

IN THE COMPETITION APPEAL TRIBUNAL

**BETWEEN:**

**TERRY BRANNIGAN**

Appellant

-v.-

**OFFICE OF FAIR TRADING**

Respondent

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**NOTICE OF APPEAL**

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The Appellant is Terry Brannigan of 119 Long Beach View, Eastbourne, Sussex, BN23 5NB.

The Appellant's address for service is as above.

The Respondent is the Office of Fair Trading (OFT) of Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8JX.

The Appellant requests that the proceedings take place in England and Wales.

**I BACKGROUND AND RELIEF SOUGHT**

1. This appeal is made in accordance with the procedure set out by the Tribunal in §98 of the Tribunal's judgment of 15 November 2006 in this matter, and the Tribunal's Order of 26 October 2006.
2. Mr Terry Brannigan, the Appellant, is a sole trader who carried on business as "Brannigan Publishing". He was the publisher of two free newspapers which began publication in June 2003 in Lewes and Uckfield respectively, until those

newspapers were forced to cease publication, and he became bankrupt on 12 September 2003.

3. Mr Brannigan complained to the OFT that, in breach of the Competition Act 1998, one, or two, other publishers had unlawfully forced him out of business. He now appeals against a non-infringement Decision of the OFT made under the Competition Act 1998 (the 1998 Act) and set out in its letter of 9 June 2006, and, insofar as may be relevant, in its associated correspondence with Mr Brannigan.
4. Mr Brannigan requests the Tribunal to (a) set aside the Decision on the grounds that the OFT unlawfully failed to provide him with an opportunity to comment on its findings before publishing its Decision, and/or (b) substitute an infringement Decision for the OFT's non-infringement Decision under Chapter I and/or Chapter II of the 1998 Act, and/or (c) remit the matter to the OFT for such further investigation and such further Decision as it may deem necessary.
5. Mr Brannigan is a litigant in person, but has been assisted by counsel in the preparation of this Notice of Appeal. However that (pro bono) assistance has been provided at short notice and without the benefit of detailed instructions. The drafting has drawn on the judgment of the Tribunal of 15 November 2006 (see [2006] CAT 28). Mr Brannigan respectfully requests the Tribunal to take these matters into account, should they be relevant to the future course of these proceedings.

## II FACTS

6. In March 2003 Mr Brannigan launched two local free newspapers known as "Lewes Life" and "Uckfield Life" in Lewes and Uckfield respectively. Mr Brannigan had been previously employed by Johnston Press for six years, where he won "salesman of the year", until he resigned in 2003 in order to set up his own newspapers.

7. Mr Brannigan's venture involved seven full-time staff, in addition to Mr Brannigan, and 36 part-time staff. In January 2003 Mr Brannigan 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. 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.
8. In mid-March 2003 Mr Brannigan was told that Newsquest (Sussex) was unable to print his publications, although the launch was then only one week away. Mr Brannigan was told that Newsquest (Sussex) no longer had capacity, but he understood that a superior to Mr Baker at Newsquest had told Mr Baker not to print Mr Brannigan's publications because he was a competitor.
9. Mr Brannigan was also informed by one of the reporters from Johnston Press that Johnston Press intended to close down his newspapers.
10. Newsquest was the only newspaper printer in East Sussex. After many attempts to find an alternative printer 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 some further computers which were compatible with Newsquest (Essex)'s Colchester press.
11. Mr Baker was subsequently dismissed by Newsquest. It was Mr Baker's job to fill available slots with outside work. Mr Baker was dismissed because he had assisted Brannigan Publishing. Newsquest (Sussex) were not happy that Newsquest (Essex) had agreed to publish Mr Brannigan's papers (Attachment E, §14).

12. Uckfield Life and Lewes Life were launched at the end of March 2003 and distributed to almost all households in the Lewes and Uckfield areas. For the first three months, to June 2003, all went well. Both 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. A turnover of some £50,000 was achieved in the first three months of trading, breaking even in some weeks. The papers were on target to achieve a turnover of over £250,000 in the first year and profitability well within that period.
13. In or around June 2003 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, and Mr Brannigan's titles clearly and deliberately stated that they were independent. This episode had the consequence of causing Mr Brannigan a great deal of stress and expense in legal costs, and has still not formally been dropped by Newsquest.

