to guide you in any steps you might wish to take in relation to this matter in the future.
>
> I regret to say that, on the basis of the evidence that you provided to us, we consider that the grounds for suspecting an infringement of the Act are weak. There is no clear evidence that either Newsquest or Johnson Press are dominant in any

> market or that there were agreements which could have an appreciable effect upon competition. We are of the view that much of the alleged behaviour can be justified as a vigorous competitive response and of too short a duration to pose a threat to serious competition, whether from Brannigan or others.
>
> Whilst I understand that you will be disappointed with this outcome I hope that this assessment provides you with an explanation of the circumstances that sadly led you to close down Brannigan Publishing."

36. The two documents "Assessment of the complaint by Brannigan Publishing against Newsquest and also Johnson Press (Case CE/3651-03)" and "Whether, in the complaint by Brannigan Publishing against Newsquest and also Johnson Press (Case CE/3651-03), there were reasonable grounds to suspect an infringement of competition law under Section 25 of the Competition Act 1998 (the Act)", both dated 9 June 2006, are being published on the Tribunal's website, so we do not need to summarise them in detail here. We refer to the first of these documents as "The Assessment Document" and the second document as "Attachment F", since it comprises Attachment F to the Assessment Document.

37. The Assessment Document begins with a brief summary of the complaint and then sets out certain information about market shares. According to the figures in the Assessment Document, nationally the four largest publishers of regional/local paid-for and free titles by volume of circulation are Trinity Mirror with 24 per cent, the Daily Mail and General Trust (DMGT) with 22 per cent, Newsquest with 15 per cent, and Johnson with 12 per cent, although Mr. Brannigan's complaint and Newsquest's website suggest that Newsquest is the United Kingdom's second largest publisher of regional and local newspapers. Across East Sussex, Newsquest's publications include The Argus (a paid-for daily), the free Brighton and Hove Leader, the free Mid-Sussex Leader, and the free South Coast Leader. According to the Assessment Document, Newsquest appears to have a market share of about 36 per cent in East Sussex. Johnson's Publications include the paid-for weekly Sussex Express, Bexhill Observer, Eastbourne Gazette, Eastbourne Herald, Hastings Observer, Rye and Battle Observer and West Sussex Gazette. Johnson appears to have a market share of around 37 per cent in East Sussex.

38. Specifically in Lewes, Johnson, through its paid-for weekly title the Sussex Express, appears to have a readership of around 70 per cent, whereas Newsquest, through the Argus, has an average readership of 25 per cent.

39. In Uckfield, Johnson's weekly paid-for Sussex Express appears to have a 31 per cent readership, followed by the weekly paid-for Kent and Sussex Courier with 14 per cent readership. Newsquest's daily paid-for Argus has 7 per cent, and the East Grinstead Courier 1 per cent. Both the Kent and Sussex Courier and the East Grinstead Courier are published by DMGT.

40. Paragraphs 23 to 25 of the Assessment Document read as follows:

> "23. An assessment has been made of whether in the complaint there were reasonable grounds to suspect an infringement of competition law under Section 25 of the Competition Act 1998 (attachment F).
>
> 24. The assessment shows there was no clear evidence that either Newsquest or Johnson was dominant or that their agreements which could have an appreciable effect on competition. Also, even if dominance had been established much of the alleged behaviour could have been justified as a vigorous competitive response and of too short a duration to pose a threat to serious competition.
>
> 25. It was therefore unlikely that anti-competitive practices by Newsquest and Johnson were responsible for the demise of Brannigan and, as a result, the grounds for the OFT to have a reasonable suspicion that the act had been infringed were weak."

41. There then follows a section of the Assessment Document, which is headed "OFT Administrative Priorities". According to this section the OFT prioritises its competition casework against six criteria, as set out in the OFT's Annual Plan 2006-2007: likely consumer harm from anti-competitive behaviour, strength of the evidence provided, type of case, special features of the case, precedent or policy value, and whether the OFT is best placed to take action. In the Assessment Document the OFT concludes that this case does not fall within the above priorities, stating at paragraph 37 that the OFT "rejects the complaint on the basis of its administrative priorities."

42. We are not concerned in this judgment to comment on the question of the OFT's administrative priorities, although we can see that in other contexts major issues could arise in that regard. For example, it could be inferred from the Assessment Document that the market for local newspapers in East Sussex, which appears to be approaching a duopoly controlled by two major national concerns, and which has a population of around 500,000, is of insufficient importance to attract the attention of the OFT, as is alleged anti-competitive behaviour affecting places such as Lewes or Uckfield since harm to consumers who live in "two towns rather than a city or a region" is considered to be of lesser importance. That approach seems to us to raise potential questions about the effectiveness of the 1998 Act, particularly when smaller new entrants challenge established incumbents. We are not however concerned with those issues in the present judgment.

43. The second document, "Attachment F", contains an assessment, over 80 paragraphs, as to whether in this case there are reasonable grounds to suspect an infringement of the Act. In that document the OFT first considers the question of market definition. As regards the product market, it is concluded, at paragraph 8, that the most probable product market is "advertising space in free and paid-for regional and local newspapers". As regards to the geographical market, which is considered at paragraphs 9 to 13, the conclusion is reached that the relevant geographic market is at least as wide as East Sussex if not wider, notably on the grounds that there is likely "to have been a chain of substitution covering all regional and local newspapers throughout East Sussex if not further afield". Accordingly, the document states "the relevant market was advertising space in free and paid-for regional and local newspapers in East Sussex" (paragraph 14).

