IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1048/1/1/05

Victoria House
Bloomsbury Place
London WC1A.2EB

7th April 2005

Before:
MARION SIMMONS QC
(Chairman)
PETER GRANT-HUTCHISON
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED — Appellant

and

OFFICE OF FAIR TRADING — Respondent

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

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

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CASE MANAGEMENT CONFERENCE

THE CHAIRMAN: Good morning. It seems to us from the written submissions and the defence, that the issues can be summarised in this way. What does a new acquirer of the business have to do to disassociate himself from the prior and potentially continuing infringement by the undertaking he has acquired? That, I think, is effectively what para.25 of the defence says, but put the other way around. On an appeal it is important that the Tribunal has the reasons of the OFT for rejecting the submissions to it of the alleged infringer. Without the Statement of Objections procedure, which is a pre-cursor of a Decision of the OFT the Tribunal does not have such assistance. Moreover, the alleged infringer should have the reasons of the OFT before it considers whether it is appropriate for them to appeal.

In this case, as we understand it, it is accepted by the parties that the change in control was not identified in the Rule 14 Notice. The OFT are now submitting that such change of control is of no relevance to infringement but only to liability for penalty. That was not put in the Rule 14 Notice, and it appears that the Applicant does not accept the OFT's submissions as to this. The Applicant submits, it seems to us at the moment, that the change in control is, to use a figurative comparison, a fence which needs to be negotiated. There may be an issue as to whether it is for the OFT, or for the alleged infringer, to negotiate the fence. So we would like submissions today on whether the facts and matters relied upon in respect of the negotiation of the fence is a matter to be addressed by the parties at the Statement of Objections stage or whether it is appropriate for it to be explored for the first time in an Appeal to the CAT. One of our concerns in relation to that is the cost of a Tribunal hearing which it has been suggested would be three days, so it has considerable preparation beforehand, as against the costs of either a Statement of Objections procedure and then a Decision, or a Decision.

I hope that is helpful.

MR. TURNER: Does the Tribunal wish me to address that straight away?

THE CHAIRMAN: I am not sure how you were going to proceed today.

MR. TURNER: Well the Tribunal has given a provisional view on how it sees the case and on the implications of that. In my submission there is a misunderstanding which I do need to knock on the head straight away, and I would like to do that because I think it will be very helpful for all concerned.

THE CHAIRMAN: Yes.

MR. TURNER: First, in relation to the timescale for the hearing, I should just say that my friend and I have spoken. I suggested three days without knowing what the ambit of any witness evidence was entirely likely to be and that was a highly precautionary estimate. As between my friend and myself we now believe that two days should on any view be ample.

THE CHAIRMAN: As we have started at that point, we note that in your skeleton I think you say that you may be calling some witnesses. Is that your intention?

MR. TURNER: Of course, we had relied in the Decision on evidence from a number of individuals. We continue to rely on the evidence and the reasoning in the Decision, which includes the evidence from those individuals.

THE CHAIRMAN: But the witness statements that you refer to in para.3 of your skeleton, are they the ones attached to your Decision, or are they new ones?

MR. TURNER: They are the ones attached to the Decision.

THE CHAIRMAN: So it is not as if you are going off to get ----

MR. TURNER: Not at all, they are all there. I am very pleased that the Tribunal is raising this in this way because it does enable me to show you the way in which the Decision was constituted, what it relies on and the evidence in support, because I believe that once you see that your understanding of the way in which the OFT is putting its case in the Defence will be affected.

THE CHAIRMAN: It is very helpful, and that is why I came in explaining where we were, because otherwise we would both go off in different directions.

MR. TURNER: I am very pleased.

THE CHAIRMAN: So para.3, the witness statements are there, so if they were accepted you would not be calling any evidence?

MR. TURNER: If they are accepted we will not be calling any oral evidence, that is absolutely right.

THE CHAIRMAN: So then we come to 4(b) where ----

MR. COOK: There is one point I would just like to clear up. There has been an additional file note produced in relation to Mr. Stock and Mrs. Williams, it might be helpful to clarify the position in relation to those from my learned friend's point of view?

MR. TURNER: We are not relying on those as evidence. My friend has indicated to me yesterday that he would propose to rely on the note relating to Mrs. Williams as effectively her evidence-in-chief – that is a matter for him.

Shall I proceed?

THE CHAIRMAN: Yes. So it is a question of whether the Applicants want to cross-examine any of your witnesses.

MR. TURNER: Yes.

THE CHAIRMAN: And then you will produce them?

MR. TURNER: What I will explain is the way the Decision is constituted and then I will show you the way in which the reasoning proceeds and it depends upon evidence that was gathered from a number of individuals. Those witnesses and their statements are the ones which are listed in the skeleton and were attached annexed to the Defence. There is nothing at all additional.

That being the case as, madam, you correctly say, it is for my friend to say whether he challenges any of that evidence. If he does not then it can be accepted. If he does he can cross-examine. It is then for him to say what evidence he is leading, and we will say whether we wish to cross-examine in relation to that. So far as that is concerned, he has referred to two witnesses, Mr. Mitchell and Mrs. Williams. I am happy to clarify that those witnesses being called for the Appellant we would wish to cross-examine those two witnesses.

THE CHAIRMAN: You will wish to cross-examine them?

MR. TURNER: Yes. But in substance this is, as I will hope to show you, a standard Appeal, in which the OFT is not moving in its evidence or, indeed, in its reasoning in a significant respect from what was there at the Decision stage.

THE CHAIRMAN: That would be very helpful.

MR. MATHER: Sorry, on "not moving in a significant way" – can you clarify a little where you are moving from? Is that insignificant?

MR. TURNER: No, it is only and exclusively the concession that prior to June 2001 the economic undertaking in respect of which the OFT found an infringement in its Decision was not controlled by the legal entity which is now before the Tribunal.

MR. MATHER: And are you relying on any new reasoning as opposed to new evidence?

MR. TURNER: No. Perhaps it would be simplest if I explained the core of the reasoning in the Decision and then I think you will be able to see the way we put the case in the Decision and, in our submission, a quite profound misconception which has arisen as to the way in which the Decision is framed. In short, we say that DQS have swung a very large red herring across the still waters of this Tribunal and we wish now to address that point.

The way in which the reasoning in the Decision is constituted is as follows – I will set this out in a series of points.

THE CHAIRMAN: Do we need one of the bundles open?

MR. TURNER: Thank you, madam. Perhaps it would be sensible to refer straight away to the Decision which in my bundles was appended to the Notice of Appeal.

THE CHAIRMAN: Yes.

MR. TURNER: Just before we open it, if I may deal straight away with the point, madam, that canvassed in your opening remarks. You said that the issue appeared to be referring to para.25 of the Defence: What does a new acquirer have to do to disassociate itself from a prior and equivalent infringement? The assumption appeared to be therefore that the OFT's material and evidence related to events that had taken place beforehand and that what we were relying on was some presumption, as it were, that things continued in the same fashion thereafter, and that that was a point which, given the concession that the OFT is now making, seemed to be central

to the Appeal. I understand that put thus it might appear to be the case, but that is not in truth the way in which the Defence or the Decision proceeds.

So far as the Defence is concerned, para.25 is one of the points. The principal points are set out in paras.21, 22 and 23, and as I will now hope to demonstrate, all these matters refer to evidence and reasoning in the Decision, relating directly to participation by DQS in the infringing agreements after June 2001, without the need to just say this is all a presumption that everything had continued following that date.

The original Decision in short was this. There was continuing involvement by DQS in price fixing after June 2001, continuing, active involvement.

THE CHAIRMAN: When you say "after 2001"----

MR. TURNER: June 2001.

THE CHAIRMAN: You say after June 2001?

MR. TURNER: Yes.

THE CHAIRMAN: Right.

MR. TURNER: The central question for the Appeal is whether the basis for the OFT's Decision in that regard was justified because the OFT is not now seeking to rely on any new evidence whatsoever, or any material – certainly new reasoning – apart from what will emerge naturally from the litigation process.

DQS says that there is a new factual case in the Defence, referring to involvement in price fixing after June 2001. We say that is quite wrong, the Decision is actually built on compelling evidence of DQS's continually active involvement during the period in question, after the period June 2001. Although, this being a cartel case, all the evidence will need to be considered by you, the Tribunal, cumulatively at the end of the day (which is really one of the points that para.25 in the Defence goes to) it is, in my submission, important to appreciate the elements in the reasoning in the Decision which are being critically overlooked if one says there is no evidence beyond June 2001 of their continuing infringement – no direct evidence – there is. I make five points in that regard.

First, the Decision is built on clear and compelling statements – a series of statements – from the individuals who are mixed up in the price fixing arrangements from other companies, that these arrangements involved all four distributors and that is a central and important part of the OFT's reasoning in the Decision. If you now have the Decision open, let me ask the Tribunal to turn, by way of introduction there to para.65 – really the paragraphs under the heading: "The 'price match but not undercut' policy". This is the discussion of the main aspects of the continuing infringement, namely that the distributors, including DQS would not undercut each other on price. If you look first, and this is by way of introduction, at

para.65, you will see there a quote from the statement of Mr. Scullion from UOP, who was at the centre of the spider's web.

THE CHAIRMAN: Yes.

MR. TURNER: And he speaks in general terms and refers to there being an undertaking between UOP distributors. He says what it was, an understanding that they could match each other's price of desiccant but that they did not need to undercut each other. We will show you in context that he was talking about that at large, he was not referring to any specific period, and he was referring there to each of the four distributors.

Paragraph 70 and following, just for the Tribunal's note, concerns the way in which this policy was built up over a period of time, and how it came to include, and needed to include all four of the distributors to be effective.

That is by way of introduction. Now let us turn to the reasoning, and if you go to para.136, under the heading "Participation by the distributors". Does the Tribunal have that?

THE CHAIRMAN: Yes.

MR. TURNER: Para.136:

> "The following evidence demonstrates that all the distributors complained about undercutting, demonstrating knowledge of, and participation in, the Policy".

By "the Policy", which is a defined term, we mean there not undercutting each other.

Paragraph 137:

> "The OFT contends that all the distributors participated in the Policy through complaining to UOP if undercut".

Then we have a reference to the evidence of Mr. Ealing, which you will see from the footnote was in his witness statement. He said:

> "I am aware that all the other distributors have reported to UOP breaches of UOP's policy on pricing at some time."