#### *Uckfield*

14. Newsquest (Sussex) then launched their own free newspaper in Uckfield called "Uckfield Leader". Newsquest offered specifically targeted 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 the Halifax Building Society, deserted Mr Brannigan despite having said earlier how pleased they were with his publication Uckfield Life, which had resulted in increasing numbers of applicants and property viewings.
15. Mr Brannigan was obtaining an enthusiastic response from a number of his advertisers, who were obtaining a better response than from other media. Mr Brannigan was committed to providing a proper local newspaper in an area with which he was very familiar. He provided copy of substance, some of which was

surprisingly similar to the copy subsequently published by other local newspapers, in particular Johnston's Sussex Express.

16. Newsquest was able to cross-subsidise the Uckfield Leader from its neighbouring newspapers in West Sussex (and its other business).
17. 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.
18. The flight of advertisers from Uckfield Life as a result of Newsquest's aggressive actions had the result that Mr Brannigan's publications got into serious financial difficulties.

#### *Lewes*

19. As far as Lewes Life was concerned, the prominent local newspaper in Lewes is the Sussex Express, published by Johnston Press, but Newsquest's Argus is also published there.
20. Mr Brannigan has been informed that there is a local agreement between Johnston Press and Newsquest to the effect that neither will publish a free newspaper in Lewes, and that Johnston Press will not publish a free newspaper in Brighton, the home territory of Newsquest's Argus. In any event no "spoiler" paper was launched by Newsquest (or Johnston Press) in response to Lewes Life.
21. By September 2003 Mr Brannigan's venture had failed, and he was bankrupted (now discharged) despite an estimated readership of some 45,000 persons. His 40 or so full time and temporary staff lost their jobs. In circulation and advertising sales terms the newspapers were well on track to meet and exceed their targets.

*The complaint to the OFT*

22. On 24 October 2003, Mr Brannigan contacted the OFT with a complaint under the 1998 Act, alleging breaches of the Chapter I and Chapter II prohibitions.

23. On 24 November 2003, the OFT replied to Mr Brannigan in terms that further investigation was justified, but that the OFT had insufficient resources to pursue them, specifically:

“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...”

24. There was subsequent correspondence to the same effect. In the same letter of 24 November 2003, the OFT recommended that Mr Brannigan consider a private action, despite the fact he was bankrupt, (a suggestion made by the OFT on more than one occasion).

25. 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 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.”

26. The OFT replied to that letter on 8 December 2003 in similar terms to their letter of 24 November. Mr Brannigan then assembled various market share figures and Counsel's Opinion, all of which were forwarded to the OFT.
27. On 8 April 2004 the OFT replied to Mr Brannigan's solicitor, 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."
28. The OFT indicated that they had not ruled out the possibility of making further enquiries at a later stage if sufficient resources were to become available.
29. However on 1 September 2004, 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. Thereafter Mr Brannigan attempted to explore other avenues of redress all of which were unsuccessful.
30. 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".

*The proceedings before the Tribunal*

31. On 12 March 2006 the Registry of the Tribunal received a letter from Mr Brannigan requesting that they review his case.

32. The Tribunal convened 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..."
33. 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.
34. A private hearing took place before the Tribunal on 28 April 2006. That hearing focused particularly on whether there was an appealable decision in respect of which the Tribunal would have jurisdiction under section 47 of the 1998 Act.
35. At that hearing Mr Vincent Smith, then Director of Competition Enforcement at the OFT, 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."
36. 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 prepared to adjourn the matter to enable Mr Smith's undertaking to the Tribunal to be given effect.



