IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1067/1/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

12th September 2006

Before:
VIVIEN ROSE
(Chairman)

MICHAEL BLAIR QC
MICHAEL DAVY

Sitting as a Tribunal in England and Wales

BETWEEN:

ACHILLES PAPER GROUP LTD — Applicant

and

OFFICE OF FAIR TRADING — Respondent

Mr. Philip Collier (of Proud Goldbourn, Accountants) appeared for the Applicant.

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

Mr. Mark Clough QC (instructed by Addleshaw Goddard) appeared for the applicant Intervener, Bemrose.

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Excisions in this transcript (marked "[…][C]") relate to commercially confidential information

HEARING

THE CHAIRMAN: Good morning everyone. I have a few remarks I want to make before we kick off: first, to thank the parties for the very helpful submissions that they have put in. The Tribunal have found those very useful. The point about confidentiality, I understand from Mr. Collier's letter of 7th September that they are not now taking a particular point on confidentiality. The Tribunal takes that to mean that with regard to the figures redacted from the Decision we will still treat those as being confidential; and as far as any other figures are concerned we hope that both parties will concentrate on the principles that are involved in this case and the issues that arise so that we will not have to get too involved in the nitty-gritty of the actual numbers.

The OFT have provided us with a proposed timetable for today's hearing. I think Mr. Collier you have seen that timetable, is that acceptable to you to proceed on that basis?

MR. COLLIER: Yes.

THE CHAIRMAN: Thank you. The factual issues we regard as those set out in the OFT's skeleton. Mr. Collier, if I can just explain to you your role today, you are wearing two hats as it were. In regard to the Applicant's submissions and in any closing submissions you want to make at the end you are the advocate in the case, but you are also the witness on behalf of the Applicant and at one point we will ask you to move into the witness box and you will then give your evidence. Your evidence will largely be the witness statement that you have made already and your letter of 7th September and then Mr. Kennelly will ask you some questions on behalf of the Office of Fair Trading.

Mr. Clough is here, we understand, acting for Bemrose.

MR. CLOUGH: Good morning, madam.

THE CHAIRMAN: Bemrose has before the Tribunal an adjourned application to intervene. At the case management conference we understood that that application was made to preserve your client's position in case the arguments in this case opened up in a way which affected your clients. In our view it still remains unlikely that this will happen. We are not sure that it is appropriate for you to address us now, but rather to wait until the end of the day and then you will be in a better position to decide if anything has arisen which causes you to want to renew your application.

MR. CLOUGH: I am very grateful, madam, that is exactly what I would have proposed myself. The only comment I was going to make is that if it would help the Tribunal and the parties if we withdrew from the front row, so to speak, I am very happy to do that, otherwise we will sit here and listen quietly and do exactly you say. If there is anything that arises – in the unlikely event that anything arises – then we would renew our application that has been adjourned.

THE CHAIRMAN: Well I do not think we have any strong feelings about where you sit in the court, that is entirely for your convenience.

MR. CLOUGH: I will keep my head down then. Thank you.

THE CHAIRMAN: Thank you. So I think, Mr. Kennelly, then you are going to give us a bit of a background to the case.

MR. KENNELLY: Madam, yes, as neutrally as I can. The Appellant as we know carries on business as a supplier of stock check pads. By a Decision dated 31st March 2006 the OFT found that the Appellant had (with other undertakings including Bemrose) infringed the Chapter 1 prohibition. A penalty was imposed. The Notice of Appeal is dated 1st June 2006; the Appellant appeals under s.46 of the Act on the penalty alone. The critical instrument to examine for the purpose of this appeal is the Guidance in the setting of penalties, and that was contained in the CMC bundle, and hopefully the Tribunal will have a copy of that – it may be useful to turn that up now to refresh the memories of the Tribunal and the parties as to the terms of the Guidance as to the appropriate amount of a penalty.

If I could ask the Tribunal to turn first to the introduction on p.2 and to para.1.4 entitled "Policy Objectives", there as set out:

> "The twin objectives of the OFT's policy on financial penalties are:
>
> * to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
> * to ensure that threat of penalties will deter undertakings from engaging in anti-competitive practices."

Continuing with that paragraph over the page, the OFT's discretion imposes fines which are severe:

> "... in particular in respect of agreements between undertakings which fix prices or share markets and other cartel activities."