44. In Attachment F the OFT goes on to consider the question of dominance on the part of either Newsquest or Johnson, taking readership figures as a rough proxy for share of advertising revenue.

45. On the basis of the figures set out in the Assessment Document, the OFT states in Attachment F that, in contrast to the situation in *Aberdeen Journals*, cited above, this was not a case where there was virtually a local monopoly. As regards Newsquest, it is stated at paragraph 19 that "local dominance of Newsquest in either Uckfield or Lewes

is therefore not plausible". It is also pointed out by the OFT that the predation is alleged to have occurred in Uckfield, where Newsquest has only a comparatively small market share (7 per cent), smaller than Johnson with the Sussex Express and DMGT with the Kent and Sussex Courier. As regards Johnson, at paragraph 22 the OFT comes to the conclusion that "it is doubtful that Johnson was dominant in either town [i.e. in either Lewes or Uckfield] despite its leading market shares for readership." Notwithstanding that Johnson had a readership of 70 per cent in Lewes with only one other competitor (Newsquest), the OFT apparently took the view that there was no evidence that Johnson was earning supranormal profits in respect of Lewes, or that Johnson was not competing in what was essentially a competitive market. As regards East Sussex, the conclusion is reached by the OFT that the market shares for Newsquest (36 per cent) and Johnson (37 per cent) suggest "a more evenly balanced situation than that in the local towns and that neither is likely to have been dominant, if the relevant geographical market is East Sussex." The OFT stated,

> "The only conclusion that can be drawn on the basis of the readership figures provided is that as before Johnson, rather than Newsquest, is probably the market leader in the wider geographic market of East Sussex. This suggests that it would be difficult to reach a conclusion that Newsquest was dominant in East Sussex."

It is pointed out that there is no evidence before the OFT as regards West Sussex.

46. As regards potential competition, the OFT pointed out in Attachment F that Newsquest had demonstrated the possibility of entering the market through free newspapers in various areas through its "Leader" publications, and expressed the view that "it therefore seems possible that entry/expansion can act as a constraint on a leading player who might have market power" (paragraph 27). The OFT's overall conclusion is set out at paragraph 31:

> "the evidence therefore suggests that irrespective of whether markets are defined narrowly or more widely Newsquest was very unlikely to have been dominant. Johnson is also unlikely to have been dominant in East Sussex. Whether or not Johnson was in fact dominant in Lewes, or indeed Uckfield, is likely to be immaterial in view of the limited nature of its conduct".

47. Turning to the issue of collective dominance, the OFT considers that it results from Case T-342/99 *Airtours v. Commission* [2002] ECR II-2585 that three conditions are

necessary for a finding of collective dominance: each member of the dominant oligopoly must have the ability to know how the others are behaving in order to monitor whether or not they are adopting a common policy; tacit collusion must be sustainable over time, which requires that retaliation against firms deviating from the common policies is feasible; and that the foreseeable reaction of current and future competitors, and of consumers, must not jeopardise the results expected from the common policy. The OFT forms the view that though Newsquest and Johnson would know the advertisers in their respective publications, it would be difficult to monitor pricing behaviour. Secondly, a coordinated market outcome would apparently be sustainable only in Lewes, whereas in Uckfield DMGT would also have to be involved and there was no evidence of that. Publishers such as DMGT or even Trinity Mirror, or the more prestigious advertisers, would, according to the OFT, act as a constraint on tacit collusion. At paragraphs 35 and 36 the OFT states:

> "35. The existence of Newsquest's Lewes and South Coast Leader, although no longer targeted at Lewes, but just the South Coast, also appears to shed doubt on tacit collusion in Lewes between Newsquest and Johnson. Moreover, the continued expansion of Newsquest's free newspaper portfolio, and in particular the Uckfield Leader into the Uckfield and Heathfield Leader (after Brannigan's exit) would suggest that there is no coordinated market outcome more generally. Finally, no evidence was provided to support tacit collusion.
>
> 36. The dynamic nature of the market would suggest that Newsquest and Johnson were in fact competing against each other not only in Uckfield but also in Lewes, more generally in East Sussex and that coordinated market outcome was not possible. In the absence of evidence to the contrary, the conclusion is that collective dominance was unlikely".

48. Turning to the issue of abusive conduct, the OFT does not consider that either the cancellation of Mr. Brannigan's print slot by Newsquest (Sussex), nor the dispute over the use of the word "Life" in the publication titles founded a case on the question of abuse. As to the launch of the Uckfield Leader, at paragraphs 40 to 43 the OFT comes to the conclusion that on the facts "it is unlikely that, at the time, the Uckfield Leader could be considered simply as a fighting title to eliminate only Brannigan and protect Newsquest's limited market share in Uckfield" (paragraph 41). The OFT points out that the Uckfield and Heathfield Leader is still around, almost three years after the

event, which would suggest that it was not launched purely as a market spoiler to thwart a new entrant (paragraph 43).