37. Following that hearing, on 31 May 2006, Mr Brannigan submitted a revised complaint. The OFT subsequently rejected his complaint by letter of 9 June 2006. Mr Brannigan appealed against that decision, and at a hearing on 26 October 2006 the Tribunal gave Mr Brannigan 28 days in which to “put the notice of appeal in order”. This document is that appeal. The Tribunal also issued a judgment on the issues arising at the hearing (see [2006] CAT 28)

### **III THE OFT’S DECISION OF 9 JUNE 2006**

38. 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 (“the Assessment Document”) 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).” (“Attachment F” to the Assessment Document)

39. Mr Brannigan will rely on both documents in full (including the other Attachments to the Assessment Document).

#### **The Assessment Document**

40. The Assessment Document included the following conclusions:

- a) There is no clear evidence that either Newsquest or Johnston Press are dominant in any market;
- b) There is no clear evidence that there were agreements which could have an appreciable effect upon competition.

*Nationally:*

- c) 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 Johnston with 12 per cent.

*East Sussex*

- d) 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. Newsquest appears to have a market share of about 36 per cent in East Sussex.
- e) Johnston'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. Johnston appears to have a market share of around 37 percent in East Sussex.

*Lewes*

- f) Specifically in Lewes, Johnston, 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.

*Uckfield*

- g) In Uckfield, Johnston'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.

*The assessment*

- h) “The assessment shows there was no clear evidence that either Newsquest or Johnston was dominant or that their agreements 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” (§24). It was therefore unlikely that anti-competitive practices by Newsquest and Johnston 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.” (§25)
- i) “It was therefore unlikely that anti-competitive practices by Newsquest and Johnston 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.” (§25)

**Attachment F**

- 41. Attachment F contained the following analysis:

*Relevant market and dominance*

- a) “Conclusions on Relevant Market: The relevant market was advertising space in free and paid-for regional and local newspapers in East Sussex” (F: §14);
- b) As regards Newsquest, “local dominance of Newsquest in either Uckfield or Lewes is therefore not plausible” (§19)

- c) The predation is alleged to have occurred in Uckfield, where Newsquest has only a comparatively small market share (7 per cent), smaller than Johnston with the Sussex Express and DMGT with the Kent and Sussex Courier.
- d) As regards Johnston, "it is doubtful that Johnston was dominant in either town [i.e. in either Lewes or Uckfield] despite its leading market shares for readership." (§22) (Johnston had a readership of 70 per cent in Lewes with only one other competitor (Newsquest));
- e) As regards East Sussex, the market shares for Newsquest (36 per cent) and Johnston(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", and "The only conclusion that can be drawn on the basis of the readership figures provided is that as before Johnston, 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."
- f) "...irrespective of whether markets are defined narrowly or more widely Newsquest was very unlikely to have been dominant. Johnston is also unlikely to have been dominant in East Sussex. Whether or not Johnston was in fact dominant in Lewes, or indeed Uckfield, is likely to be immaterial in view of the limited nature of its conduct" (§31).

#### *Collective dominance*

42. The OFT considered that the relevant test was a three part test set out in Case T-342/99 *Airtours v. Commission* [2002] ECR II-2585: (1) 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; (2) tacit

collusion must be sustainable over time, which requires that retaliation against firms deviating from the common policies is feasible; (3) that the foreseeable reaction of current and future competitors, and of consumers, must not jeopardise the results expected from the common policy.

43. The OFT formed the view that though Newsquest and Johnston 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.
44. The OFT concluded "The dynamic nature of the market would suggest that Newsquest and Johnston were in fact competing against each other not only in Uckfield but also in Lewes, more generally in East Sussex and that a coordinated market outcome was not possible. In the absence of evidence to the contrary, the conclusion is that collective dominance was unlikely" (§36).

#### *Abuses*

45. The OFT found that neither 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 amounted to an "abuse";
46. As to the launch of the Uckfield Leader "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" (§41). The fact that the Uckfield and Heathfield Leader is still around, almost three years after the event, suggests that it was not launched purely as a market spoiler to thwart a new entrant (§43).