If the Tribunal could then turn to s.2 on p.6, the "Steps for determining the level of penalty". Here the several steps are set out. Step 1, the Starting Point, Step 2 (p.8) Adjustment for duration; and Step 3 – and this is the sole step in the Guidance which is in issue before the Tribunal, "Step 3 – Adjustment for other factors." Rather than read the passage, it may be helpful if the Tribunal could read to itself para.2.11 of the Guidance.

THE CHAIRMAN: (After a pause) Yes.

MR. KENNELLY: The Tribunal will see that the phrase relied upon by the Appellants is in particular that which provides that the considerations which the OFT may consider may include the "... financial position of the undertaking in question." In applying the Steps in the Guidance the OFT considered whether the Appellant's financial position should lead to an

adjustment of the financial penalty reached at the end of Step 2, and that is at para.295 of the Decision which is the first document attached to the Notice of Appeal (p.72 of 75). Again if the Tribunal could read – I am sure not for the first time – that paragraph in relation to the representations made and the Decision by the OFT. Having completed its assessment of the penalty the OFT imposed the fine the figure of which is set out at para.12 of the Defence. The amount of the penalty is reduced by 50 per cent. under the leniency programme. As summarised in the Defence and skeleton (and it is undisputed) the Appellant's sole challenge is to this single aspect of the OFT's application of Step 3 of the Guidance, namely, its decision not to make a downward adjustment of the penalty.

The OFT, for the reasons given in the Defence, disputes that it made an error of law and stands by its factual assessment of the Appellant's financial health.

Those are the issues before the issues before the Tribunal. Can I give you any further assistance at this stage?

(The Tribunal confer)

THE CHAIRMAN: Mr. Collier, if you would like to address us now?

MR. COLLIER: The appeal against the OFT's decision was made because the financial penalty imposed was far too high relative to the financial position of Achilles and was based on the OFT's clear lack of appreciation and understanding of its financial statements. The misinterpretation of some of the information contained in the financial statements resulted in making Achilles appear stronger financially than it actually was.

The Appeal and my witness statement refer to two specific points made by the OFT in their Notice of Infringement Decision, on which the OFT base their assessment of the financial position of Achilles.

To quote from para.295 of the OFT Decision, they stated:

> "The OFT notes that although Achilles appears to have made a net loss of £[…][**C**] for the 12 months up to and including March 2005 Achilles made a profit of £[…][**C**] in financial year ending 31st March 2002, and a profit of £[…][**C**] in the financial year ending 31st March 2004. In the circumstances therefore the OFT does not consider that Achilles' financial position warrants a reduction of Achilles' penalty at Step 3."

It is clear from that statement that the OFT did not make a reduction of Achilles' penalty at Step 3 because they are essentially basing their assessment of Achilles' financial position on the incorrect conclusion that there was a profit of £[…][**C**] in the year ended 31st March 2002 and a profit of £[…][**C**] in the year ended 31st March 2004.

The first point was that the profit for the year ended 31st March 2002 as stated at £[…][**C**] included a dividend of £[…][**C**] from Grosvenor Paper Supplies Ltd, the company that Achilles

had acquired in the previous year. Grosvenor did not trade at all during the year ended 31st March 2002. The dividend was the means by which Grosvenor transferred its accumulated reserves to Achilles as part of the acquisition and did not relate to any trading income or outgoings during the year. On consolidation of the accounts of the two companies the dividend paid by Grosvenor and the dividend received by Achilles cancel each other out and the actual profit of both companies for the year was £[…][**C**]. This amount was clearly shown on p.4 of the financial statements of Achilles.

In assessing the profit for the year ended 31st March 2002 the OFT should therefore have used the figure of £[…][**C**] rather than £[…][**C**].

The second point was that for the year ended 31st March 2004 the Directors' remuneration charge in the financial statements had reduced to £[…][**C**] from £[…][**C**] in the previous year, but this reduction had been replaced by dividends. For the purpose of assessing the true profitability of the company for the year the dividends should be aggregated with the remuneration as a cost with the result that instead of there being a profit of £[…][**C**] there would be a net loss before tax and after dividends of £[…][**C**].

Taking the foregoing two points into account the results of Achilles before tax but after dividends, were £[…][**C**] loss for the year ended 31st March 2003, £[…][**C**] loss for the year ended 31st March 2004 and £[…][**C**] loss for the year ended 31st March 2005. The total losses of in excess of £[…][**C**] left net assets of only £[…][**C**] as at 31st March 2005.