49. As regards the sale of advertising below cost by Newsquest, in broad terms the OFT considers that short term promotions by Newsquest in relation to the newly launched Uckfield Leader could be objectively justified "if it was a genuine new product (rather than a fighting title)", although there could be competition concerns if sales below average variable costs ("AVC") were made beyond what might be considered to be a reasonable period to make a new free title profitable. In this case one is concerned with a period of less than six months up to the point that Mr. Brannigan exited the market. In the OFT's view it would be difficult to establish that Newsquest was deliberately acting abusively on the basis of its conduct relating to the Uckfield Leader. The OFT also considers whether Newsquest was selling advertising in The Argus below AVC and comes to the conclusion that that would have been an extremely unlikely possibility (paragraphs 44 to 51).

50. As regards Newsquest's alleged exclusive purchasing requirement, the OFT's conclusion is that "given the short period of the exclusivity arrangements with the Halifax Estate Agency, the lack of evidence about any other arrangements and possible objective justification for such arrangements when Newsquest had been establishing its new free newspaper [the Uckfield Leader] it would be difficult to establish that Newsquest had acted abusively with the sole intention of eliminating competition from Brannigan" (paragraph 54).

51. As to Mr. Brannigan's allegation that Newsquest (Sussex) launched a free newspaper into Uckfield by employing a cross-subsidy with its newspapers in West Sussex (based in Haywoods Heath and/or Burgess Hill), the OFT's principal conclusion is that it is unlikely that there could be narrow markets in free newspapers in Haywoods Heath or Burgess Hill and that there was insufficient evidence to suggest that Newsquest could be dominant in any such markets in any event, with the consequence that it would be difficult to establish that Newsquest had been using its dominance in neighbouring markets (i.e. in Haywoods Heath or Burgess Hill) to strengthen its activities in Uckfield (paragraphs 55 to 61).

52. The OFT dismisses Mr. Brannigan's complaint of defamatory remarks about his publications (paragraph 67). The OFT considers that even if there had been threats by Newsquest against distributors, such as newsagents, since Mr. Brannigan's publications were essentially distributed direct to households "it is questionable whether such conduct could be classed as an abuse against a free publication even if Newsquest was dominant" (paragraph 65).

53. As regards Chapter II, the OFT concludes:

> "68. The market information provided by Brannigan, although only providing a rough guide, suggested that irrespective of whether markets are defined narrowly or more widely neither Newsquest or Johnston had sufficient market power to have been dominant… However, most of the allegations were against Newsquest. In Uckfield, where predation was alleged, Newsquest appears to have had little or no market power, even allowing for the inaccuracy of readership data…
>
> 69. Joint dominance of Newsquest and Johnston was also ruled out due to the structural nature of the markets. The relatively dynamic nature of the market(s) – arising from the launch of free newspapers by Newsquest in a number of towns in East Sussex, including Lewes where a pact was alleged to exist between Newsquest and Johnston – would suggest that there was not a co-ordinated market outcome.
>
> 70. Even if Newsquest was dominant in a market, much of the alleged conduct could either be objectively justified or dismissed as vigorous competition. The possibility that the Uckfield Leader was a fighting title to eliminate Brannigan is unlikely because there was not a monopoly, or near monopoly situation to protect, and two other main players in the market would also have had to be eliminated besides Brannigan…"

54. As to the Chapter I prohibition, the OFT concludes that Newsquest's alleged exclusive agreement with Halifax Building Society would not have given rise to an appreciable effect on competition (paragraphs 73 to 76). As to the alleged horizontal agreement between Newsquest and Johnson, the OFT concludes at paragraph 77:

> "No compelling evidence was provided in relation to the alleged cartel agreement between Newsquest and Johnson. A single, second hand allegation of collusion, even from a named source, would not provide the OFT with reasonable grounds to suspect an infringement of the Act."

55. The OFT's overall conclusion was:

> "80. From the information supplied by Brannigan there was no clear evidence that either Newsquest or Johnson was dominant. Or that there were agreements which could have an appreciable effect upon competition.
>
> 81. Much of the alleged behaviour can be justified as a vigorous competitive response and of too short a duration to pose a threat to serious competition.
>
> 82. Overall, it was unlikely that anti-competitive practices by Newsquest and Johnston were responsible for the demise of Brannigan. As a result, the grounds for the OFT to have a reasonable suspicion that the Act had been infringed are weak."

Subsequent correspondence

56. On 22 June 2006 Mr. Brannigan replied to Mr. Smith's letter of 9 June:

> "I refer to your letter of 9 June 2006. I note that this is a final decision of the OFT. I was led to believe that I would be consulted before any final decision was made. You seem to have come to a conclusion to reject my complaint without coming back to me to seek my views. Is that right? If so, what now happens? Does the matter come back before the Competition Appeal Tribunal? If that is the case, will you fix a date or should I be contacting the Tribunal?"

57. The OFT replied on 28 June:

> "Thank you for your letter of 22 June 2006 to Vincent Smith. His letter to you of 9 June did set out the conclusions of the OFT on your complaint on the basis of the material available to us including the revised case which you submitted on 31 May. However, if in the light of the assessment sent to you by Mr. Smith you would like to send us further information about the case we will consider it. Alternatively, it is open to you to send a notice of appeal to the Competition Appeal Tribunal."

58. On 3 August the Tribunal invited observations from the parties on further steps to be taken in the light of the OFT's letter of 9 June, which had been copied to the Tribunal.