So there we have the witness evidence first of Mr. Ealing, centrally involved, the man from UAKE, one of the main other distributors, who was under the impression that all of the distributors are involved. If I may I will build this up cumulatively, but you must see the way in which the Decision is reasoned.

Paragraph 138, is Thermoseal, and we have the evidence there of Mr. Paterson, and if you turn the page and look at the top, he again refers to what happens:

> "If Thermoseal is substantially undercut on a quote by another UOP distributor …"

then what happens? The OFT's case is that this included also DQS.

Paragraph 139, the evidence of Mr. Hickox of Thermoseal, and if you read that again, you see the same point, another UOP distributor and what happened there. Pausing there, you

see the way in which the OFT is relying on the evidence of the people directly involved for what they said was the case at large, and not referring to any specific limitation on the period concerned.

Those are the witnesses who I have mentioned in the skeleton from the other distributors. There is also quite a lot in the evidence from Mr. Scullion, who was the man involved from UOP and who was, as I say, at the centre of the spider's web for this period. If you turn specifically to what he says about the year 2001 (you can see that at para.99, p.31) this is part of what he is saying generally about the price fixing arrangements during 2001, and he is referring to the period after the Callow Hall meeting in November 2000, and he is referring generally to his role in refereeing disputes between distributors. His evidence is never to say that there was some exception for DQS, that after June 2001 for some reason DQS drop out of the picture. All of this witness evidence taken together is, in our submission, part of a compelling picture that DQS was directly involved at the time; and this is all the evidence relied on as you can see in the Decision. Lest it be said that somehow this was not banged home in the clearest of terms, have a look at para.160, p.44, the last sentence of which makes the very point that I am now making – the witness statement evidence.

That is only one of the strands, but that is sufficient in my submission to show the Tribunal that the central way in which the Decision is reasoned and the evidence that is relied on has not changed one jot or tittle from what was there before.

My second point is that it is supported by the reliance in the Decision on letters – not just the witness evidence – from the other distributors complaining about undercutting by DQS in the post-June 2001 period, and expecting within that same period corrective action to be taken by UOP. I will give you only a few examples because I do not want to bore the Tribunal. Paragraph 142 of the Decision, which refers to an example of active participation in the policing of the policy and refers to a contemporaneous document, which is an internal memorandum from one person to another within UKae, and you will see there a reference to the DQS invoices and how those have been brought to the attention of Tony Scullion expecting, as it were, corrective action, and if you have a look at the dates concerned, footnote 131, at the bottom of that page, you will see that that is well within the period post-2001, and within the subsequent period.

Turning forward to para.150, here is another one, which again is all part of the central reasoning in the Decision. We have a letter from the area sales manager of Thermoseal to Mr. Scullion, and the Tribunal can see what that says. Again, it is a complaint, among other matter, about the DQS's behaviour and asking at the end of that quotation for corrective action to be taken: "Please can you help us with this issue?" Again, I invite the Tribunal to look at

the date by reference to footnote 137 – 28th September 2001. The Decision is replete with these matters. I will give you ----

THE CHAIRMAN: Do you get one earlier than 28th September?

MR. TURNER: Yes, para.166, this is Mr. Aucott:

> "Despite your assurances, the position at […] is still the same. DQS are still supplying at £[…] Comments please."

And if you look there, footnote 155 we are back now in July – 25th July.

THE CHAIRMAN: Where do you get that from?

MR. TURNER: Footnote 155.

THE CHAIRMAN: That is the fax, 27th July – is it?

MR. TURNER: Yes, that is absolutely right and he is complaining about the behaviour of DQS ----

MR. COOK: DGS.

MR. TURNER: Yes, he is complaining about the behaviour of DQS, as you see from para.166.

MR. COOK: 167 is the footnote 156.

MR. TURNER: I am sorry, 155 and 156, they are the same "Ibid", July 2001.

MR. COOK: I think that is quite wrong. The fax is 166, if you turn over the page it is actually one dated May 2002.

THE CHAIRMAN: That is what I was wondering.

MR. COOK: The OFT then mysteriously says and further evidence is shown by something historical, which you see is actually in relation to DGS, an entirely separate entity.

MR. TURNER: I have not followed through the footnotes into the underlying materials.

MR. COOK: 167 says: "Further evidence of DGS' …" – a completely different company "… is found in a fax", that is 156, that is July 2001, but it is nothing to do with my client, or any other entity in which we have ever been involved. The previous one you will see is actually dated May 2002.

MR. TURNER: All right, well it does not matter – a very helpful interruption. Paragraph 167 footnote 156 ----

THE CHAIRMAN: So 160?

MR. TURNER: 167, para.156 which is referring to, as my friend says, DGS's participation. There is a complaint there about DQS: "Copy DQS invoice for information. Do you want to support?" And then Mr. Scullion's response. So again, it is at least supportive evidence and the reference here is quite clearly July 2001 to the involvement of DQS at the material time.

Now, I have no intention of fighting this Appeal point by point in this Case Management Conference ----

THE CHAIRMAN: No.

MR. TURNER: -- but what I do want to show you is how everything is already there, and how the OFT is absolutely not moving away from that. Those are the letters from the distributors. If I may mention briefly three other matters.

First, the clear and only faintly contested (if at all) question of the participation of Mr. Mitchell from DQS, as a member of senior management, in co-ordinating a price increase at the beginning of 2002. That is there in stark terms, and I invite the Tribunal to look at para.228 of the Decision on p.56: "Mr. Scullion followed up this letter with a fax addressed to all four distributors …" and he is asking for a co-ordination in the timing of a price increase and the amount. Subject to correction, the letter that went to DQS went to Mr. Mitchell, it was addressed to Mr. Mitchell. At para.251, a few pages forward you will see that what happened in response to that fax of 25th January 2002 is the compliant action by DQS notifying customers of the price increase in tandem with the other distributors, and at 252 Mr. Mitchell's confirmation that this letter was sent out to DQS's customers, and that DQS did implement the price increase.

The case against us here is that Mr. Mitchell essentially had a moment of madness on his part. It is faintly (if at all) denied that this was participation in price fixing at this stage by Mr. Mitchell. We say that taken together with everything else in the case, and of course in a cartel case you do look at matters cumulatively, it represents stinging and irresistible evidence of DQS's continuing involvement through, among others in the company, Mr. Mitchell.

That brings me on to my fourth point which is that contrary to what is said by DQS, the involvement of DQS in all of this is not in the Decision co-extensive with the involvement of Mr. Stock. The Decision does not identify him, as I have already made clear, as the connecting factor with the infringement, and he left in June 2001. There is Mr. Mitchell and, other than Mr. Mitchell, there is also strong evidence directly relied on in the Decision that Mrs. Ann Williams, whom my friend proposes to call, was involved for DQS, and you see that at para.152-3. If you cast an eye over that you will see: "The OFT concludes that DWS fully participated in the policing of the policy", and then reliance is placed on this letter from Mrs. Ann Williams, and the Tribunal can see what that says. Then if you turn forward to para.160 in the Decision, you will see the conclusionary nature of the OFT's reasoning about that, that it is satisfied that the letter from Mrs. Williams to Miss Marchant is further evidence of their participation in the policy, and so on. There is an issue which in this Appeal will need to be tried, as to what she meant. But there it is, it could hardly be clearer. It is quite wrong to suggest that Mr. Stock is the only individual named in this Decision as the connecting factor, that was absolutely wrong.

Moreover, and I say this in passing, if you turn to para.108 it is pretty clear from that that it would be idle for anybody to assume that Mr. Ray Stock was a rogue, one-man band within the DQS undertaking, because the implementation of this all has to be done by a sales' team, and if you look at that fax of November 2002 sent to DQS as well as the others, what you see about half way down there is UOP saying:

> "We therefore need to ask all of you to re-emphasise the need for your sales team to be diligent when it comes to the price of desiccant."

and the natural understanding of what is being said there is that the sales team, *inter alia* of DQS is already well versed in what they have to do in terms of their pricing of this product.

Finally, for present purposes, it is of course the case that when the price fixing was ultimately brought to an end when all this came to light, this was done by a letter from UOP sent to all four of the distributors, including DQS along with the others, and the reference for that is para.125 of the Decision on p.36.

If I may pause there, what I have done is not to give the Tribunal in a very quick tour de raison – all the OFT's case in a few moments. What I have tried to do is to show you the way in which this Decision was made, the evidence which is relied on, how it relates directly to the period which is now in issue, and what we are saying the Defence is "This is what we are going to be saying still in the Appeal". You will hear the witnesses concerned, and you can decide whether we have strong and compelling evidence that in the period in question that they were guilty or not. This is a standard Appeal and there is absolutely no fundamental change of case that, according to any of the previous case law of this Tribunal, should mean that there is a remission. This is a case that absolutely is within the ball park of the Tribunal and it is not a case for remission.

So that is my response, madam, to your initial remark. I did obviously anticipate that you might be thinking along those lines because I had read the material from the previous Case Management Conference and so I knew the direction that people were coming from. But what I hope I have managed to do is to show you that this is the way in which the OFT is approaching the case and that there is no question of a sudden change in case. If one takes the previous examples where there has been remission, in *Argos* the OFT introduces new witness statements with new evidence of price fixing. Of course, in those circumstances the companies concerned need to be given an opportunity to meet the point again, and that is what has happened.

In *Aberdeen Journals* what happens is that there is new evidence about the relevant market which was not there before. Of course, that should have been put to them. We are not

relying now on any new evidence at all. We are saying "This is the way the case was put in the Decision, allow us to defend it on the Appeal."

THE CHAIRMAN: Do you want Mr. Cook to answer now?

MR. TURNER: I am in your hands, madam.

THE CHAIRMAN: Would that be the most appropriate course? Yes.

MR. COOK: Madam, I am very grateful to my learned friend, because I am going to suggest he has rather made my point for me. He is absolutely right to say the OFT has not changed the end result it comes to. The reality is though that it is fundamentally changing the basis upon which it comes to it. He has taken you through all of this but, of course as we all know, the Decision at that time illustrated absolutely no understanding at all because the OFT did not understand it; they were talking about two entirely separate legal entities being involved each owning the DQS business at various times. So the whole thing flows without taking account of 12th June 2001 date and thinking about what changes that may or may not have made at that time. So what exactly my learned friend is trying to do, as the Defence itself does, is to say "We do now recognise there was this change, based upon this new understanding, this different set of facts, nonetheless we come to the same result", and that in my submission is exactly what the Tribunal ruled last time he should not do.