At the time that the OFT was assessing the financial position Achilles was not in a healthy financial situation. The deterioration in the company's finances had been such that Mr. Winward and his family had had to introduce loans to the company to assist with the company's cash flow. The loans introduced during the years ended 31st March 2005 and 31st March 2006 amounted to £[…][**C**] in total. The effect of the credits to the loan accounts was that Mr. Winward and his family could continue to draw their regular amounts from the company by charging part of those amounts against the loan accounts, and by charging reduced amounts as remuneration or wages against the company's profits. This also meant that the company's net assets were substantially preserved, which was important at a time when Mr. Winward and his family were rebuilding the business. What they did not wish to happen was for suppliers to see from the company's financial statements filed at Companies House that its net assets were being depleted because the suppliers would then become nervous and demand payment on delivery which the company would find impossible.

Mr. Winward and his family have reduced their remuneration and/or dividends from the company as the financial circumstances have dictated. By way of comparison during the year

ended 31st March 2002 the total amounts of remuneration and/or dividends were £[…][**C**], whereas during the year ended 31st March 2006 the totals were £[…][**C**].

During the course of the OFT's inquiries the company's legal representatives, in a letter dated 28th February 2006 (attached to the OFT's Defence) pointed out that Achilles was not in a healthy financial position. The letter went on to say:

> "I am instructed that a fine of even in the region of, say, £30,000 will cripple Achilles". The effect of that would, Achilles submits, be particularly unattractive from the perspective of competition in the relevant market and, indeed, in related markets for paper products because Achilles' departure from the relevant market would leave Booths as the single dominant operator, more or less in the same position as it was in 1996 before Achilles entered and started vigorously competing. Therefore for the OFT to impose a hefty fine of, so I am instructed, £30,000 or more may mean that Achilles could go out of business and thereby enable Booths to obtain the very commercial objectives that it sought to achieve through what appears to have been predatory pricing behaviour."

The amount of £30,000 is as valid today as it was then.

The company's draft financial statements for the year ending 31st March 2006 (as attached to my witness statement) confirm that the penalties imposed leave the company in an insolvent position. If the penalty stands, the directors would have to seek immediate specialist advice from insolvency practitioners. A liquidation would inevitably follow, and the consequences described by the company's legal representatives in their letter of 26th February, 2006 would become a reality. A further consequence of a liquidation is that the assets usually realise considerably less than their carrying value in the financial statements prepared on a going concern basis. If this happened, the OFT would receive from the liquidation considerably less than a penalty of £127,849.

The company has paid in excess of £30,000 in legal and professional fees in connection with the OFT's investigation. Given the company's profitability and precarious financial position, the fees represent a substantial penalty in themselves. We believe that if the OFT had fully appreciated and understood the financial statements and financial position of Achilles it would not have imposed such a high level of penalty. We respectfully request that the Tribunal make an appropriate reduction accordingly.

THE CHAIRMAN: Thank you very much.

(The Tribunal confer)

THE CHAIRMAN: Thank you very much, Mr. Collier. Now it comes to the time for you to give your evidence.

PHILIP EDWARD COLLIER, affirmed

Questioned by THE TRIBUNAL

THE CHAIRMAN: Can you just confirm what your role is in regard to Achilles, the Applicant?

A. Yes. I am a director of Proud, Goldbourn Ltd. who are the accountants that act for Achilles Paper Ltd. and have done so since it was incorporated.

Q You have made a witness statement dated 20 July, 2006 in these proceedings. Do you confirm that the contents of that witness statement is true? A. I do, yes.

Q Similarly, you wrote a letter to the Tribunal of 7th September, setting out some other financial matters. Can you confirm that the content of that is true? A. Yes, I can, yes.

Q Is there anything else that you would like to add by way of evidence at this stage? A. No.

MR. KENNELLY: Madam, I will, of course, be referring from time to time to the accounts which have been attached to the Notice of Appeal and referred to, and I want to check that they have been provided.

Cross-examined by MR. KENNELLY

Q Mr. Collier, it is true, is it not, that you signed off on the financial statements of Achilles in the years 2002 to 2006? A. It is, yes.

Q Each of those accounts presented a true and fair view of the state of affairs of the company.

A. It did, yes.

Q A true and fair view of the profit and loss of Achilles. A. Yes.

Q Therefore, if one wants to look for a true and fair picture of the company's financial health, one would look to the financial statements as signed off by you. A. Yes, indeed.

Q Turning to the year in issue - 2002 - it is true, is it not, that the accurate figure for the net profit was £[…][**C**]? If you could turn to p.18 of the second document (this is the document at the back of the Notice of Appeal), it says, 'Achilles Paper Group Ltd. - Company trading and profit and loss account for the year ended 31st March, 2002'.