59. On 9 August the Tribunal received the following letter from Mr. Brannigan, dated 8 August 2006:

> "It is unclear to me whether I need to appeal the decision of the Office of Fair Trading of 9th June 2006, a copy of which is enclosed, determining that the conduct of Newsquest (Sussex)

> was not in breach of the Chapter I prohibition. Insofar as I do, I hereby appeal.
>
> On 20th June 2006, I wrote to the OFT to inform them that they had rejected my complaint without consulting me and asking them how the matter ought to proceed. By way of response, the OFT indicated that I had the option to appeal their decision.
>
> Insofar as it might be said that I need to appeal the OFT's decision of 9th June 2006, I hereby appeal it on the ground that the OFT made a final decision of non-infringement without consulting me as the OFT is required to do following the Competition Appeal Tribunal's decision in Pernod Ricard SA and Campbell Distillers v. Office of Fair Trading, judgment of 10th June 2004.
>
> Although the OFT may be willing to take further submissions, they have made a final decision thereby prejudicing my position."

60. On 21 September 2006 the Tribunal determined that a further hearing should take place to decide the appropriate procedural course for this matter, and to determine the status of Mr. Brannigan's letter of 9 August 2006.

61. On 13 October 2006 Mr. Brannigan wrote to the Tribunal, stating that he was still acting in person, although he appears to have had legal assistance in drafting that letter. Mr. Brannigan asserts that he believes the OFT's decision to the effect that there has been no breach of the Chapter I and Chapter II prohibitions "to be wrong in substance". He contends that there is an appealable decision before the Tribunal. He then goes on to give certain information about the circumstances of the dismissal of Mr. Baker which, according to Mr. Brannigan, was because Mr. Baker had disregarded a management instruction by Newsquest not to print Mr. Brannigan's titles. He says that this is evidence that Newsquest was "trying to force my business out of the market at the eleventh hour" by refusing to allow Mr. Brannigan to use the Sussex plant. He also advances a new submission to the effect that Newsquest owns the only press capable of printing newspapers in East Sussex, and that the geographic market for printing services for newspapers is local. He contends that Newsquest has a dominant position in a local market for the offer of printing services and that Newsquest's refusal so close to the launch date to print Mr. Brannigan's titles in East Sussex was an abuse of that dominant position.

62. By letter of 24 October 2006 the OFT pointed out that dominance on the part of Newsquest in the printing services market had never previously been alleged, and rightly drew the Tribunal's attention to Rule 11(3) of the Tribunal's Rules which sets out the circumstances in which the Tribunal may allow a notice of appeal to be amended.

III THE TRIBUNAL'S ANALYSIS

Rule 10 of the Tribunal's Rules

63. At this stage the issue before the Tribunal is the application of Rule 10(1)(a) of the Tribunal's Rules, which allows the Tribunal to reject a notice of appeal which "discloses no valid ground of appeal". In our view, that provision is in effect a strike-out power, analogous to Rule 3.4(2) of the Civil Procedure Rules (CPR), which among other things permits a statement of case to be struck out where it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim. Such circumstances may arise, for example, if the notice of appeal is unreasonably vague, incoherent, vexatious or obviously ill founded (see generally the White Book 2006, at 3.4.1). Although under the CPR there is a substantial overlap between CPR Rule 3.4 and CPR Part 24 (which provides for summary judgment on the grounds that there are no real prospects of success and no other compelling reason for the case to proceed to trial), the Tribunal's Rules have no precise equivalent to Part 24 CPR as regards appeals under the 1998 Act, in contra-distinction to claims for damages, where Rule 41 contains provisions closely analogous to those of CPR Part 24. That implies, in our view, that the Tribunal's power to strike out under Rule 10 is more circumscribed than it would be if Rule 41 applied, which it does not. In our view, in a case such as the present we should not strike out a notice of appeal in whole or part under Rule 10 of the Tribunal's Rules unless the circumstances disclose no appealable decision, or the grounds in question are manifestly ill founded. In that latter regard, we also bear in mind the Tribunal's power under Rule 9, considered below, to order to a defective notice of appeal to be put in order in accordance with the Tribunal's directions.

The appealable decision issue

64. The OFT argues that there is no appealable decision before the Tribunal, within the meaning of sections 46 and 47 of the 1998 Act, applying the criteria set out in *Claymore Diaries v. OFT* [2003] CAT 3, at paragraph 122. The OFT contends that it rejected Mr. Brannigan's complaint on the basis of administrative priority; that the OFT's assessment of whether there were reasonable grounds to suspect an infringement were carried out "without prejudice" to the OFT's assessment of its administrative priorities (Paragraph 1 of Attachment F); that that assessment was made solely because of the OFT's undertaking to the Tribunal, and was no more than "guidance" to Mr. Brannigan. The Tribunal cannot determine the priorities in which the OFT decides to treat its cases: see *Ofcom v. Floe Telecom* [2006] EWCA Civ. 768, at [36] to [39].