There was one understanding of a particular set of facts, and the OFT came to one decision previously. Now, they say based on some different facts we now recognise there was a change of legal ownership, and "based on those different facts we are going to come to the same result". It is clearly based upon a different understanding of the facts and that, in my submission, is exactly the point that the Tribunal ruled was wrong last time. It is making a new Decision at the Defence stage, because you are saying "Different facts but I come to the same result" that is in effect a new Decision – same result different reasoning. These are exactly the type of points that make this wholly appropriate for remission, the last point my learned friend made when he referred to the fact that you must ensure that your entire team know, your entire sales' force know about that. One looks through this and one does not see anywhere in the OFT's Decision here reference to the sales' team having known about it, or evidence like that. That is a new point, and it is exactly a new point he has to make because the only reference to individuals prior to June 2001 (the point I make in my skeleton) was to Mr. Stock. There is not at any point a reference to anybody more widely – the sales' team, for example, whoever that might be – knowing about this. They simply refer to Mr. Stock – because they had not appreciated the change in ownership and Mr. Stock's departure at that stage, they did not appreciate the need to do that. Now, what my learned friend was doing there was saying "Oh it is apparent far more people must have known", and that is how they are going to try and make

the point. It is exactly this type of thing which, in my submission, is exactly an example of the OFT trying to make a new Decision by its Defence. They have to establish, in my submission, that somebody within my client's knew about these matters from 12th June 2001. There are certainly events that take place later that might constitute an infringement. There is the separate infringement, but subject to issues of appreciability – the 2002 price increase where we accept some issues of appreciability we are on the hook on. But that is separate, that is different from the "price match, we are not undercut" policy.

A new limited company comes into effect and my submission is going to be that one has to identify somebody within that company who knows what is going on, and that a policy is being pursued in the knowledge that it is part of either an agreement or a concerted practice. No attempt was made in the Decision to do that, and what my learned friend is doing today is trying to produce exactly that evidence and say "Look at the evidence we have, based on the new knowledge of the facts, the fact there was this change, we can now support the Decision", but it is different reasoning. It is exactly that matter, in my submission, which makes it wholly appropriate for remission because they have not done that in the Decision because they had not appreciated it.

So all the points that one can go through – I am not going to take you through all the points he made – I will deal with a couple of them briefly. As far as the references to the individuals giving evidence of this ongoing infringement are concerned, the actual case the OFT make on this, it is not just that it is an infringement of the Competition Act, but the suggestion that anti-competitive practices were going on from 1989 onwards, so 1989 – 2003 is effectively the case that is made, but it is not suggested it is all an infringement of the Competition Act. So when you take a witness statement from somebody saying that there was involvement of the distributors they are talking about something that may have involved a period of 14 years. Now, at no point was it suggested or dealt with as individuals – "Were you aware of the change of control of the business of DQS?" If they were not aware of it there is no particular matter why they would distinguish matters, but nonetheless from my client's point of view none of its employees knew about this – it does not matter what other people thought they were party to, my client has to know it is party to a concerted practice to be involved in anything. So it is exactly those type of issues that the OFT did not raise with these individuals because it did not know to raise them with the individuals, or it certainly did not appreciate that it should have raised them. That, in my submission, is the mistake one makes all the way through here that the OFT was looking at this as all part of the same individuals doing it, the same businesses doing it. As soon as you recognise you are talking about different companies, different individuals being involved, you have to start asking different

questions, such as "Did the new limited company not know about it?" There is no hint of that in the Decision because the OFT was not thinking about that, but it has to change its entire structure of the case. That is what my learned friend was doing this morning, we are now looking at just after 12th June 2001, now we can try and piece it together, and that in my submission is what the OFT should do at the Statement of Objections stage and the Decision stage. It should not be trying to do it on the hoof in the course of Appeal proceedings, essentially making a new Decision and that is what the Defence is. In my submission that is the reason, based on the Tribunal's previous Ruling, that this is a matter, by definition, for remission. It is not a classic appeal. A classic appeal is a situation where the OFT turns up and says "Our Decision was completely right." That is a standard Appeal. This is one where the OFT has turned around and said "Actually we accept in terms of fines 40 per cent. of our Decision was completely wrong, and we reckon for a period it was completely wrong. The whole factual basis upon which we proceeded, namely that there was one single entity involved, is wrong. Nonetheless, we are now looking at a very different period, different individuals being involved and nevertheless we can still support – for that period at least – the Decision we came to". It is an entirely different set of reasoning. Therefore it is very different from a standard Appeal where you are supporting the Decision as a whole with no change in reasoning, facts or anything else. It is different reasoning, albeit that it comes in respect of a completely different period to the same result they reached before.

My learned friend's mistake is that he confuses the result with the reasoning. The reasoning has changed in order to try and preserve, at least partially, the same result and that, in my submission, is the reason it should be remitted.

(The Tribunal confer)

MR. TURNER: Madam, there are two brief points, if you wish, perhaps I ought to just make them.

THE CHAIRMAN: Before you do that, I think it might be helpful, you keep saying that the reasoning has changed, can you just show us the passages in the reasoning which you rely on to substantiate that?

MR. COOK: Certainly. If I could start with para.21 of the Defence? It is right to say that the OFT has not taken it to the detail as my learned friend has this morning in the Defence, but if you look at para.21 the statement they make is that the change in ownership and the details of the undertaking did not bring the participation of that undertaking in the infringing agreement or concerted practice to an end … the departure of an employee, namely, Ray Stock.

Essentially what they are saying is "We conclude that the infringing conduct was there from 2001 onwards" and now we know there is a difference. In my submission, they are concluding

based on a different set of facts something which ends up with the same result, but they are now doing it on the basis of a different set of facts.

THE CHAIRMAN: Well you say it is a different set of facts, but the facts are in the Rule 14 Notice and in the Decision.

MR. COOK: Well there is a key, and the key change is enormous, which is they now recognise there is a completely different limited company there, and a completely different management staff. So they are now saying "Now we recognise there is a completely different management company, different management control, nevertheless we conclude that that change did not make a difference."

THE CHAIRMAN: "On the evidence that we had and set out in the Decision".

MR. COOK: Nevertheless they have to say based on the evidence we are now asking ourselves a different question – that is really the issue you started with. They are asking themselves an entirely separate question. They are not relying on wholly new evidence to do so but they have to start with a different question. They are not asking themselves was one business involved in a continuous infringement over a 14 year period (but in essence a 3 year period)? They are saying that there were two separate companies involved here. The second company only became involved on 12th June 2001. "Was that second company involved?" is the question they are asking themselves – a completely different question – and, "If we look at this bit of evidence, therefore we conclude the following." In my submission that is a change in their reasoning. It might be that we are looking at the same facts but you are answering a different question and you are essentially coming to a different answer, because you are saying "Therefore we say this new business was involved in it".

THE CHAIRMAN: My understanding of what Mr. Turner is doing is not that. What he is saying is that they have found a continuous infringement throughout the whole period. They have evidence of that continuous infringement. The fact that the company changed makes no difference to that continuous infringement. The only thing it makes a difference to is who they make liable for the penalty.

MR. COOK: In my submission that is not in fact what they are doing.

THE CHAIRMAN: That is what he says they are doing.

MR. COOK: I know that is what he says they are doing but in my submission they cannot be doing that. The question they asked themselves originally was "Was there a single infringement in the context of a single business, a single company?" They answered that in one way and said that there was a continuous infringement. Now they have to ask themselves a completely different set of questions. They have to say that from June 2001 was there an infringement ongoing in which my client (the limited company) was involved? There was a fundamental

change in facts to conclude that because you are saying that the limited company has changed, the management has changed and therefore there is this whole sea change – did it make a difference? That is not a question they asked themselves in the Decision nor considered at all. So they simply ask themselves exactly the wrong point. They are now asking themselves the right point and they are trying to answer it in their Defence.

THE CHAIRMAN: Can we just look at their Rules – have you got the Purple Book? Page 348 – if you have the 10th edition. This is what the Notice has to state: "The facts on which the OFT relies, the objections raised by the OFT, the actions the OFT proposes and its reasons for the proposed action."

The action that the OFT proposes is to find your client as an infringer and to impose a penalty.

MR. COOK: Yes.

THE CHAIRMAN: The reasons for the proposed action would be partly that they took over the business at that point and were therefore liable for the infringement from that date.

MR. COOK: Yes.

THE CHAIRMAN: That bit is not in the Decision.

MR. COOK: Absolutely.

THE CHAIRMAN: Is there anything else that is not in the Decision?

MR. COOK: Well I would say that there is. It is right to say that in the Decision the view is that there was this sort of continuous infringement all the way through but only because they were proceeding on a wholly incorrect factual basis that it was simply one company involved. So one could simply make the assumption that if you found some infringing conduct here, some infringing conduct a couple of years later, you assume that because there is no change in between that it all carried on all the way through. As soon as you have a fundamental sea change in that you actually have to look and see did that make a difference? The answer that the OFT gives, and in particular in para.21 of its Defence is "no", it did not make a difference. We disagree with that. You actually have to look at that and answer the question "Did it make a difference?" and you cannot simply make the assumption they made when you are looking at a single entity. Well, nothing will have changed, everything therefore must have carried on. You are saying that yes, it has changed and did it make a difference? That is the bit of the reasoning, not in the Decision for obvious reasons, that is now in the Defence and they are trying to create a new Decision.

Fundamentally there is nothing in the Decision which talks about, for obvious reasons, that change in management and that change in ownership and what, if any, difference that makes to what was going on. In order to conclude that my client was involved in

something from 12th June 2001 onwards, they have to conclude that somebody there was involved, and somebody there was doing it from 12th June 2001 onwards recognising this sea change in ownership, and particularly management. The reason why management is important is up until that point they do just identify Mr. Stock as being the only individual involved, the only person who is referred to prior to June 2001 as being employed by the DQS business. So he has gone in June 2001, different managers are in – subsequently Mr. Mitchell takes over but there was a different manager before that. They need to show that somebody else knew about this and was doing it from June 2001. That is not there at all because they were not asking themselves that question.