A. Yes.

Q The net profit for the year is stated on the bottom left-hand column to be £170,96.

A. Yes.

Q The gross profit figure is stated there to be £[…][**C**]. A. No. The gross profit is £[…][**C**].

Q That is the dividend referred to in your evidence. A. Yes.

Q And it is from that figure that the overheads are subtracted to produce the net profit.

A. Yes.

Q This figure is re-stated, is it not, again at p.6 of the same document - 'Achilles Paper Group Ltd. - statement of total recognised gains and losses for the year ended 31st March, 2002'.

A. Yes.

Q The reported profit on ordinary activities before taxation for 2002 is stated to be £[…][**C**].

A. Yes.

Q You say in your evidence, Mr. Collier, that Mr. Rimmer and his children have made considerable sacrifices in an effort to keep the business going. That is correct, is it not?

A. It is, yes.

Q I would direct you to the very helpful table that you attached to the letter which you sent to the Competition Appeal Tribunal on 7th September 2006. It is true, is it not, that in 2003 the directors' remuneration was £[…][**C**]? A. Yes.

Q To which was added the remuneration for P. Winward? P. Winward is one of Mr. Winward's children ? A. No, it is his former wife.

THE CHAIRMAN: What was the figure you gave again, Mr. Kennelly?

MR. KENNELLY: The directors' remuneration figure is dated for 31st March 2003 to be £[…][**C**], and since we are referring to what I would submit would be the remuneration for the Winward family in the broad sense of the word, I put to Mr. Collier that it was appropriate to add £[…][**C**], the figure paid to P. Winward. (To the witness): It is true, is it not, that in that year 2003 Achilles made - madam, for the purpose of these questions I will be putting figures to Mr. Collier because Achilles is not legally represented I think I have to pause here and check with the Tribunal that this is the appropriate way to proceed in view of Achilles' concerns about confidentiality. Normally if they are represented I would proceed with the figures, but on the basis of what the Tribunal said earlier today I may have to direct Mr. Collier to the numbers without referring to them in open court.

(The Tribunal confer)

THE CHAIRMAN: Mr. Kennelly, how long do you think you are likely to be in taking Mr. Collier through the figures?

MR. KENNELLY: 15 minutes.

THE CHAIRMAN: I think we will then hear that portion of the cross-examination in private.

MR. CLOUGH: Madam, I am very happy not to repeat any of the numbers that have been discussed already as well – I imagine that your last comment is addressed to us.

(For closed hearing see separate transcript)

MR. KENNELLY: May it please the Tribunal, I now make the formal submission on behalf of the OFT. It will be my submission that in view of the OFT's broad discretion in this respect, both the interpretation and the application of the Guidance and in view of the fact that it based itself

on the true and fair accounts as presented by Achilles and the submissions made by Achilles in mitigation, its factual assessment is impeccable and its interpretation of the relevant law is also impeccable. We have heard Mr. Collier at length, but I hesitate to suggest that sometimes the length should not emphasise an importance greater than it deserves. Mr. Collier's evidence is useful in understanding the background to the financial health of Achilles. One is concerned in my submission with the picture as it appears to OFT as presented by Achilles at the relevant time.

Beginning with the legal background to the OFT's assessment. The importance of deterrence in setting the penalty is highlighted both in the decisions of the Community Courts and this Tribunal. I propose to take the Tribunal to a number of the authorities referred to in the Defence, not all of them the Tribunal will be relieved to hear, but some, both for the Tribunal's benefit of course and for the benefit of Achilles. I spoke to Mr. Collier before the hearing in order to clarify and explain the procedure, and he explained to me that he had not had an opportunity to read through all the authorities and it may be useful for Achilles itself to be taken to the relevant passages. Of course, Achilles has the bundles, they have been served on them by the OFT.

Beginning then with the issue of deterrence and the Decision of the European Court of Justice in the *Musique Diffusion Française* case ----

THE CHAIRMAN: Can I just interrupt there? Are you going to deal, Mr. Kennelly, with what the effect of the Community jurisprudence is on the Tribunal – whether or not we are bound by it?