65. We remind ourselves that the test for deciding whether the OFT has taken an appealable decision for the purposes of sections 46 and 47 of the 1998 Act was set out in *Claymore*, cited above, at paragraphs 122, in the following terms:

> "(i) The question whether the Director has 'made a decision as to whether the Chapter II prohibition is infringed' is primarily a question of fact to be decided in accordance with the particular circumstances of each case (*Bettercare*, [24]).
>
> (ii) Whether such a decision has been taken is a question of substance, not form, to be determined objectively, taking into account all the circumstances (*Bettercare*, [62], [84], and [93]). The issue is: has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before him? (*Freeserve*, [96]).
>
> (iii) There is a distinction between a situation where the Director has merely exercised an administrative discretion without proceeding to a decision on the question of infringement (for example, where the Director decides not to investigate a compliant pending the conclusion of a parallel investigation by the European Commission), and a situation where the Director has, in fact, reached a decision on the question of infringement, (*Bettercare*, [80], [87], [88], [93]; *Freeserve*, [101] to [105]). The test, as formulated by the Tribunal in *Freeserve*, is whether the director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question

> whether there has been an infringement of the Chapter II prohibition (*Freeserve*, [101] and [102]).”

66. It is true that paragraph 37 of the Assessment Document states that the OFT rejects the complaint “on the basis of its administrative priorities”. However, the consideration of the OFT’s priorities in that document is preceded by the conclusion at paragraph 24 that:

> “There was no clear evidence that either Newsquest or Johnson were dominant or that their agreements could have an appreciable effect on competition.”

The OFT similarly concludes at paragraph 24 that:

> “Even if dominance had been established much of the alleged behaviour could have been justified as a vigorous competitive response and of too short a duration to pose a threat to serious competition.”

67. Those conclusions are based on the analysis in Attachment F. It seems to us reasonable to infer that even the Assessment Document dealing with priorities contains an implicit conclusion by the OFT that, on the evidence, dominance was not sufficiently established, nor did the matters alleged have an appreciable effect on competition, or pose a sufficiently serious threat to competition, to found an infringement of the Chapter I or Chapter II prohibition. The sequence of analysis in the Assessment Document is that those conclusions are reached before the OFT turns to consider its administrative priorities. In the Tribunal’s view, even the Assessment Document, standing alone, arguably contains, by necessary implication, a view on the question whether there has been an infringement of the Chapter II (or Chapter I) prohibition, namely a view that such an infringement was not shown on the evidence.

68. However, we do not need to decide whether the Assessment Document standing alone contains an appealable decision, since it is clearly arguable that Attachment F does contain such a decision. That document, as shown above, contains a detailed analysis of dominance of the individual firms in question, and of the issue of collective dominance, and concludes that neither individual nor collective dominance is shown, on the evidence. The document also deals with the question of abuse, pointing out that it would be difficult to characterize Newsquest’s actions in Uckfield as an abuse of dominance, in view of Newsquest’s small market share in Uckfield; and that, in any

event, the matters alleged could be objectively justified and/or merely reflective of vigorous competition. On the alleged Chapter I infringement, the OFT considers that on the information provided it is not established that there were agreements which could have an appreciable effect on competition.

69. It thus seems to us, reading Attachment F as a whole, that the OFT did reach a view, either expressly or by necessary implication, that neither the Chapter II nor the Chapter I prohibition had been infringed, on the material before the OFT. If, as the OFT found, that material did not give rise to reasonable grounds to suspect an infringement, it follows in our view that the OFT implicitly reached the view that the Chapter II and Chapter I prohibitions had not been infringed on the basis of that material. That in our view arguably gives rise to an appealable decision on the basis of section 46(3) (a) and (c), read with section 47(1)(a) of the 1998 Act: see in particular, the Tribunal's reasoning in *Bettercare v. DGFT* [2002] CAT 6, at [82] to [87]; *Freeserve v. DGFT* [2002] CAT 8, at [93] to [105]; *Claymore*, cited above, at [116] to [122] and [147] to [156]; and *Pernod Ricard v. OFT* [2004] CAT 14 at [161] to [168]. In particular, in *Claymore* the Tribunal said at paragraph 148 that a useful approach was to pose two questions: "Did the Director ask himself whether the Chapter II prohibition had been infringed? What answer did the Director give to that question when making his decision?" In this case, it seems to us that the OFT asked itself a series of questions – e.g. does this evidence establish dominance? is there collective dominance? do these actions amount to abuse? is there evidence of an anti-competitive agreement? – and answered those questions in the negative. That arguably gives rise in our view to an "appealable decision" within the meaning of the Act.

70. As to the OFT's submission that its substantive assessment in Attachment F was "without prejudice" to its decision to close the file on the grounds of administrative priorities, we note that Mr. Smith's undertaking to have the substance of Mr. Brannigan's complaint examined was, quite properly, not subject to any qualification, and was not given "without prejudice". In our judgment, it is correctly submitted on behalf of Mr. Brannigan that the OFT in this case arrived, in effect, at two decisions, one based on administrative priorities and the other, set out in Attachment F, of an assessment of the substantive issues in the case. We also note that the OFT, in its letter of 28 June 2006, accepted that the OFT had reached "conclusions" on the basis of the

material available to it, and pointed out that it was open to Mr. Brannigan to send a notice of appeal to the Tribunal. That is inconsistent with the OFT's submission that the assessment in Attachment F was no more than "guidance".

71. In all those circumstances the Tribunal is not prepared to strike out Mr. Brannigan's appeal under Rule 10 on the basis that there is no appealable decision before the Tribunal.