What my learned friend was trying to do this morning was show that legitimately they could come to that Decision that somebody else did know – really that is not the question – and I would argue that they legitimately could not. The issue is they have never asked themselves that question before. Now, they have and now they are putting together the case my learned friend was doing this morning saying "Well we can see from this" and the last point he made about all the sales' force must have known. That is exactly the type of argument they do have to put together in order to say that everyone we have referred to before has gone, the business has been transferred to a different management team and a different legal ownership, therefore a lower strata of people knew. If that was the case then they would be able to show that we were involved in the infringement that did start on 12th June 2001. The point is they did not ask themselves that question. They have not raised it before. It is exactly that type of point which concerns me, namely, my learned making a point like that which actually comes from a document and nobody has drawn that point out of it before – the Decision certainly does not – about something that happened, it is actually 2002 so it is something that happened over a year before, and saying "Based on that others must have known". That is what the OFT needs to do – it is what my learned friend was doing this morning – it is not in the Decision, it is not actually even that much in the Defence, but that is what they are trying to do in the Defence, namely create that type of "we conclude in answer to a question we never asked ourselves before, that as from 12th June 2001 the new management knew or the staff that did come did in fact know and therefore just carried on doing the same thing in knowledge". In my submission you have to show either the new management knew or the staff that came across knew. In my submission you simply cannot be liable for an infringement if you do not know that you are either party to an agreement or party to a concerted practice, you are not doing anything in accordance with that. So the OFT has to be showing some sort of activity in accordance with some agreement or concerted practice and it did not ask that question, did not answer it and they are now trying to.

Paragraph 21 is essentially the conclusion passage in the Defence which does this.

THE CHAIRMAN: Assume that the new company had not taken it over. Mr. Stock left, that is what they knew – there was a continuing company, Mr. Stock had left.

MR. COOK: Yes.

THE CHAIRMAN: Do you say that thereafter, after June 2001 when he left, they would need to show that somebody else was there that had knowledge?

MR. COOK: It is actually a very interesting competition question into issues of imputed knowledge. If one member of staff knows something that knowledge is imputed to the company, if they carry on doing the same thing when that individual has left it is very messy. I think there will certainly be an argument to say if you are doing something as part of a concerted practice the only person who knows about it then leaves and you can ask every single member of the company "Why are you doing this? Are you doing it as part of a concerted practice?" and every single member honestly says "No, I am not. I did not know there was one." I would say in competition terms there were reasons to say that they are not party to any form of unlawful arrangement, and certainly should not be fined for it.

THE CHAIRMAN: So the OFT must have come to the conclusion on this that there are other people around who did know, on that basis?

MR. COOK: I am not sure they actually asked themselves that question. I am not in any way suggesting the opposite is unarguable. In my view there is certainly a doubt about whether the answer is clear or not.

THE CHAIRMAN: But what you say is that because there is a new company that comes along that company has to acquire knowledge from somebody, and if Mr. Stock is the only person with the knowledge then that knowledge cannot be imputed to the company.

MR. COOK: Yes, and I think certainly one could very simplistically just take an imputed knowledge view when it is a single limited company and say that the previous managing director knew, the fact that you have some internal breakdown in communication and did not tell anybody else does not get you off the hook – I can certainly see that being an arguable position. In my submission you cannot impute knowledge to my company from an employee who has never been employed by us. In my submission that is an obvious matter of basic contract law essentially.

THE CHAIRMAN: But that is really your point, is it? That is really your main point?

MR. COOK: That is going to be the inherent part of the agreement, that they cannot impute that knowledge from an individual who was never employed by us, therefore they need to find somebody else. They were not trying to do that in relation to the previous position because they did not see the need, they assumed it was one limited company. So however one proceeds

on it they are asking themselves a completely different set of questions and getting essentially different answers, albeit the end result if they still try and fine my client for that period. There is certainly nothing in the Decision that indicates that they were assuming that others knew. They do not say that, but if that is what they were assuming then they should have put it in the Decision. They seem to have assumed, and it certainly could be seen as sufficient, that if the managing director knew and he left and the company carries on doing the same thing it is still liable. In fact, what they expressly say in the Defence is that the company carried on with the infringement, the company is liable. So they are drawing the conclusion that from 12th June 2001, from that day my company started infringing, and that is an entirely new conclusion, based as it is on a fundamentally different set of facts.

THE CHAIRMAN: Yes. Mr. Turner?

MR. TURNER: If I may make two main points in response to that. First, if I may pick up on, if I may say so, madam, on the extremely perspicacious comment that you made in relation to Mr. Cook's argument. It was always the case, on any view, that Mr. Stock left this business in June 2001, regardless of the change in the company ownership – Mr. Stock left. The OFT Decision nevertheless found infringement for the period after that time. That was therefore the finding in the Decision. Madam, you are absolutely right to identify that as a key point. We rely just as before, in relation to the disputed period, on clear and direct evidence of other people who were involved in the price fixing activities, both witness evidence, their contemporaneous letters, which imply in their own terms that DQS was involved and, without going back through all of the material I have already covered, clear evidence that at least Mrs. Williams was directly involved in doing something about it in that period and, of course, Mr. Mitchell in relation to the co-ordinated price increase. We rely on all of that.

On analysis what Mr. Cook is saying is that this is not good enough because what the OFT needs is direct evidence of particular individuals within his client's company being involved at the material time. He says without that we should not win, we should not have made the decision. That is a question that goes to the merits. That is not a question of any change in case. We are relying and we say it is both fair and, in our case, compelling to have done, on certain circumstantial evidence which we are putting together. All Mr. Cook is saying is this, for there to be strong compelling evidence of infringement in the disputed period what one needs to have is evidence about who was actually involved doing the price fixing within DQS at the time. Obviously we do not have that – we do not have it now and we did not have it then. We made our decision nevertheless on the circumstantial evidence which I have gone through, and we persist in that. It is exactly the same.

That being the case, what DQS should do, if they really believe that that is the issue, is to fight that in the Appeal Tribunal and if he is right he will win. In my submission it is quite bizarre to suggest that there should be a remission. For one thing it is very difficult for anyone to see the advantages that the process as a whole would gain from this and, in particular, his client, because we rely on the same circumstantial material and we will say that is the evidence which forms a strong and compelling basis for a Decision relating to infringement in the period in question. It is there and we do no rely on anything else.

The second point is this, Mr. Cook did advert to the question of the change in legal ownership as somehow being fundamental to all of this. It is not. DQS is, in my submission, obviously wrong to suggest that the original Decision was not based on the concept of infringement by an economic undertaking but a legal one, and that the vase breaks because the legal ownership changed at a certain point. The Chapter I prohibition applies to economic undertakings, it does not apply to legal ones. The finding in the Decision was that DQS was an undertaking for the purposes of the Chapter I prohibition – I am not sure whether you need to look at it, but paras. 29 and 30 (p.14) of the Decision itself make that absolutely clear. Paragraph 29 simply recites what the Chapter I prohibition in line with Article 81 of the Treaty says, and 30 reciting:

> "UOP and the four distributors are all undertakings for the purposes of the Chapter I prohibition."

There was no crucial reliance upon the legal control of the legal undertaking being the same throughout at all. The only error that the OFT has made therefore essentially goes to whether the right man was identified at the right time. The error was to assume, encouraged by DQS, because of its written representations, that the economic undertaking was co-extensive with DQS all along when it was not. But from June 2001, DQS (the undertaking now before the Tribunal) was in the driving seat, was in direct control; we rely on all the same

Madam, those are my submissions.

MR. MATHER: Picking up on the admitted error of getting the wrong man, or the wrong company, can you say a little about how serious that is initially and how careful the OFT ought to be not to get the wrong person and the consequences, because at least in terms of penalty, directing a penalty against a Body which did not exist for part of the period does seem to raise quite difficult issues.

MR. TURNER: Yes. First, in my submission, it is an important question to canvass, but it does not affect the matter before us. If the OFT got it wrong, and if it was culpable, the right cure for that remedy would sound in costs. It would not mean that remission was appropriate with all

of the procedural safeguards and extension of the process that goes with it, when it would not otherwise be.

The question therefore comes back to what happened and essentially was anyone to blame for it. Now, I believe that Mr. Ward at a previous Case Management Conference has shown you quite plainly what happened. First, that the Rule 14 Notice on the understanding of the Office of Fair Trading at the time, recorded that it was the same legal company throughout the whole period, and that in the written representations that DQS then made on the Rule 14 Notice they endorsed that. They not only endorsed it, Mr. Mitchell's witness statement went further and he actually said in terms that he was employed essentially by the same legal company throughout the period and beyond. So the OFT, for its part I have to say, feels somewhat aggrieved by the way matters have turned out. It is true and fair to say that in an email exchanged concerned with assessing the right level of turnover for the purpose of determining the fine which, if we have copies available, perhaps I can show the Tribunal.

THE CHAIRMAN: I think we asked for them yesterday because we thought that might be relevant. We did not see them last time. We wondered how it had arisen. [Document handed to the Tribunal]

MR. TURNER: I am not troubling the Tribunal by actually showing you the written representations, the responses, I believe Mr. Ward has already done that and you do not need to have your memory refreshed. But first you see a request for information by the OFT on 27th May 2004, where you see what they are doing is writing to request turnover figures from your client in order to calculate a possible penalty. They then ask for that.

The last page that you have in that little clip is the response, which we believe is a response on 10th June rather than 6th October – I think it is the American arrangement. You will see that what happened there was that in the first full paragraph they did explain – not entirely perfectly with what we now know to be the case, but pretty well – that there was a change in the ownership. That was obviously overlooked and I cannot get away from that. Nevertheless, the point when it was taken on the Appeal as a point of appeal, a point of objection to the Office's position, was taken for the first time. The Office was faced with having to deal with that as from that stage. So in terms of whether this was a serious error in terms of culpability, my submission is that it is not, it was an oversight which is regretted. But it was not a serious error from that point of view.

In terms of whether it should affect the question which we are now canvassing, which is whether to hear the Appeal or whether there should be remission, I say that is irrelevant. Remission is an entirely different matter from this.

MR. MATHER: Right, well I have two further points on that if I might ----

MR. COOK: Before you go on, my learned friend has not taken you through the full chain of correspondence on this – I am struggling to find copies of all of it. He has taken you through the first two stages, there was then a further request for further information dated 30th July where the OFT expressly asked for separate turnover figures for different bits of the organisation including a recognition there was a limited company and DQS separately, and then we responded on 9th August 2004 with a more detailed letter, which included the pictures you have seen before – just so you have seen the entire picture.