47. As regards the sale of advertising below cost by Newsquest, *short term* promotions by Newsquest in relation to a newly launched title could be objectively justified "if it was a genuine new product (rather than a fighting title)". It was unlikely that Newsquest was selling advertising in The Argus below AVC (§§ 44 to 51).
48. As regards Newsquest's alleged exclusive purchasing requirement, "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" (§54)
49. As to Mr Brannigan's allegation that Newsquest (Sussex) launched a free newspaper into Uckfield by employing a cross-subsidy, it was unlikely that Newsquest was dominant in other markets giving rise to the possibility of a cross subsidy (§§55-61)
50. As to the defamatory remarks, "it is questionable whether such conduct could be classed as an abuse against a free publication even if Newsquest was dominant" (§65).

*OFT's conclusions on Chapter II*

51. "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... (§§ 68 & 69).

52. Joint dominance of Newsquest and Johnston was also ruled out.
53. Much of the alleged anti-competitive behaviour could either be objectively justified or dismissed as vigorous competition.
54. 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).

*OFT's conclusions on Chapter I*

55. 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 (§§ 73 to 76).
56. As to the alleged horizontal agreement or concerted practice between Newsquest and Johnston, "No compelling evidence was provided in relation to the alleged cartel agreement between Newsquest and Johnston. 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".

#### **IV GROUNDS OF APPEAL**

*Grounds: 1. Failure to give Mr Brannigan the opportunity to comment*

57. The OFT failed to give Mr Brannigan the opportunity to comment on its findings before issuing its Decision of 9 June 2006, according to its obligations as set out in *Pernod Ricard v OFT* ([2004] CAT 10) and elsewhere.

*Grounds: 2. Market definition*

58. The OFT wrongly failed to consider:

(i) that the relevant geographic market was national, in which the four largest suppliers were collectively dominant; alternatively,

(ii) that if the relevant market was East Sussex (the OFT's position) that the four largest suppliers were collectively dominant or, alternatively, Johnston and Newsquest were jointly dominant or, alternatively, that Newsquest was dominant; alternatively,

(iii) that the relevant markets were the local markets of Lewes and Uckfield, and that in that case Johnston was dominant in Lewes.

Grounds : 3. *Joint and collective dominance*

59. In respect of the wider geographic market and collective dominance the OFT failed to consider and take into account the observations of the Competition Commission ("CC") in its Reports (which were known to the OFT) on three mergers concerning Johnston and Newsquest: *JohnstonPress plc/Trinity Mirror plc* Cm 5495, May 2000 ("*Johnston/Trinity Mirror*"); *Gannett UK Limited/SMG plc* Cm 5782, March 2003 ("*Gannett/SMG*") (Newsquest is owned by Gannett); and *Newsquest (London) Limited/Independent News and Media PLC*, Cm 5951, October 2003 ("*Newsquest/INM*").

60. The OFT wrongly concluded that local markets were likely to be "dynamic" (Attachment F, §36). The OFT failed to consider the increasing concentration for local newspapers, and the indications that the market may not be fully competitive (see e.g. *Gannett/SMG* at §2.33, *Newsquest/INM* at §§2.48 to 2.51).

61. In particular, the OFT failed to consider the relevance of 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, and the policy of “live and let live”. In *Johnston/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” (Glossary to *Johnston/Trinity Mirror* report, and §§ 2.33 et seq, particularly §§2.38, 2.39 and §§2.42 to 2.44).

62. The OFT also failed to consider 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” (*Johnston/Trinity Mirror*, §2.61(e)). The OFT failed to take this opportunity to address (by an alternative means) the CC’s view that the OFT should give early attention to whether an industry wide inquiry 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” (*Johnston/Trinity Mirror*, §§ 2.163 – 2.164).
63. The OFT also failed to consider the similar observations of the CC in the *Newsquest/INM* Report. The CC referred to the 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 (§§ 2.119 to 2.120). At §2.132 the CC again expressed the view that there was a “live and let live attitude” among the major publishers.
64. The OFT also failed to consider the implications of the information supplied by Mr Brannigan that a named reporter had told him that Johnston intended to exclude him from the market, although the exclusionary practices were exercised by Newsquest. The OFT also wrongly rejected his evidence that despite low-cost desktop publishing there were few entrants, there was a market-wide perception in

the industry that small independents would be squeezed out, including through buy-outs by Newsquest, who were also seeking to control newspaper printing. (Attachment B, §§47,48, 50; Attachment C, §18)