72. We do not need to reach a view on whether the OFT's earlier letter of 6 February 2006 was also an appealable decision, a matter on which we did not need to rule at the hearing of 28 April 2006 in view of Mr. Smith's undertaking. In our view, for case management purposes, it is convenient for working purposes in this case to treat Attachment F, and the reasons set out therein, as the potentially appealable decision for the purposes of this case.

The substantive grounds of appeal

– The consultation issue

73. Mr. Brannigan's letter of 9 August 2006 – which we take to be the notice of appeal in this case – contains expressly only one ground of appeal, namely that the OFT adopted its decision of 9 June 2006, as contained in Attachment F, without first giving Mr. Brannigan any chance to comment. That ground is based on the decision of the Tribunal in *Pernod Ricard v. OFT*, cited above.

74. In *Pernod Ricard* the Tribunal held, notably at [232] to [235] and [239] to [245], that the complainant in that case should have been given an opportunity to submit observations to the OFT before the latter closed its file. That judgment of the Tribunal was based both on an analogy with the procedural rights which apply to complainants under Community law, having regard to section 60 of the 1998 Act, and on principles of fairness in domestic administrative law.

75. In *Pernod Ricard*, the case closure took place on 28 January 2003. Since then, the European Community has brought into force, with effect from 1 May 2004, the so-called Modernisation Regulation (EC) No. 1/2003. Regulation (EC) 1/2003 gives the

OFT power to apply Articles 81 and 82 of the EC Treaty, as well as the prohibitions of Chapter I and Chapter II. When Articles 81 and 82 of the EC Treaty are applied by the European Commission, a particular rôle is afforded to complainants who, amongst other things, are entitled to have the opportunity to comment before the Commission rejects their complaint: see e.g. Article 7 of Regulation (EC) 774/2004 and more generally *Pernod Ricard* at [207] to [219].

76. It seems to us in the light of *Pernod-Ricard*, that a right to have the opportunity to submit comments before the OFT adopted the decision contained in Attachment F arguably arose in this case in favour of Mr. Brannigan. The OFT did not, however, give Mr. Brannigan an opportunity to comment before Attachment F was adopted on 9 June 2006.

77. The OFT submits that no such right to consultation arose in the special circumstances of this case, since Attachment F arose solely out of Mr. Smith's undertaking; that the OFT thought it was working to a timetable set by the Tribunal; that the OFT's letter of 28 June gave Mr. Brannigan an opportunity to submit further material; and that the OFT's decision would have been the same whether it had consulted Mr. Brannigan or not. We observe that a court or tribunal will be slow to uphold the last of those arguments, since to accept that argument would tend to empty a right to be consulted of any substance. In any event, that and the other points made by the OFT seem to us to go to the strength of this ground of appeal, and not to the question whether or not this is a valid ground of appeal in the first place.

78. In all those circumstances the Tribunal is not at this stage prepared to strike out under Rule 10 the ground of lack of consultation as an arguable ground of appeal.

– Procedural Issues affecting matters of substance

79. The Tribunal takes it from Mr. Brannigan's letter of 13 October 2006 that he wishes to contend before the Tribunal that the OFT's decision of 9 June 2006 contained in Attachment F was in any event wrong in substance. It appears from that letter (third paragraph) that Mr. Brannigan wishes to rely notably on the facts and matters set out in his revised complaint of 31 May 2006.

80. In this connection, various procedural issues arise. At present, if Mr. Brannigan wishes to pursue matters of substance before the Tribunal, his notice of appeal of 9 August 2006 must comply with Rule 8 of the Tribunal's Rules, and in particular Rule 8(4) (which requires a concise statement of the facts, a summary of grounds, a brief presentation of the arguments, the relief sought, and a schedule of documents) and Rule 8(6) which requires available documents and witness statements to be annexed. Secondly, Rule 11(3) restricts the addition of a "new ground" of appeal unless the circumstances there set out are complied with. That Rule provides, among other things, a protection for the OFT since the OFT can hardly be criticised for not responding to arguments that had not been previously raised. According to the OFT, Mr. Brannigan's argument concerning Newsquest's alleged dominance in printing services would need to surmount the hurdle raised by Rule 11(3). In addition, although Mr. Brannigan's letter of 13 October 2006 alleges that the OFT's approach is wrong as a matter of substance, no particulars have yet been given as the respects in which it is alleged that the OFT's analysis is "wrong".

81. Rule 9 (1) of the Tribunal's Rules provides:

> "If the Tribunal considers that a notice of appeal does not comply with rule 8, or is materially incomplete, or is unduly prolix or lacking in clarity, the Tribunal may give such directions as may be necessary to ensure that those defects are remedied."

82. In this case, Mr. Brannigan has been acting in person, although at times with the benefit of pro bono legal assistance. Since his complaint to the OFT in October 2003, it has taken Mr. Brannigan some three years to obtain any kind of meaningful response. In those circumstances, and having regard to the history of this matter, it seems to us that Mr. Brannigan would have a justified sense of grievance if, at this stage, the Tribunal did not exercise its power under Rule 9(1) to give Mr. Brannigan a chance to put his notice of appeal in order. We also bear in mind certain matters of public interest, as they appear from various Competition Commission reports referred to below. However, it also seems to us that we should exercise our power under Rule 9(1) only if we are satisfied that the material before us does reveal matters reasonably capable of being argued as grounds of appeal. We therefore consider, albeit briefly, certain aspects of the substance, in order to decide whether it would be right to allow Mr.