MR. TURNER: If I may add just one more point which is that in terms of the consequences of the error, we are now in a situation in which the OFT has conceded a very large fraction of the overall case. The result of that is – and my friend's calculations are not nearly the same as ours – the level of the fine which is due on the OFT's case has come down by about 50 per cent. from £109,000 to £58,000. So in terms of the impact we say that that has been taken account of in the OFT's case in the Defence. The concession deals with it and the oversight is certainly regretted.

MR. MATHER: My second point then goes to para.16 of the Defence, where the second sentence says:

> "Thus, references in the Decision to DQS are in substance references to the DQS undertaking and are relied upon by the OFT in this Appeal as such."

MR. TURNER: Yes.

MR. MATHER: That seems to attempt to do something which you said was not being done to change the reasoning of the Decision because this seems to suggest that what appears to be the target of those references in the Decision, namely, DQS as they are defined, are in fact additionally references to something else.

MR. TURNER: I understand that point.

MR. MATHER: How would you respond to that?

MR. TURNER: The point which should be made there is the point which I was referring to a few moments ago in reference to paras. 29 and 30 of the Decision, namely, that it is the economic undertaking to which the Chapter 1 prohibition attaches, and it is therefore the behaviour of the economic undertaking at any given point in the period to which liability attaches. After June 2001 the behaviour is there, we have our evidence, we have our case – who is liable for that? It is DQS.

MR. MATHER: Yes, but that suggests that there should be two Decisions, or two penalties separately in respect of the two legal entities which form part of the economic undertaking and are we not faced with quite a difficulty by trying to force these together into one framework?

MR. TURNER: In my submission, no. So far as the entire period of infringement found in the Decision is concerned you are right, that for the period prior to June 2001 if the OFT intended to find some infringement for that prior period then the right man is not in court. We are not therefore pursuing that at all. Using only the evidence and reasoning that was there before, as augmented by the natural litigation processes we are proceeding in relation to the period post-June 2001, and the right man in relation to that is sitting next to me now. [Laughter]

MR. MATHER: That takes me directly to the last point that I wanted to raise which is in terms of procedural fairness, appropriateness and cost and so on. You have argued against the Appellant's suggestion that this be remitted to the OFT essentially to sort out who it is penalising for what in a clear and succinct way. Is it not possible that that would be procedurally not only the fairest to the parties because each party who ought to be subject to a penalty would receive one and be able to challenge it, or whatever, as appropriate, but also it would be much simpler than trying to sort it out before the Tribunal, even if it is two days rather than three days?

MR. TURNER: There is nothing, in my submission, to sort out as respects DQS because all of the evidence is there in relation to the right period of time, and you have the right person in front of you. What is clear is that for the previous period on the OFT's concession there could be an infringement Decision – or at least a Rule 14 Notice – issued in relation to Hayward Williams. The OFT is not concerned with that, and the Tribunal is not concerned with that. There is no need therefore for the period post-2001 to disentangle responsibility in any way because the only person clearly who is responsible is in court before the Tribunal.

MR. MATHER: So what are we going to spend two days doing then?

MR. TURNER: What we are going to do is to hear the evidence from the individuals, on whose evidence the OFT relies as part of its case, to the extent that my friend wishes to challenge them – he may simply accept the witness evidence as it is. We are proposing to lead our witnesses. There would be cross-examination certainly because I have indicated our position on that, of Mrs. Williams, and Mr. Mitchell who are my friend's witnesses. Beyond that there will be the need for submissions by both sides, and my friend and I felt that it would not be safe to try to fit all that into a day, but to have submissions and to hear the evidence would probably be safely accommodated within two days.

MR. MATHER: Thank you.

MR. COOK: Madam, there is one point I failed to mention in my submissions, it was raised in my skeleton argument and I just wanted quickly to refer you to it, which is the other problem that does arise with the OFT's Decision as it currently stands and proceeding in this way, and that is in relation to in particular the starting point percentage that is used, and the aggravating

factor percentage that is applied. It is para.13 of my skeleton. The OFT reached a conclusion about what was the appropriate factor in each case based on a particular view of the world, which was its view of the world in the Decision, based on a view that we were involved in a particular infringement, including particular things – most significantly I would say including the 2001 price increase. That is far more important than the 2002 price increase because in 2001 there was a simple attempt to raise prices just simply to create more profit. In 2002 there was a 4 per cent. price increase from the supplier and everyone tried to create a 4.5 per cent. price increase. So effectively it was almost exclusively, 90 per cent., an attempt simply to reflect the flow through of prices from the supplier, 0.5 per cent. of the price increase was an attempt to acquire profit. It is far less serious than the other one was, namely, a simple attempt to increase prices by 4 per cent. across the board, no increase from the supplier – all profit is far more serious infringement. That has gone, but nonetheless the OFT is effectively saying in its Defence that both those factors are nonetheless right. That is really all they can be saying. "We could have come to the same view based upon these facts and we do", which is of course another which warrants remission. They are not sitting down as, in my submission, they should – and it really arises from, sir, your comment about identifying who is the right party to fine. That is part of the problem with the appeal process as it is now proceeding here – they are not trying to identify what is the right penalty sitting down thinking about it, as in what I right? They are simply trying to defend as much of the Decision as they can, and that is what they are doing there. They are simply saying "Well, we could have come to that decision based on these facts, therefore we should preserve it". They are not saying what is actually based on these facts the right answer. In my submission that is something that requires remission. They need to sit down and think based on these facts what they are now going to say is the right starting point, based on the seriousness of the completely different infringement they are now finding, and what is the correct aggravation? The aggravation is key because they said "We are going to put a particular aggravation factor because Mr. Stock and Mr. Mitchell were involved." Mr. Stock was never employed by my client so that is completely irrelevant, so they are left with saying Mr. Mitchell. Mr. Mitchell was only involved in certain infringements and not others, he was actually slightly lower down the chain for a considerable part of that period before being promoted. It is nowhere near the same. In my submission it warrants a lower aggravation factor but it is quite apparent the OFT is not considering that question, it is just simply saying "That is reasonable anyway in effect" and in my submission it is another key reason why remission is actually appropriate, because they need to think starting from scratch, obviously in the context of the other fines they are imposing, what is the right answer here, not desperately trying to preserve as much of the Decision as they can which, in

my submission is what they are doing here. If it continues on an Appeal point one of the point I will be making is exactly that, that the answer they came to in terms of starting point and aggravation factor is absolutely nothing to do with the facts they are currently proceeding on and is unsustainable on that basis.

I just simply wanted to make that point because it was in my skeleton.

MR. TURNER: Shall I deal with that?

THE CHAIRMAN: Yes.

MR. TURNER: Five points. First, the detailed calculation of the fine is not one of the essential elements of the infringement – I am using the language of the previous case law – which it is up to the OFT to prove. The calculation of the fine is a matter which falls out of the findings on liability; and secondly, just as in Europe, on which this system is modelled in this regard, the calculation of the fine and the proposal as to how it is going to be done is not a matter which forms part of the administrative procedure at all. It is not and never has been a part of this Statement of Objections or Rule 14 Notice procedure. The parties do not have a bite of the cherry in relation to that. The Rule 5(2)(a) matter which you were referring to before, which is the replacement for the Rule 14 Notice says what that shall include – the facts on which the OFT relies, which relates essentially to the infringement, the objections raised by the OFT, that is as to the conduct of the undertaking concerned, the action the OFT proposes, which is understood to be the making of a Decision and any consequential matters such as the penalty or directions; and the reasons for the proposed action.

THE CHAIRMAN: "A" penalty or directions, rather than "the" penalty.

MR. TURNER: Yes, "we intend to impose a penalty in view of the seriousness".

THE CHAIRMAN: Yes.

MR. TURNER: That is and always has been the approach, and it is quite wrong to say that this is part of the Rule 14 procedure. Thirdly, the adjustments to the penalty which the OFT is proposing now in its Defence do not depend on any new factual evidence at all. They depend on an appreciation of only the pre-existing material and, at the end of the day, after an Appeal is heard, the Tribunal will set the penalty based on that and whatever has come out of the Appeal process.

Fourthly, were it otherwise any concession on liability by the OFT in an Appeal will necessarily trigger remission. That is the necessary logical and absurd consequence of DQS's argument. Fifthly, and I say this with great feeling, there is no advantage to anyone in remission so that the OFT can simply say what it is saying in the Defence about the fine, and then that can be appealed and we are back here with nothing having changed in several months time.

So for those reasons there is absolutely nothing in that point. The Tribunal decides the fine. The OFT has put its case as to it, but it is you who will decide that.

(The Tribunal confer)

THE CHAIRMAN: Mr. Turner, if you look at para.5 of the Decision, my reading of that is that there was a company called "DQS" all the time, but it is ownership changed?

MR. TURNER: That appears to be the case.

THE CHAIRMAN: When you look at the document you handed up, and I think you admitted this – I think this goes to Mr. Cook's point so I just want to make clear so that I understand.

MR. TURNER: Yes.

THE CHAIRMAN: When you look at 10th June document it says that DQS was created in June 2001. So we have a Decision which, on its face, was taken on the basis that there was one company throughout with different ownerships, different control, at a time when it should have been known but it was not taken on board ----

MR. TURNER: Yes.

THE CHAIRMAN: -- for whatever reason, that that was not the case, that there was a new company.

MR. TURNER: Yes.

THE CHAIRMAN: I have got that right, have I?

MR. TURNER: You have, but it does not affect the question of remission. To summarise briefly, the Chapter I prohibition is concerned only with the behaviour of an economic undertaking. The Decision finds and gives all of the reasons and the evidence for finding an infringement by the DQS economic undertaking after June 2001. The force and consequences of the error about the company ownership relates to who is to be found liable during the disputed period.

THE CHAIRMAN: But I think what Mr. Cook is saying is that if you have to work out who is liable, even if you have what you think is an economic undertaking all the way through ----

MR. TURNER: Which has been conceded.

THE CHAIRMAN: Yes, it is my fence that there is a new company that goes in there – I think this may be the way to put it – do you say that once you found an economic undertaking all the way through, then if that period is broken up with a number of new companies at any point, haphazardly, you just divide it between those companies?

MR. TURNER: When it comes to apportioning the fine?

THE CHAIRMAN: Yes.

MR. TURNER: Yes, provided – and it is a very important proviso – that you have a continuous economic undertaking throughout the period. Because obviously if you have different economic undertakings you cannot do that. Different people are responsible for the breach of

the Chapter 1 prohibition. Here it has been conceded in the plainest terms that there was a continuous economic undertaking – a point that Mr. Cook wanted to think about at the first CMC on 10th February, it was subsequently conceded in correspondence.