65. In considering the relevant geographic market the OFT wrongly rejected the evidence of Mr Brannigan that there is at least tacit (if not agreed) adherence to a policy of 'live and let live' as between Newsquest and Johnston as regards the geographical areas in which their titles compete. Newsquest apparently no longer circulates a free newspaper in Lewes and Johnston does not appear to compete head to head with The Argus in Brighton.
66. The OFT wrongly and/or too narrowly applied the *Airtours* test for joint dominance:
  - i) It wrongly assumed that there was a lack of transparency in advertising prices. Since a major source of income in paid for newspapers is from advertising, and all income is from advertising in free newspapers, it will be an important part of the sales teams' work to know the rates charged by other newspapers to individual customers, and those customers will not generally be unwilling to provide that information, even absent the Dutch auctions to which the OFT itself refers.
  - ii) It wrongly assumed that retaliation from the other local publishers was likely, concerning which there was no evidence in circumstances which, had the OFT been correct, evidence would have been expected. The OFT failed to consider the evidence in the CC Reports and the possibility that competitors might support, tacitly or otherwise, the elimination of new independent entrants on the basis of showing an example to others.

67. The OFT correctly relied on the effect of *Aberdeen Journals* as ruling out eliminatory behaviour by an obviously dominant firm in a local market, but failed to consider whether, in the case of collective dominance, it was not therefore an obvious and necessary strategy to allow a party with a small local market share, not expressly covered by *Aberdeen Journals*, to introduce the “spoiler”.
68. The OFT failed to consider whether the alleged abuses were in fact indicative of market power, whether joint or individual. For example, *Bellamy & Child* European Community law of Competition (5<sup>th</sup> edition) lists at §9-072 eleven examples of abuse. Newsquest engaged in all of the nine that could be relevant: excessive pricing (extra costs of printing in Essex), predatory pricing, price discrimination, exclusive dealing, refusal to supply, attempted enforcement of intellectual property rights, contractual conditions (difficulties over printing arrangements), limiting production (there is no free newspaper in Lewes), litigation (intellectual property right, breach of contract). (Newsquest did not (on present evidence) engage in tying or discrimination on grounds of nationality).

Grounds: 4. *Dominance in the local markets*

69. The OFT wrongly failed to conclude that there were in addition, or alternatively, relevant geographic markets in Lewes and Uckfield respectively. The OFT emphasised that the alleged “spoiler” was aimed specifically at Uckfield. The three newspapers principally involved were all local to Lewes or Uckfield (Mr Brannigan’s two newspapers and the “spoiler”). Had the market included Newsquest and Johnston’s other newspapers in East Sussex, then, on the OFT’s arguments as to the dynamic nature of competition in the market it would have been likely that there would have been observable competition from other newspapers.
70. The OFT wrongly concluded that Johnston was unlikely to be dominant because there was no evidence that its business was unduly profitable, unreasonably drawing that inference from the fact that “Mr Brannigan ... worked hard to

become sales person of the year and build up a profitable area for the company". (Attachment F, §21).

71. The OFT wrongly considered that it was "doubtful" that Johnston was dominant in Lewes on the basis of Johnston's market share in Lewes of 70%. The OFT wrongly rejected the evidence of tacit or other agreement between Johnston and Newsquest (referred to further above).
72. It follows from the above that (i) Johnston had an interest in eliminating Mr Brannigan from Lewes, and that (ii) that could be achieved by appropriate action in Uckfield, which would have the effect of closing *both* papers (which it did) and that (iii) the agreement whether tacit or express between Johnston and Newsquest over the geographic distribution of their titles was not disturbed if a spoiler was introduced by Newsquest in Uckfield. The effect of dominance in one market having an effect in another market is well known to the OFT.

#### *Summary of market shares*

##### 1. Nationally

73. 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 Johnston with 12 per cent. Their total market share is 73%.
74. In 2003 Newsquest was either the second or third largest publisher of paid for/free local weeklies, depending on which measurement is taken (*Newsquest/INM*, Appendix 3.2). In 2003 Johnston 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).