MR. KENNELLY: I was not proposing to deal in detail with that because I did not believe it to be in issue. As ever before the Tribunal I refer to the Community Authorities under s.60 of the Competition Act – they are relevant insofar as there is no inconsistency between Community practice and domestic practice. Similarly, domestic procedure mirrors Community procedure where possible, save where there is a difference in the stated procedure, and there is the *Pernod Ricard* case, and so I refer to it only in that regard. I do not say the Tribunal is strictly bound by the Community authorities but s.60 and the case law of this Tribunal indicates that the Tribunal should where possible pay close regard to those Decisions. In that respect I would direct the Tribunal to this particular decision of the European Court of Justice. It is in the supplementary authorities bundle tab 1. A Judgment of the court of 7th June 1983, joint cases 100-1003/80. I will not take the Tribunal through the entirety of the Judgment, it is substantial, but take the Tribunal simply to the part that refers to the importance of deterrence in penalties, which is para.106, at p.1906 of the Judgment. Here the court states:

> "…in assessing the gravity of an infringement for the purposes of fixing the amount of the fine, the Commission must take into consideration not only the particular

circumstances of the case but also the context in which the infringement occurs and it must ensure that its actions have the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the objectives of the Community."

The Tribunal will have seen in our Defence and skeleton that price fixing, which is what occurred here, is among the most serious infringements of the Chapter I prohibition. Similarly this Tribunal in the *Genzyme* Judgment, which is in the second authorities' bundle, behind tab 4, if I could ask the Tribunal to turn to para.705, that is at p.209 of the Judgment. At para.705 this Tribunal confirmed the OFT's Guidance, that it was appropriate to consider the question of deterrence as an important aspect of the 1998 Act. Over the page, at para.706 the Tribunal referred to the fact that the sanction should be appropriate to the conduct having regard to the need for deterrence. Deterrence does not just mean deterrence of the company subject to the penalty but also dissuade other undertakings that may be contemplating similar practices.

In that same authorities' bundle is the case of *Umbro v OFT* and I would ask the Tribunal to turn that up in relation to the margin of discretion enjoyed by the OFT in assessing and applying these penalties. Paragraph 101 of the Umbro Judgment, that is at p.28, behind tab 7. Here this Tribunal echoed the guidance, it confirmed that the OFT must have regard to it, and this imports a stronger obligation than merely taking into account. At para.102, the Tribunal said:

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

Over the page at p.104, the Tribunal added that:

"… it is not appropriate to seek to analyse each individual "Step" of the Guidance in isolation from the other Steps. For example, the starting percentage rate used under Step 1, and the multiplier used under Step 3."

It says that these involve an exercise in judgment. At para.105 the Tribunal said:

" In other words, although each Step of the Guidance is formally distinct, the Guidance in our view cannot be treated as if the OFT is merely making a series of mechanical calculations according to pre-determined mathematical formula, although no doubt the OFT's calculation should be carried out as objectively as possible the Guidance contains, rightly in our view, a number of subjective and inter-related areas of judgment which necessarily play a part in fixing the final penalty."

In that same authorities bundle, behind Tab 6 is the Judgment of this Tribunal in the case of *Argos Ltd. & Littlewoods Ltd. -v- OFT* where the Tribunal gave further guidance as to the

discretion enjoyed by the OFT in this respect. That is behind Tab 6. I am afraid the index does not quite match the files. I have switched mine. I ought to have told the Tribunal in advance. If you have the Judgment at p.51, it sets out the Tribunal's analysis from para. 168. Here, again, the Tribunal confirm the OFT's margin of appreciation at the beginning of para. 168. There is an element of repetition in these paragraphs and I was going to direct the Tribunal over the page to paras. 171 and 172. In particular, because it is new, para. 172 where the Tribunal indicated that the focus should be primarily on whether the overall penalty imposed is appropriate for the infringements in question.

> "In our view, provided the OFT has remained within its margin of appreciation in applying the guidance, the Tribunal's primary task is to assess the justice of the overall penalty rather than to consider in minute detail the individual steps applied by the OFT, particularly as regards Step 1 and Step 3."

Of course, it is Step 3 that is in issue - and only Step 3 in issue - for the purpose of this appeal. The Tribunal has, in the defence, and in the skeleton, the factual submissions which I have made in relation to the steps which were carried out by the OFT and the application of Step 3 in para. 295 of the decision. I shall not turn those up because the Tribunal has already had an opportunity to consider them today.

Before going to the individual grounds of appeal, it may be appropriate at this stage again to recall, in relation to the standard of view the parameters of the exercise to be conducted by the Tribunal. As the Tribunal is, of course fully aware, the Tribunal is appellate. Matters should not be canvassed for the first time before the Tribunal when they could, or should, have been raised in the administrative procedure. The authority for that is the *Aberdeen Journals* case, which is in the supplemental authorities' bundle (the first authorities' bundle) behind Tab 3. The paragraph to which I will draw the Tribunal's attention is at 177 at p.54 of the Judgment. The Tribunal says in relation to an approach that has been canvassed before it that what the Tribunal wants to avoid is converting into a court of trial where matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time at the level of the Tribunal when they could or should have been raised in the administrative procedure and dealt with in the decision.