THE CHAIRMAN: So once you have a continuous economic undertaking you just broke it up?

MR. TURNER: Yes.

THE CHAIRMAN: And fine during the periods when those people were in control of that undertaking?

MR. TURNER: Yes.

THE CHAIRMAN: And so is Mr. Cook's submission really going back on this concession that you have just told me about?

MR. TURNER: It appears to be. He appears to be saying, and this comes back to the point you were canvassing with Mr. Cook, that in June 2001 an important event happened and, when pressed, he referred to the departure of Mr. Stock which, of course, is not something to do with company ownership – it is a more fundamental matter about what was going on in practice on the ground at the time. It has always been the case, irrespective of the company ownership, that Mr. Stock left at that time. He then, when pressed, makes clear that what his objection is to the nature of our evidence about his client's involvement after that time, and I have gone through what that comprised. He says that is not good enough evidence, there should be evidence for him to be found guilty of individuals in his company who were directly involved in price fixing.

THE CHAIRMAN: Tell me if I am wrong, but that seems to me to be saying that there is not a continuous undertaking with a continuous infringement?

MR. TURNER: No, that goes to the merits, the evidence that we do have ----

THE CHAIRMAN: Yes, shows that?

MR. TURNER: -- shows that the economic undertaking, DQS, was actually involved, and continued to be involved throughout the whole period.

THE CHAIRMAN: Yes.

MR. TURNER: And that is all it boils down to. At the last CMC, and before that, the point that the OFT was wrestling with was a legal point based on the *Aalborg Portland* case about whether when a change in company ownership takes place you have the same economic undertaking throughout. You can simply go after the successor for the whole period, including the period before they got into the driving seat. The OFT has said is that it is not going to take that point. We are going to go after DQS only for the period from which it was the legal owner of the business.

THE CHAIRMAN: I think I understand that now. In relation to the penalty, the only concession you are making effectively is the period. That is right, is it not? The one and three quarter years?

MR. TURNER: That is the adjustment being made.

THE CHAIRMAN: The result of that adjustment is that there is a knock-on effect all the way through.

MR. TURNER: That comes in the middle of the algorithm that you have to perform. You start with the starting point which depends on a number of factors and, in relation to that, 7 per cent. was taken originally. The OFT in view of the concession and, as it were, the abbreviated period, has looked to see whether it thinks that 7 per cent. is still appropriate, and it says it is. It has looked at aggravating factors and, in relation to that, the one pinpointed before was that senior management were involved.

THE CHAIRMAN: You say that it is 15 per cent. and you are not changing that even though Mr. Stock was not there?

MR. TURNER: We say that there is sufficient there and, in particular, Mr. Mitchell who was his right hand man and then assumed the role. That is sufficient to justify the 15 per cent. So those are the OFT's views about the penalty when it comes to it. You are the decision maker in relation to that, you can agree or disagree in view of the material that was before the OFT at the time of the Decision is relied on now and in view of what you are going to hear from the witnesses who are called.

THE CHAIRMAN: But what we do not have is the calculation, I think – how you get to the new calculation. If we have a Decision which has a calculation in it, and we do not have that calculation ----

MR. TURNER: All it is is a mathematical point of substituting one number for another. That is all it is. I can do that instantly, Mr. Cook has done it instantly, it is certainly not a basis for remission.

THE CHAIRMAN: You said you were not agreed about the end figure, or did I misunderstand that?

MR. TURNER: By an insignificant amount.

THE CHAIRMAN: The maths has gone wrong?

MR. TURNER: That is all it is. I think it is probably a rounding.

THE CHAIRMAN: So you do actually agree with how ----

MR. COOK: Well madam, I am sure we can. To be honest, I did not purport in my skeleton argument – if he is referring to that – to come to one that was right in pounds, shillings and pence. I was just giving you an idea of the nearest thousand.

THE CHAIRMAN: So if we proceeded as Mr. Turner would like us to proceed, then there would be an agreed calculation of the new figure.

MR. TURNER: Yes, we can do that in five minutes or less.

THE CHAIRMAN: Right. And then the issues would be not in relation to the period as such, once one got there, because the period I suspect is agreed, it is all the other things that are not agreed.

MR. COOK: It depends what you mean by "agreed", madam. It is not agreed because I do not accept I was part of the infringement.

THE CHAIRMAN: No, no, if we found infringement, it in fact is not the bit that is being changed that would be not agreed, it is all the other things – you would be relying on the materials that you had all the way through and saying "we think that applies", and you would be saying "no, it does not".

MR. TURNER: Yes.

THE CHAIRMAN: And then the argument would probably be the same whether or not there had been this new company?

MR. TURNER: Yes, and the OFT has formed its view ----

MR. COOK: It is quite different, it would not be the same with the company, it is because you are looking at something which, as an infringement involves different elements from the infringement the OFT find on previously. It is not simply the OFT can say it is a single infringement, but a single infringement involving a number of different things of various seriousness and effect on competition, some of which they now accept we were actually never involved in. Now, if I can persuade you that one of the things we were not involved in was more serious than anything you do find we were involved in the percentage must be low.

THE CHAIRMAN: Yes, but what Mr. Turner says is that that happens in every case.

MR. TURNER: It happens in every case and it is ----

THE CHAIRMAN: Because it is after we have heard all the evidence, decided whether or not there is an infringement, decided what the infringement is we then have to decide the penalty. If the OFT's Decision is not upheld then that must happen in every case that it is not upheld?

MR. TURNER: Yes. You may find that we have got it completely wrong and either you could vary the penalty or you could set it aside completely. If I may, there is one interesting point that my friend made in relation to the need for remission which should be addressed here. He said that part of the need for remission arises because the OFT is trying to keep the penalty as high as it was and is not fairly looking at the issue now. But, of course, it is you who make that decision, it is not the Office of Fair Trading and the idea that there should be remission so that the OFT can, as it were, say "Now we are dispassionate, which we were not when we were in front of

the Tribunal because then we felt adversarial", then comes up with a lower fine and that is a correction to the process, is misconceived, because we are not making the decision now. In the Appeal it is you who do that.

THE CHAIRMAN: I think the only question about that is the point you were making really, that if Mr. Cook was right, and there was a different approach to the Decision, then the way you came up with the figure at the end, and the penalty might be different, and the costs of a Tribunal hearing would be avoided.

MR. TURNER: If Mr. Cook was right that there was a different approach that might be the case. I have made absolutely clear and say so again, I have shown you that is the reasoning, that is the evidence in the Decision and we are sticking to it. The question comes down to whether your appreciation of the appropriate fine, if that is upheld is right or wrong. What DQS wants to argue about with you is whether the evidence on which the OFT relies is good enough to find him liable for the period in question. He says it is not because he says you need to have direct evidence about individuals within his company and what they were doing. We say that is not the case, but that is an issue for the Appeal Tribunal to decide.

THE CHAIRMAN: Thank you very much.

MR. COOK: You asked questions of my learned friend whether I had made concessions or was resiling from concessions, and if I can just briefly clarify what my position is?

THE CHAIRMAN: Yes.

MR. COOK: I am not resiling from any concessions I have made. The concession we made was that it was the same economic undertaking but there was a change of management – there was obviously a change of ownership as well, but that was the key point. The consequence of that that we say follows is if you get a change in ownership management – not that that inherently makes a difference, but what it does is it prevents you simply assuming that the business carried on doing exactly the same thing as you assumed before, meaning you have to actually show evidence it was doing what you say it was doing before. Also, the second point, you actually have to show that it was doing that in knowledge of something, as part of a concerted practice or as part of an anti-competitive agreement in order to be able to say it was actually doing something ----

THE CHAIRMAN: Does the management have to know about the agreement or concerted practice?

MR. COOK: Well in my submission somebody has to know, and it does not matter if ----

THE CHAIRMAN: If you have a whole lot of salesmen who get together and have an agreement or concerted practice ----

MR. COOK: Oh I am not saying management has to know ----

THE CHAIRMAN: -- but it never gets up to the board of directors?

MR. COOK: No, I am not saying that in any way at all. I am saying someone has to know.

THE CHAIRMAN: "Someone has to know".

MR. COOK: You frequently get situations where only a single individual is actually involved in anti-competitive practices and the board of directors are four, five, six levels up and nobody knew. I am not suggesting that at all. What I am suggesting in this context, had it been the OFT's case that 25 of our sales' staff knew all the way through then a change of management would be neither here nor there. It is because the only individual they actually make any reference to before we come on the scene was never our employee that the change in management becomes very significant, because that means that one wipes out the only individual that it is suggested actually did know – that is why I say that is so fundamentally important in this context. It might not be in different cases – probably would not be in different cases – but it is in this case because you are looking for an individual who knew, the only one mentioned historically, and never ours.

You also asked a question about if you had an economic undertaking owned by different legal companies, and my answer to that would be twofold. First, you actually have to show what each limited company was involved in in the infringement. They actually have to show when the undertaking was owned by a particular company it was doing something that was constituting an infringement, and it was doing something in the knowledge that it was doing it infringing rights – either that it knew it was doing it as part of a concerted practice, that others were doing it, or it knew there was an agreement to do it.

THE CHAIRMAN: I think what Mr. Turner is saying is that if you have a continuous infringement, *a fortiori* the people who owned the company all the way along ----

MR. COOK: That is the case, if you find a continuous infringement. What I am saying is that in order to find a continuous infringement you actually have to find in relation to each chunk of it that somebody knew and somebody was doing something, or was party to an agreement to do something obviously as an object situation. But that is all you need to find in order to find a single continuous infringement all the way through – knowledge and activity.

You also asked about severity of fine and I would say, and my point would be that actually you cannot simply apportion by reference to time where you might be able to if it was just a simple infringement that was absolutely identical all the way through – there would be no issue. However, where you get infringements which vary in nature and time, even if you wish to describe them as being a single infringement, one has to fine any party by reference to what they in fact did.

THE CHAIRMAN: But what I think Mr. Turner is saying is that on the way he is putting the case you can do it in these chunks. The way you are putting the case you have a break and therefore

you would not be liable, or your liability may be less. He then says that is a matter for the Tribunal when they hear the evidence.