Brannigan the opportunity to put his case in order under Rule 9(1). It would not, in our view, be right to do so if, on the material before us, it was manifest that Mr. Brannigan's case was unarguable.

83. We deal first with the issues arising under the Chapter II prohibition. As to the matters arising as to the issue of abuse, the allegations made by Mr. Brannigan against Newsquest include: the cancellation of the print shot by Newsquest (Sussex); the allegation of infringement of the word "Life"; the launch of the Uckfield Leader as a 'spoiler'; the offer of free or below cost advertising; exclusive arrangements with advertisers; targeting of Mr. Brannigan's customers; cross-subsidy from other newspapers, enabling prices in Uckfield to be below AVC; threats against Mr. Brannigan's distribution points; and disparagement of Mr. Brannigan's publications.

84. In our view, on a strike out application under rule 10, we should assume the truth of facts alleged, although we stress again we make no findings of fact. In our judgment, at this stage of the proceedings, it is impossible to say that such a catalogue of allegations, viewed either collectively as a concerted campaign to drive Mr. Brannigan from the market, or as individual allegations, are incapable of supporting allegations of abuse, if carried out by a company enjoying a dominant position. It is not evident to the Tribunal that, if given the opportunity, it would be impossible for Mr. Brannigan or his advisers to advance a critique of the OFT's contrary conclusion at paragraphs 38 to 65 of Attachment F.

85. We observe in particular that it would be for consideration whether the OFT's view that the allegations here made were of too short duration, or are too insignificant to matter, fully took account of the facts that, on Mr. Brannigan's evidence, the actions of which he complains did succeed in eliminating a new entrant from the market, not only from his existing trading areas, but also as regards any potential expansion into other areas; that an incumbent may have an interest in preventing a new entrant from becoming established and potentially expanding into other areas; and that the dissuasive effect of such actions on other would-be entrants would be felt more widely than merely locally. On the other hand, the Tribunal fully recognises that where the line should be drawn between what may be a legitimate, vigorous competitive response, on the one hand, and abusive conduct on the other, is a matter requiring careful examination.

86. Turning to various issues of dominance, a difficulty in Mr. Brannigan's case needs to be faced. At present, there are few allegations of abuse against Johnson, who on its market share (70 per cent) could arguably be dominant in Lewes. The principal allegations of abuse are against Newsquest as regards Uckfield, in which town Newsquest appears to be in third position (with only 7 per cent) as against Johnson (Sussex Express) with 31 per cent and DMGT (Kent and Sussex Courier) with 14 per cent. In those circumstances it would appear to the Tribunal, at first sight, that Mr. Brannigan would need to establish either some kind of collective dominance on the part of Newsquest/Johnson (who appear between them to have around 75 per cent of the market in East Sussex at least) or dominance by Newsquest in some relevant area in proximity to Uckfield, to which the alleged abuse (if there was one) could be shown to be credibly related.

87. We observe that both Mr. Brannigan (paragraph 32 of his revised complaint) and the OFT (footnote 2 to the Assessment Document) have drawn our attention to previous reports of the Competition Commission ("CC"), to which we have accordingly referred ourselves. We note that the markets for regional or local newspapers, paid for and free, have been considered several times in recent years by the CC in the context of various newspaper acquisitions: see e.g. *Johnson Press plc/Trinity Mirror plc* Cm 5495, May 2000 ("*Johnson/Trinity Mirror*"); *Garnett UK Limited*[1]*/SMG plc* Cm 5782, March 2003 ("*Garnett/SMG*"); and *Newsquest (London) Limited/Independent News and Media PLC*, Cm 5951, October 2003 ("*Newsquest/INM*").

88. In the above reports, the CC has frequently stated its concern about increasing concentration in the market for local newspapers, combined with indications that the market may not be fully competitive (see e.g. *Garnett/SMG*) at 2.33, *Newsquest/INM* at 2.48 to 2.51). By October 2003, the market share of the four leading publishers of regional/local newspapers had reached 74.6 per cent (*Newsquest/INM* at 2.49). Such a concentration was described by the CC in *Garnett/SMG* as "a high degree of concentration by any standard" (2.32).

89. It further appears from the CC reports that by 2002 Newsquest had a turnover of some £515 million. Newsquest is owned by Garnett, a U.S. group with a turnover in 2002 of

[1] Garnett is the parent company of Newsquest.

some £4.3 billion (*Newsquest/INM* at 2.3 to 2.5). Newsquest in 2003 was either the second or third largest publisher of paid for/free local weeklies, depending on which measurement is taken (ibid, Appendix 3.2). Johnson had a turnover of some £301 million in 2001, prior to its acquisition of Regional Independent Media Holdings Limited (RIM) for some £560 million in 2002. On 15 March 2002 Johnson had a market capitalisation of some £0.8 billion (*Johnson/Trinity Mirror*, 2.3 and 3.1). In 2003 Johnson was the largest publisher of paid-for weeklies, the second largest publisher of free weeklies, and in third position overall (behind Newsquest and Trinity Mirror) in terms of total circulation (*Newsquest/INM,* Appendix 3.2).