Now, of course, it is open to the parties to raise arguments and documents which have not been raised below, but as a matter of practice it is my submission that where arguments could have been raised below, it is appropriate that they are raised at that stage.

THE CHAIRMAN: Are there arguments which Achilles is raising in relation to which you apply that particular principle?

MR. KENNELLY: Not arguments, madam, because, of course, the basic argument that Achilles made is the argument that it is making today. I will, in my submission, be later analysing the facts, but the submissions, for example, in relation to the loans are points that could have been made at the administrative procedure, and in assessing what weight to give to those points, the Tribunal ought, in my submission, bear in mind that that was not raised when it could have been, and should have been, raised either in the letter which Achilles sent to the OFT or in the documents themselves which were given to the OFT to consider - namely, the financial statements.

To summarise that case law, the margin of discretion that the OFT enjoys is well-known. It is not appropriate, in my submission, to analyse the Steps in minute detail – notwithstanding the questions, of course, which I put to Mr. Collier (which were probably just that). It is instead appropriate to analyse the overall nature of the fine and assess its overall reasonableness. That, of course, is not to say that if the OFT has made an specific error of law, or an error of assessment of sufficient severity as to render the decision a nullity, that is a different matter. But, in considering an appeal on a fine such as this, it is appropriate to look at the overall nature of the OFT's approach and the overall reasonableness of the fine. That is what is challenged in this appeal. That is Achilles' central submission - that the fine is just too big.

The legal argument which Achilles makes, which is that it should not be fined as much as it is because of its own weak financial position, has been addressed by the Community courts. In the absence of authority from this Tribunal, and in view of the obligation under Section 60 of the Act, it is appropriate, in my submission, to look at the Community jurisprudence in this regard.

The first case to which I would draw the Tribunal's attention is the *Tokai Carbon* judgment which was in the original CMC parties' bundle. In my bundle it is behind Tab 3. This is the decision of the court of first instance: 2004 *Tokai Carbon -v- Commission*. Again, I will not take the Tribunal through the various grounds of appeal because they are very extensive, but the Tribunal will be aware that the guidelines applied by the Commission in assessing penalties are slightly different to those applied by the OFT. In the Commission's guidelines there is provision made for taking into consideration the financial strength of a company in a specific economic context. The Tribunal will be aware that the same principles of proportionality and administrative reasonableness apply equally to the Commission as they do to the OFT in this regard. The relevant paragraphs of this Judgment are from para. 369, which is at p.1564 of the report. The Appellant submitted in this appeal that they were experiencing great financial difficulty and that was the reason for reducing the penalty. The court of first instance deals with that as follows - and this is equally applicable in this appeal, in my submission:

> "As stated above, cartels come into being, in particular, at a time when a sector is experiencing difficulties. If that circumstance did not justify the grant of an attenuating circumstance, it cannot justify a reduction in the fine in the present context either".

At para. 370 the CFI says:

> "... the Commission is not required when determining the amount of the fine to take account of an undertaking's financial losses since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market".

That is reference there to the fact that though the Commission took it into consideration previously, it does not mean it is obliged to in each subsequent decision.

At para. 371 the court says:

> "That line of decisions is not called into question by point 5(b) of the Guidelines, which states that an undertaking's real ability to pay must be taken into consideration. That ability applies only in a 'specific social context' consisting of the consequences which payment of the fine would have, in particular, by leading to an increase in unemployment"

That is different to the OFT's guidelines in this case. At para. 372, this, I would submit, is a separate point made by the CFI which is separate and unrelated to the point previously made which was specific to the social context:

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

In my submission that corresponds with what Mr. Collier says at the end of his witness statement when he says that notwithstanding its difficulties, Achilles is a going concern; that it has, as you can see from the consistent turnover figures, an existing economic strength. Its profitability may have been damaged for the reasons which I would be submitting were largely due to the directors, but it is a going concern, and it need not vanish, as it were, if the fines are imposed on it and insolvency results.

As a matter of principle it is my submission - and this is central to our case - that it cannot be a reason to reduce the fine that the undertaking will suffer grave financial consequences and even insolvency. That may be a consideration which the OFT takes into account. The OFT is obliged, as any public authority, to take into account all relevant considerations. But, as a

matter of principle, it cannot be the rule that an infringing undertaking avoids the penalty by pleading its own difficult financial circumstances.