## 2. In East Sussex

75. In East Sussex the OFT estimated that Newsquest's market share based on readership was 36% and Johnston's 37%, a total market share of 73%. On this basis Johnston and Newsquest are jointly dominant. Mr Brannigan has calculated that, in terms of advertising revenue, market shares are as follows: Newsquest 54%, Johnston Press 27%, Northcliffe (DMGT) 13%, Trinity 5% (Attachment G).
76. That indicates that Newsquest is dominant in East Sussex, alternatively, that the major four publishers are dominant with a market share of 79%.

## 3. In Uckfield and Lewes

77. In Uckfield Johnston's readership is 31% and Newsquest's 7%. It would appear that Johnston is the largest publisher in Uckfield.
78. In Lewes Johnston's readership is 70% and Newsquest's 7%.

## Grounds: 6. *Abuses*

79. The OFT wrongly concluded that the anti-competitive practices set out by Mr Brannigan were not "abuses".
80. Generally, the OFT failed to recognise the effect that its guidelines and practices might have in identifying how a dominant firm (or collectively dominant firms) might profitably abuse their dominant position without engaging the interest of the OFT, or by engaging in practices in such a way as might avoid the OFT finding sufficient evidence to reach the necessary threshold, or, more importantly, the OFT's desired threshold, for an investigation, or a finding of infringement.
- a) First, it has been the OFT's (not invariable) practice to avoid pursuing small markets or small complainants. Their approach, namely making

known their policies and priorities, has been confirmed in this Decision in rejecting Mr Brannigan's complaint because it does not fit in with current industry and other priorities, thus giving a further green light to the newspaper industry.

- b) Secondly, it is not the OFT's practice to engage with disputed facts, or facts that might be disputed. This was apparent in *Burgess v OFT* [2005] CAT 25, and is confirmed in this Decision (for example in respect of Mr Brannigan's statements as to the joint behaviour of Johnston and Newsquest, the reasons for the printing difficulties and the reasons for Mr Baker's dismissal).
- c) Thirdly, the OFT has shown itself reluctant to consider the reasonableness of alleged contractual disputes in *Burgess v OFT*, and in this case, and whether they may not amount to deliberate harassment, despite the CFI's observations in Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937, §30.
- d) Fourthly, by providing in its Guidelines that new entrants might engage in pricing that might be considered predatory pricing if engaged in by an incumbent undertaking, the OFT is inviting, in the newspaper industry, and in any others in which it would be practicable, the introduction of "spoilers" rather than exclusionary price cutting by incumbents.

81. Whether consciously or not, Newsquest and/or Johnston and/or the four major publishers have been able to take advantage of these "policies". Further particulars are set out below.

82. First, the OFT has wrongly failed to heed the information available to it from the Competition Commission and Mr Brannigan, for example, that indicates the importance of the facts of this case nationally, and the impact of the

characteristics of the national market on the distribution of free newspapers in Uckfield and Lewes.

83. Secondly, it has wrongly dismissed the relevance of the factual evidence as to Newsquest's intentions supplied by Mr Brannigan in respect of (a) defamatory remarks and other discouragements to advertisers and outlets concerning his newspapers (b) the dismissal of Mr Baker and the attempts to prevent Mr Brannigan from obtaining printing services (c) the statement that Johnston intended to exclude Mr Brannigan from the market (d) the value of the newspaper to consumers as evidenced by the success of the advertising and the quality of the copy that was good enough to be plagiarised (e) the experience of Mr Brannigan in the newspaper industry and with Johnston Press in particular in providing additional veracity to those statements. Such evidence is clearly capable of providing the necessary "reasonable grounds to suspect..."
84. Thirdly, the OFT wrongly dismissed the apparently baseless dispute begun by Newsquest concerning entitlement to use the word "Life" in its titles. It further wrongly dismissed the relevance of Mr Brannigan's exclusion from the market of the failure of Newsquest (Sussex) to honour its agreement to print the titles.
85. Fourthly, the OFT wrongly concluded that because the Uckfield Leader was a new title, below cost selling (including free advertising for targeted customers) was legitimate behaviour. It also wrongly concluded that because the initial offer was for four weeks it was of short duration, without enquiry as to whether it would be continued if advertisers sought to return to Mr Brannigan's titles. Insofar as it may be relevant, supplying free advertising space must be a sale below cost, regardless of the relevant definition of cost. The OFT wrongly concluded that because the Uckfield Leader was still in business that it was not a "spoiler". It may still be published simply because, were it to close immediately it would be clear evidence of abuse, or, alternatively, it may be profitable. Further, the OFT wrongly ignored the evidence that the "spoiler" was introduced