MR. COOK: Well it is not strictly true that Mr. Turner is putting his case like that, because he accepts that there were three aspects to what they describe as a "single infringement". There is an attempt to raise prices together and that was in 2001 and 2002 and a price match but not undercut policy. He accepts that we were not party to the January 2001 price increase together. So that bit has entirely gone. So one comes back to my point that one looks at the severity of what you were in fact doing and that must be a fundamental part of it, in my submission. You cannot simply say that you have a single infringement, you fine based on the comparative seriousness of that because you are accepting that my client was not actually involved in some parts of that infringement – whether they are more or less serious is another matter – but one cannot fine based on the entirety when you are only involved in a part, in that context at least.

MR. TURNER: I do not want to go over the same ground, I think it has now been pretty well sufficiently covered. The only point really to drive home is from what Mr. Cook has just said there is very little actually between us on the issue that is now vexing the Tribunal. The need is to show, and to prove, that somebody knew and somebody was doing something in DQS. What is really at issue is the way in which that is being done. The OFT – and I have shown you the way in which it has done it – says "Look, here is some evidence that there were individuals involved in the company doing things at the relevant time – we have Mr. Mitchell and Mr. Williams – and here is all this other evidence from other people mixed up in the price fixing", where everybody is assuming and saying on our case that they were involved. He does not like that and says it is not good enough to find him guilty to the standard required.

THE CHAIRMAN: That is a question for us?

MR. TURNER: That is a question for you.

THE CHAIRMAN: But are you putting your case on the basis that, having regard to the history up until June 2001 and having regard to the fact that it is the same economic undertaking throughout, when you look at what happened post-June 2001, and the documents (and other documents) that you showed us this morning ----

MR. TURNER: Yes.

THE CHAIRMAN: -- that you put those in the context of the material you have before 2001?

MR. TURNER: Yes, I am saying it is relevant circumstantial evidence.

THE CHAIRMAN: Yes, but if you just had those things and had none of the other evidence it may be different, but you are ----

MR. TURNER: That was where we were when we started, and I fully understand your point. What I am trying to say is that that is not the way that the Office proceeded in is Decision based on

some bare presumption of continuous ownership, that is completely wrong. The way in which it arises is as relevant circumstantial evidence, which it would be quite wrong for anyone – the Office as a competition authority, or the Tribunal making the decision as to infringement – to leave out of account.

THE CHAIRMAN: Yes.

MR. TURNER: It is simply circumstantial evidence.

THE CHAIRMAN: Thank you. We are going to adjourn.

(The hearing adjourned at 12.15 p.m. and resumed at 12.35 p.m.)

(For Ruling see separate transcript)

THE CHAIRMAN: That leaves us with directions for today and a date for a hearing.

MR. TURNER: Madam, I am obliged. In relation to the hearing date, I do not know if the Tribunal shares the parties' view, at least provisionally, that two days should be sufficient?

THE CHAIRMAN: At the moment we do not know what the witnesses are, but I would fix it on the basis of two days – I mean proportionality this case should not take longer than two days.

MR. TURNER: It should not take longer than that.

MR. COOK: Madam, I could probably help in terms of witnesses. It is likely the witnesses will be Mr. Mitchell, Mrs. Williams, Mr. Stock almost certainly, given we will be relying upon the additional material being produced by the OFT from Mr. Stock by way of file note.

THE CHAIRMAN: How long do you think the witnesses are going to take? Mrs. Williams and Mr. Mitchell, and then is Mr. Stock going to be called?

MR. COOK: The position of Mr. Stock is a slightly unusual one in the sense that there was a statement that was originally used and the OFT relies upon that. The OFT have got additional evidence from him by way of file note, they have disclosed that to us. They are not going to rely upon that. I would, because it is very helpful to my position but I do not want to cross-examine him because I am very happy with what he said in that. So it is something for us to sort out, that point on it.

MR. TURNER: We rely, as I have set out in the skeleton on Mr. Stock's witness evidence. If my friend wants to cross-examine him by reference to that document he is free to do so, but we have, I have to say, put him forward as our witness.

MR. COOK: I would be quite happy simply to say "Could you read the following three page document – is this true?" If he says "yes", then that would essentially be the point I wished to raise with him.

THE CHAIRMAN: You are going to have to sort that out as to what you do. It is not a witness that you would be calling?

MR. TURNER: We would not call him to give oral evidence. As indicated in our case his witness statement and what he said was relied on in the Decision. You have correctly summarised how we rely on his evidence for the relevant period. That remains the case. If my friend wants to cross-examine him, which presumably will relate to the period prior to June 2001, then he may do so, but it is his election, as it is for the other witnesses Scullion, Ealing, Paterson and Hickox.

THE CHAIRMAN: He could call him.

MR. TURNER: As his own witness?

THE CHAIRMAN: Yes.

MR. TURNER: His evidence forms part of the basis for the Decision. It is cross-referenced and it is in witness statement form and we rely on it. So if he wishes to call him as his witness, this may simply be a matter of formality, if the view is that he should be here, my friend wants him to be here, so that the Tribunal can get the whole picture, we have no objection and perhaps the parties and the Tribunal can ask such questions as they need to, to get to the truth.

MR. COOK: It is obviously a point for us to deal with. Certainly there are going to be those three witnesses – the final position on what, if any, others will need to be called ----

THE CHAIRMAN: Anyway, Mr. Stock is not going to be very long if he is called because it is only in relation to the evidence that is in this statement that was taken afterwards, which is not being relied on?

MR. COOK: That is correct, madam. I do not want to foreclose myself from any of the others ----

THE CHAIRMAN: No, but as to period of time.

MR. COOK: I do not think it is going to be a huge period of time if any of those ----

THE CHAIRMAN: Not more than an hour each?

MR. COOK: In relation to ----

THE CHAIRMAN: If I take three at not more than an hour each, in other words three hours for the witnesses?

MR. COOK: I think in relation to Mr. Mitchell and Mrs. Williams you probably need to ask my learned friend how long – I am not sure it will be him, but how long the OFT will be with them?

MR. TURNER: No longer than a morning.

THE CHAIRMAN: What, for the three?

MR. TURNER: Well in relation to our cross-examination of the two witnesses whom my friend proposes to call.

THE CHAIRMAN: It will be no longer than a morning?

MR. TURNER: No longer than the morning. In relation to the totality I understand my friend is still considering his position as to who he wants to cross-examine, but there are up to four witnesses there, and even if all of them are called ----

THE CHAIRMAN: It should not take more than a day for witnesses.

MR. TURNER: It should not take more than a day.

THE CHAIRMAN: And it should not take more than a day in submissions, having regard to a lot of it can be done in writing.

MR. TURNER: Yes. That is why I believe that on any view we are agreed that two days is ample.

THE CHAIRMAN: So I think we are two days.

MR. TURNER: Yes.

THE CHAIRMAN: So, if we work back, for the Tribunal diary we would suggest the 23rd and 24th May, a Monday and Tuesday.

MR. COOK: Madam, I do not have immediate problems with that date. There are a number of other individuals, Mr. Mitchell and Mrs. Williams.

THE CHAIRMAN: It is far enough in advance – five or six weeks – so hopefully that should be all right. Let us put in 23rd and 24th May and if it turns out in the next day or two that witnesses are not available then you will have to come back to us. With that date in mind, you will want to put in a reply?

MR. COOK: That is correct, madam.

THE CHAIRMAN: How long do you want for that – 14 days.

MR. COOK: If my friend says 14 days I am happy with that.

THE CHAIRMAN: You are happy with 14 days, fine, so that is 21st April. Effectively then, if we call them "pleadings" and pleadings are closed there is nothing else there, it is only preparation for the hearing, is it not?

MR. TURNER: There is then skeleton arguments. We had a brief discussion about that yesterday and provisionally we were thinking along the lines of exchange rather than sequential service, on the basis that if my friend will have served his reply then it would seem not sensible for him to repeat the same material.

THE CHAIRMAN: What about witness statements? Those should come before, should they not, so that they can be dealt with?

MR. TURNER: We have ----

THE CHAIRMAN: Not yours, you have got yours, I am thinking of your [Mr. Cook's] witnesses.

MR. COOK: I was going to suggest that our reply will attach to it such material as we wish to rely upon in that regard.

THE CHAIRMAN: So the reply will attach material relied upon not yet in evidence.

MR. TURNER: May I say just as to that, that as far as Mr. Mitchell is concerned it is the Appellant's job to serve with their Notice of Appeal under the Rules any witness evidence in support of their Appeal. In this case the Notice of Appeal was accompanied by, I believe, the witness statement of Mitchell, so that is already there. That is done. The loose end, if there is one, is Mrs. Williams. As to that there is not a witness statement. We are neutral as to whether he wants to produce one and append it to his reply. We had canvassed, again informally, yesterday whether a witness statement would be necessary. Obviously it would be desirable to avoid the need for any extensive evidence-in-chief.

THE CHAIRMAN: Yes, and having regard to the fact that we want to do it in two days I think it is better – it is also better because then it can be dealt with in the skeletons.

MR. TURNER: We have no objection to that.

THE CHAIRMAN: You will append ----

MR. COOK: Yes, with Mr. Mitchell it is fair to say that the case has changed somewhat in the way the OFT puts it, though you may not did not agree with me in the context of the entire thing changing and it should be remitted, but nonetheless the way in which we put our case is slightly different than the way in which the OFT now do it. I do not think it is going to be hugely different but I do not want to be ruled out from perhaps amplifying what Mr. Mitchell has put in previously. I am not saying I am going to at this stage, I have not looked at it in the context of how my learned friend is expelling the OFT's case today. But I would not wish to be ruled out from so doing in the context of Mr. Mitchell. In relation to Mrs. Williams I am sure a witness statement will obviously be of assistance.

THE CHAIRMAN: You are neutral?

MR. TURNER: I am not neutral on that issue. I cannot see any basis for a further witness statement from Mr. Mitchell given that we have made absolutely clear that we are relying on the way in which the case was put and the evidence in the Decision.

THE CHAIRMAN: Although I appreciate what you are saying, the problem is that there is six weeks to do it and they are offering to do it in two weeks, otherwise there will be an application to examine-in-chief for additional points ----

MR. TURNER: Well there may be.

THE CHAIRMAN: -- and is it not easier just to put it in and then see whether you take objection to it at that point?

MR. TURNER: I am content.

THE CHAIRMAN: Yes, so if you put it in and the OFT take objection they can let us know that they take objection.