As the court of first instance said in *Tokai Carbon* - and this is the point of principle - cartels arise in situations of economic difficulty. It may well be the case in most cartel cases that one of the undertakings fined may say "This fine will cause us great difficulty and may push us into insolvency." It may reduce the number of undertakings operating at that point in time on the market. But that must arise in a great number of cases and, as a matter of principle, it cannot be a basis for avoiding the penalty otherwise it would be pleaded by a great number – one could imagine how it could be pleaded by a great number of undertakings in cartel cases.

THE CHAIRMAN: The situation here is slightly different from the situation *Tokai Carbon* if it is the case that were Achilles to exit the market there would then not be viable competition in the relevant market, what is your case as regards the application of *Tokai Carbon* in those circumstances?

MR. KENNELLY: Save where I have indicated there is a difference in the Rule, *Tokai Carbon* stands as the starting point of principle. Achilles raises now the point that if it were to be insolvent, which is not accepted by the OFT, it would reduce the number of undertakings in the market. We do not have evidence before us that there were particularly high barriers to entry or that there may be some reason why if the remaining undertakings were to increase their prices above competitive levels other undertakings would not intervene – there is simply no evidence to support that allegation and, of course, the burden in this respect is on Achilles. Really, in the absence of that evidence, which is for Achilles to produce – that is the core of our submission – there is no evidence that other undertakings would not intervene if the remaining undertakings were to increase their prices above competitive levels. This market is under the scrutiny of the OFT in any event. It would be surprising if that kind of conduct was to follow an infringement decision of the type we have seen and fines which we hope would have deterrent effect. The concern must be, on the part of Achilles, that there is a risk of some anti-competitive activity if it were to exit the market . In my submission that is not a substantial concern. In any event, Achilles simply has not produced the evidence to show that competition would be harmed to a material extent if it were to exit the market.

THE CHAIRMAN: You put your case quite high, Mr. Kennelly, and we wonder how that is consistent with the fact that the OFT does seem to have accepted in this case, and in other cases, that financial hardship is something which it would take into account at Step 3. The Guidance that you pointed us to earlier indicates that the size and the financial position of the company is a relevant factor. It has not previously, I think, been asserted that that only goes in

one direction. If it is capable of giving rise to a reduction in the fine in what circumstances would it give rise to such a reduction if not in these circumstances?

MR. KENNELLY: Madam, just so I can be clear, obviously it may be a relevant consideration and the price, the roofing case is an example where the OFT did take into consideration the financial circumstances of the infringer. What I was stating was as a matter of principle the starting point is that set out by the Court of First Instance in *Tokai Carbon*, that as a rule it should not be the case that an undertaking can plead its poverty to obtain a reduction in penalty. In the broad circumstances of any particular case the OFT may decide that it would be appropriate to reduce the penalty in order, for example, to obtain payment of the fine, or for whatever reasons that are too numerous to list in my submission. That is why the OFT's discretion in this field is so broad because penalties are particularly a matter of discretion, they must be tailored to the situation both in relation to the undertakings that they will have to pay, and also the broader deterrent effect. So yes, it may well be suitable in some circumstances to reduce the fine where, for example, there may be very high barriers to entry. It could be that it may have an anti-competitive effect if one of the undertakings leaves the market and there may be particular circumstances to show that.

In my submission those circumstances just have not been shown to exist in this case, and that is the matter of principle. Our starting point is that we correctly appreciated Achilles' financial statements as presented to us. We do not accept that Achilles was in a situation of financial hardship such that it deserved a reduction in the penalty – even having heard what we have heard today in the Tribunal. Our submission is that Achilles was in the situation it was in because of the actions of its directors. Achilles could have been better managed. It is a classic case of a company which has not acted efficiently and does not deserve the protection of a reduction in fine – just the kind of undertaking discussed by the Court of First Instance in the *Tokai Carbon* case.

Those are circumstances where it would not be appropriate to reduce the penalty, but if the circumstances were different it may be appropriate to reduce the penalty because of the financial status of the company. Madam, I probably need to take instructions if I was to posit examples because, of course, the transcript of this hearing will be reviewed with great care by other Appellants and if I were to think up examples I would have to check them with my client I think. The Tribunal hopefully has my submission. This is a consideration which the Tribunal can take into account. Here it decided, having reviewed the financial statements of Achilles, that it was not appropriate to adjust the fine on a downwards basis.