90. Of particular concern to the CC has been what it has seen as the practice of "clustering", i.e. the tendency for publishers to focus their operations on particular geographical areas when either launching new titles or acquiring titles from other publishers, rather than spreading their operations more widely (Glossary to *Johnson/Trinity Mirror* report). In *Johnson/Trinity Mirror* the CC expressed the view that clustering "might be symptomatic of a mutual desire among major publishes to 'live and let live'; that is tacitly to share the market on a geographical basis and avoid competing with each other head to head in the same geographical areas" (*Johnson/Trinity Mirror* at paragraphs 2.33 et seq, particularly 2.38, 2.39 and 2.42 to 2.44).

91. In that report, the CC also expressed concerns about the difficulties of entry into the market, particularly those faced by small-scale entrepreneurs, including the risk of a "robust response" by incumbents, including cutting advertising rates, cross-selling and launching an additional title as a "spoiler" (*Johnson/Trinity Mirror,* paragraph 2.61(e)). In those circumstances, the CC expressed the view that the OFT should give early attention to whether an industry wide inquiry (which would now be under the Enterprise Act 2002) should be initiated, emphasising again its concern "that a 'live and let live' attitude on the part of publishers would attenuate competition up and down the country" (*Johnson/Trinity Mirror,* 2.163 – 2.164).

92. According to paragraph 2.129 of *Newsquest/INM* the OFT decided against any such inquiry "in view of the Competition Act casework and the soon-to-be reformed merger control regime", but would "keep the market under review". From Mr. Brannigan's point of view, those assurances by the OFT must now appear somewhat hollow.

93. In *Newsquest/INM* the CC again expressed the view that there was evidence of a "live and let live" attitude between the major publishers, leading to "only muted competition". Prospects of new entry were not in the CC's view sufficient to offset a loss of competition, and the CC again highlighted the difficulties in this market faced by smaller, entrepreneurial new entrants (paragraphs 2.119 to 2.120). At paragraph 2.132 the CC again expressed the view that there was a "live and let live attitude" among the major publishers[2]. The CC's views appear, in general terms, to be in marked contrast to the OFT's assumption in attachment F to the effect that the local markets in question are likely to be competitive.

94. In the present case it is implicit in Mr. Brannigan's contention that there is at least tacit (if not agreed) adherence to a policy of 'live and let live' as between Newsquest and Johnson as regards the geographical areas in which their titles compete. The fact that Newsquest apparently no longer circulates a free newspaper in Lewes and that Johnson does not appear to compete head to head with The Argus in Brighton is, whether rightly or wrongly, invoked by Mr. Brannigan in support of his contention of a tacit (or agreed) policy of live and let live.

95. Against that background, we are not prepared to find at this stage that it would be impossible for Mr. Brannigan to formulate more precisely, in a revised notice of appeal, a case on dominance as regards Newsquest, either individually or together with Johnson in a relevant geographical area. According to the revised complaint, Newsquest (paragraph 45) could have 40 per cent of the readership in East Sussex, if the figures for the Uckfield Leader are included. It also appears that Newsquest may have substantial shares in local areas within reach of Uckfield and/or into which Mr. Brannigan could potentially have expanded. If competition between Johnson and Newsquest is in fact "muted", for example by a tacit policy of "live and let live", to use the CC's terms, that consideration could be potentially relevant as regards to both individual and collective dominance.

[2] It appears that in the *Newsquest/INM* inquiry, Newsquest argued before the CC that there was a real prospect of new entry from "majors and independents alike". According to Newsquest, the Tribunal's judgment in *Aberdeen Journals* "had sent a strong warning to dominant incumbent newspaper publishers as regards the legitimacy of any response they might make to actual or threatened new entry to their markets". Those submissions were apparently made at about the same time as the matters of which Mr. Brannigan complains in this case (*Newsquest/INM*, at paragraph 2.105).

96. In all the circumstances we do not think it would be right to strike out the Chapter II allegations at this stage under Rule 10.

97. As regards the Chapter I allegations we similarly take the view that it would not be right to strike them out under Rule 10 at this stage.

The procedure to be followed

98. The procedure that should now be followed is that we will allow Mr. Brannigan a further 28 days to put the notice of appeal in order under Rule 9, in compliance with Rule 8. We hope that those who have hitherto assisted Mr. Brannigan pro bono may be able to assist, or failing that those subscribing to the pro bono panel at probonogroup.org.uk/competition/ may be able to help. It is up to Mr. Brannigan and his advisers to formulate the case. When that is done, the Tribunal may need to consider the effect if any of Rule 11(3), but the Tribunal points out that it is the scope of the original complaint which sets the framework for the subsequent appeal *Freeserve*, [2003] CAT 5, at paragraph 116. Once a revised notice of appeal has been served, there will be a further case management conference to consider the next steps.

99. In the meantime this judgment, the transcripts of the proceedings of 28 April and 26 October, and the OFT's documents of 9 July 2006 will be published on the Tribunal's website together with the requisite notice concerning interventions under Rule 15 of the Tribunal's Rules. The case will be registered and accorded a case number.

100. The Tribunal again points out that on a strike out application under Rule 10 the Tribunal is not to be taken as expressing any view as to the ultimate merits of this case, and still less as to the underlying facts. The Tribunal's only decision is that this appeal should not be summarily rejected at this stage, and that the procedure should now take its course, subject to Mr. Brannigan's compliance with Rule 8.

Christopher Bellamy Graham Mather Vindelyn Smith-Hillman

Charles Dhanowa November 2006
Registrar