MR. COOK: Thank you, madam. I was thinking in particular that my learned friend, Mr. Ward, did indicate to me that he was going to cross-examine Mr. Mitchell on particular issues, and to ensure that his witness statement in chief deals with those issues rather than cross-examining in a void.

THE CHAIRMAN: If you put in what you want to put in, then if the OFT want to take some issue with it then they can take some issue with it before the hearing so that we can sort it out for the two days.

MR. TURNER: That is the point, this problem has arisen before. If new evidence now comes in then the OFT might find itself faced with a desire to adduce evidence in rebuttal. That is why this all should have happened with the Notice of Appeal. That is the problem.

THE CHAIRMAN: Well let us just see what happens.

MR. TURNER: I am content to take it in stages, but it would be a shame if the final hearing needed to be postponed.

THE CHAIRMAN: No, they have two weeks to put this in, so if there is a problem we can deal with it in three or four weeks' time.

MR. TURNER: We will see what comes and take it from there.

THE CHAIRMAN: So exchange of skeleton arguments, when do you want to do that by?

MR. TURNER: We were both thinking of exchange a week before the date for the final hearing if that was convenient to the Tribunal?

THE CHAIRMAN: Would it be possible to do it a little bit before so the Registry can deal with them and send them out to the Members.

MR. TURNER: I see, two weeks?

THE CHAIRMAN: Two weeks before?

MR. COOK: Certainly.

THE CHAIRMAN: So that would be 9th May. The only other matters are the bundle of authorities and I think what would be helpful is a chronological bundle of whatever documents are being relied on so that we do not have to jump around in bundles?

MR. TURNER: Yes, a chronological bundle of all of the underlying documents?

THE CHAIRMAN: Well the ones that are being relied on, yes.

MR. TURNER: I have behind me a full set of the access to file documents, all tabulated. I do not believe that you have anything like that?

THE CHAIRMAN: No, but you will not be relying on the whole lot, will you?

MR. TURNER: No, we will not, but if we are all singing from the hymn sheet it is pretty convenient.

THE CHAIRMAN: Is that in chronological order, or is that in order of ----

MR. TURNER: It is not.
THE CHAIRMAN: I think it is useful – we have not got that and I think you probably would not want to have to copy all of that for us.
MR. COOK: I am always in two minds with these sort of things because one is in a situation where one could spend a great deal of time and effort bouncing back and forth trying to work out exactly which documents everyone wishes to include and that can sometimes be more expensive than simply copying what is an unnecessarily large amount of documents, but at least avoids you spending huge amounts of time thinking about it.
THE CHAIRMAN: But if they are not in chronological order then one spends a lot of time jumping around files, and that is not very convenient.
MR. TURNER: What perhaps we can do is to collaborate in taking the documents which are referred to in the Notice of Appeal and in the Defence, put them together in a unified bundle in chronological order and give it to you.
THE CHAIRMAN: That would be very helpful. And on the witness statements?
MR. COOK: The witness statements ----
THE CHAIRMAN: No, not the witness statements, any documents referred to in the witness statements.
MR. COOK: Any documents, yes.
THE CHAIRMAN: So an agreed chronological bundle – earliest date first – of the documents referred to in the Defence, Reply and witness statements.
MR. COOK: In terms of the Defence, madam, just simply for clarification actually there is a reference expressly made to all parts of the Decision so in practice that would become ----
THE CHAIRMAN: You both know what I mean – any documents that we are going to be referred to.
MR. COOK: In practice that means everything in the Decision, potentially, without knowing in advance ----
THE CHAIRMAN: It will not be, I do not think. If it comes after your skeleton you will know exactly what you are going to refer to.
MR. TURNER: Yes. We will try to limit it so as to exclude potentially immaterial documents.
THE CHAIRMAN: Yes, because there are all the other companies and they are referred to in the Decision, although some of that evidence is relevant some of it is not.
MR. TURNER: Some of it is not, yes. Madam, just a slight correction, it would be the documents referred to in the Notice of Appeal, Defence and Reply.
THE CHAIRMAN: Yes, and witness statements, and any other contemporaneous documents to be relied on.

MR. TURNER: Yes, although again those should have come with the Notice of Appeal.
THE CHAIRMAN: They should all be there, yes. Is it possible to do that with the skeleton?
MR. COOK: It is generally more desirable to have it with the skeleton so the skeleton cross refers.
THE CHAIRMAN: Absolutely.
MR. COOK: And the same with the bundle of authorities – if that could come 24 hours later ----
THE CHAIRMAN: That is fine.
MR. COOK: -- so that we can integrate.
THE CHAIRMAN: That will be 10th May.
MR. TURNER: It will be a small bundle. There are only two other matters that occur to me. The first is witnesses, because it is necessary for my friend to finalise who he wants to be at the hearing, not least because we have to get them there and give them notice. So if a date ----
THE CHAIRMAN: By 21st April when he does his ----
MR. TURNER: Well ----
THE CHAIRMAN: That is unfair?
MR. TURNER: I am just to ensure – that then leaves only one month for these people to so arrange their affairs to ensure that they are here for the hearing.
THE CHAIRMAN: Oh to identify who they want to cross-examine.
MR. TURNER: Who they want to cross-examine of our witnesses.
THE CHAIRMAN: When can you do that by?
MR. COOK: Madam, I would ask for a week.
THE CHAIRMAN: By next week, which is 14th April.
MR. TURNER: Yes, that is better, and then we can contact them and tell them that they have to be here, and if necessary witness summonses can be administered.
THE CHAIRMAN: And if it changes you can always stand them down.
MR. TURNER: Yes.
THE CHAIRMAN: Well what you could do – you do not want to do this – you could find out now if they can be here and then you can stand them down.
MR. TURNER: The thought had just occurred to me as well, we could try to arrange for them to be here, if they cannot, or if they are unwilling a witness summons may be administered and then we can stand them down as necessary.
THE CHAIRMAN: Then you can do it now and you do not have the week.
MR. TURNER: He still needs to identify who he wants to bring along.
THE CHAIRMAN: So can you do that by the 14th?
MR. TURNER: Certainly.
THE CHAIRMAN: So by 14th April Appellants to identify witnesses to be provided by OFT.

MR. TURNER: The remaining matter is, because this is a witness case – a cartel case – sometimes it may be sensible to have a pre-trial review pencilled in. I do not want to over burden the Tribunal with an unnecessary hearing, but I raise it in case there may be a need to sort out any procedural matters closer to the time.

THE CHAIRMAN: In one case I have done those myself – I do not know what the members feel about that [Tribunal Agree] Right, well, if you are happy, I have authority to deal with those procedural matters. Do you want to fix a date?

MR. TURNER: Again I do not have Mr. Ward's diary with me so it is somewhat difficult, but if we could provisionally put a date in the diary it may help.

THE CHAIRMAN: Should it be after the skeleton arguments, which is two weeks before, or should it be before then – after the Reply and before the skeleton arguments?

MR. TURNER: I would suggest after the Reply on the basis that if new evidence comes with the Reply that places us in difficulty it provides a convenient opportunity for us to bring it to your attention and at that stage things should be reasonably settled.

THE CHAIRMAN: So it should be some time after 21st – some time in the week beginning 25th.

MR. TURNER: 28th, Thursday.

THE CHAIRMAN: That would be all right – at 10.30?

MR. TURNER: Yes.

MR. COOK: Yes.

THE CHAIRMAN: Is there anything else?

MR. TURNER: Madam, not as far as I am concerned.

MR. COOK: You did raise a point about venue.

MR. TURNER: Because it was not in an order of the Tribunal I just thought it needed to be recorded.

THE CHAIRMAN: Yes, but there is no question that it is England and Wales. Do you want to raise a question about the actual venue?

MR. COOK: No.

THE CHAIRMAN: London is appropriate.

MR. COOK: I believe so.

THE CHAIRMAN: Your clients are Welsh, are the not?

MR. COOK: That is correct, madam.

THE CHAIRMAN: But you are not suggesting that we should go to Wales – it looks like everybody is here.

MR. COOK: Well the OFT are all here, my clients are in Wales, I am not, but it is certainly not clear that Wales is more convenient for the totality of everybody, so I am not raising an issue on venue.

THE CHAIRMAN: England and Wales. Thank you very much.

MR. COOK: Madam, before you go there is one final matter I would like to raise and that is the reserved costs' point from the last hearing. Madam, if you recall this point, the basis for this was as follows. This is the third CMC, with all due respect in the first and second CMCs we did not get anywhere because it is only with the filing of the proper Defence that we actually find out what the case is about and where we are going with it. So we had two entire hearings where we spent a lot of time trying to work out the various things that would happen depending on what did or did not happen. In my submission that arises from the OFT's persistent failure to actually come to a definitive view as to what its position was. My client provided considerable assistance, whenever it was asked for documents it provided them very, very promptly indeed.

The actual history of this matter demonstrated that actually what happened was that at the first hearing the OFT asked for documents in the skeleton argument three or four days before the hearing. We then responded the next working day, or the working day but one, to provide documents for the hearing. They still did not make a decision based on those. They then asked for more material. We provided them with almost all of it, and they still did not make a decision for the second hearing. It was only after the second hearing that we got the decision and we could see where the case was going. In my submission the costs of those first two hearings were thrown away as a result of the OFT's persistent failure to make a decision about where it was going.

That decision has considerably changed the nature of the Appeal, because they have now dropped a very large chunk of the decision which we were appealing. Had that happened before the first hearing then there would only have been one CMC, it would have essentially have been this one. We could have argued then about whether it could be remitted, dealt with that decision and then laid down procedure for trial. That could have been done at a single CMC. The only reason there have been three CMCs in this case is because the OFT could not and did not make a decision on what its position was going to be on this Appeal for some weeks. In my submission my client should not bear the burden of that lack of decisiveness on the part of the OFT.

MR. TURNER: Madam, I can deal with this, and if you want me to I will, it will take a few minutes. My suggestion is that, following the normal practice, costs of this should be reserved and you can deal with it later, because there will be a lot of costs at the end of the day for you to take

into account and weigh up the overall position. If, however, you want me to deal with this now I will go through the points one by one.

THE CHAIRMAN: It will take you 20 minutes or so?

MR. TURNER: It will take me 15 minutes.

(The Tribunal confer)

THE CHAIRMAN: We are going to go with your suggestion, costs reserved.

MR. TURNER: I am obliged.

MR. COOK: Thank you, madam.

THE CHAIRMAN: Thank you both very much.

(The hearing concluded at 1.30 p.m.)