only after other attempts to excluded Mr Brannigan had failed. (Attachment E, §§9-16)

*Other abuses*

86. The OFT has wrongly regarded Newsquest's refusal to supply as being subject to and outside the *Bronner* criteria for essential facilities. (i) It is commonly assumed that whereas a refusal to supply a new customer is subject to those principles, a refusal to supply an existing customer is not. Mr Brannigan was arguably an existing customer, either locally, because Mr Baker agreed to supply him or, subsequently, of Newsquest (Essex); (ii) It is contrary to the underlying rationale of the jurisprudence that a refusal to supply in a case such as *Bronner* can apply where another part of the same company agrees to supply; (iii) Newsquest was in the business of supplying other companies, which must reasonably include newspaper publishers, given the nature of the presses required for newspaper publishing.
87. It has wrongly ignored the effect of selective price discrimination and the systematic targeting of Mr Brannigan's advertisers. (Attachment E, §§17-18)
88. It has wrongly failed to consider whether, on the basis of economies of scale, Mr Brannigan's newspapers could only survive financially if *both* were successful. In that case Johnston could protect its market share in Lewes, in which it was dominant, as a result of the elimination of Mr Brannigan's newspaper in Uckfield, in which it was not dominant. By the time the OFT considered the matter, both newspapers had in fact failed.
89. The OFT wrongly concluded that the demise of Mr Brannigan's paper was unconnected to the anti-competitive practices set out. It wrongly relied on the short life of Mr Brannigan's newspapers as resulting from a failure on the part of Mr Brannigan to understand that a longer period of loss-making was normal. It failed to consider the facts supplied by Mr Brannigan as to the newspapers' actual



and potential success and whether, had Mr Brannigan persisted, his newspapers could have been profitable in that time period had "normal competition" prevailed.

90. The OFT wrongly rejected the possibility that the "spoiler" was being cross-subsidised. It had assumed that a new newspaper needed a year in which to become profitable. It did not take account of the extra costs associated with providing free advertising, and no cover charge. It ignored the preliminary analysis provided by Mr Brannigan (at Attachment E, §§22-29), and the information that would obviously be available to him of costs, the market and so on, having started a newspaper in that area himself.

Grounds 6: *Chapter I*

91. The OFT wrongly concluded that the agreements entered into between Newsquest and its advertisers would not have an "appreciable affect" on competition. Any practices which exclude, or are aimed at excluding, a competitor and/or provide an example to other potential entrants in the industry is of "appreciable effect".
92. The OFT's assessment that there was "no compelling evidence" of an agreement or concerted practice between Newsquest and Johnston was flawed. It wrongly rejected the evidence of Mr Brannigan both specifically in relation to Johnston and in respect of the industry generally, and it similarly wrongly rejected the observations of the CC.

Grounds 7: *the newspaper printing industry*

93. The OFT wrongly ignored the evidence that the behaviour of Newsquest (on its own or with other publishers) had the intention or effect of foreclosing that market to new independents. For example it wrongly relied on *Bronner*, in which Bronner's printing facilities were reserved for their own use, as relevant to the UK

in which newspaper printing appears to be ordinarily provided by other publishers, or at least by Newsquest.

**V CONCLUSION**

94. For the reasons set out above Mr Brannigan respectfully requests the Tribunal to set aside the OFT's decision and grant him the relief sought.



**TERRY BRANNIGAN**

23 November 2006