Reference to the *Richard Price* case (the roofing contractor's case) I shall not take the Tribunal to it, but it is para.64 of that case which is in the authorities' bundles, if the Tribunal needs to check.

Turning then, as I think my last submission flags, to the actual financial assessment of the Appellant, as I put to Mr. Collier, the Achilles' turnover was reasonably static in the period in question. I have already given the figures to the Tribunal and, as the Tribunal sees there are small movements up and down but they are reasonably static. Similarly, Mr. Collier confirmed that the movement in the cost of sales mirrors the turnover figures. This remained virtually stationary between 23 and 25 per cent. during the relevant period. It is not our case that there were not some difficulties at Achilles. But, in our submission a substantial reason why Achilles was experiencing difficulties was because of the practice of the directors in removing funds either by straightforward directors' remuneration or dividends from a company.

Mr. Collier said in evidence that that was because the directors wanted to maintain their standard of living while reducing their remuneration, and it is true the overall remuneration did reduce as you can see from the table attached to Mr. Collier's letter dated 7th September 2006 (the letter to the Tribunal). Again, in my submission, analysing those numbers it is clear that the amounts of remuneration taken out, for whatever the reasons of the directors were excessive in view of the difficulties the company was facing. The figures may have been reducing from £183,000-odd down in 2005 to £122,000. But looking at the Profit & Loss figures of each of those years to which the OFT properly had regard in analysing the financial health of the company, it is clear that one of the large reasons why the company was not doing better was because of the substantial amount of funds taken out by the directors for their own uses. That was their decision and their prerogative, but it does go in our submission to showing that Achilles need not have been making a loss if the directors had made the sacrifice that Mr. Collier said they made in his evidence in order to preserve the health of the company. Mr. Collier gave the figure which he said would have certain consequences. We have to look at the figures presented in that table and bear in mind that figure, because the numbers demonstrate that that consideration does not appear to have been in the minds – or at least not obviously in the minds of the directors – in just making their own decisions about remuneration.

Finally, the Tribunal has indicated by its own jurisprudence that it does not examine the minutiae of these issues, but looks at the evidence in the round and particularly at the evidence as it was presented to the OFT. Mr. Collier confirmed that the financial statements of themselves are the true and fair view of the financial health of the company. Implicitly it was not necessary for the OFT to look any further than the company's accounts. Mr. Collier

confirmed that he signed off the accounts and he was content that they reflected the true and fair financial health of the company. The loans to which he now refers appear nowhere in those financial statements.

There are notes to the accounts and references to related party disclosures which indicate where there have been dealings with the directors themselves, but no reference made to the loans that he has given evidence to today. If there were to be references to loans you would have expected to see them in the notes. I am not suggesting there were no loans, but I am saying the OFT could not have known they existed. It quite properly had regard only to the financial statements of the company, and it accurately reflected those financial statements in its Decision at para.295. It took into account the points made by Achilles in relation to its financial health and decided not to adjust the penalty. Really on the financial matters that is the submission of the OFT.

The loans' issue in my submission does not change the basic fact that the company's Profit & Loss figures were, as considered by the OFT, and for the purposes of this Appeal when one examines the true financial health of Achilles and the reasons why it posted the figures it did, my submission is that the directors themselves bear a substantial proportion of the blame and that is just the kind of inefficient behaviour that the Court of First Instance said should not be rewarded – and the word is mine and not the Court of First Instance – in a reduction of the penalty. Those are the submissions on the detail of the facts, but bearing in mind the overall consideration for the OFT's discretion, its own subjective judgment - and 'subjective judgment' are the words used by the Tribunal - the Achilles' appeal, in my submission, does not come close to showing a sufficiently serious error of assessment, or an error of law, which would lead to the fine being set aside or reduced further.

Those are my submissions.

THE CHAIRMAN: On the point about the dividend from Grosvenor Paper, is it accepted by the OFT that that figure does not represent any trading, either by Achilles or Grosvenor in the financial year end 2002?

MR. KENNELLY: Yes, madam. It is accepted that it is not sales revenue. It is, as Mr. Collier said, the accumulated reserves of Grosvenor. However, I would make two submissions in relation to that: the first is, of course, that the OFT can only be expected - and it is appropriate - to look at the accounts. The net profit figure is stated in those trading accounts as being £170,000-odd. I realise at p.4 that in the consolidated accounts it gives a smaller figure. But, in two separate places in those accounts it refers to the reported net profit as being £170,096. Even if they did not result from trading, it does reflect funds which have been transferred into Achilles. I took Mr. Collier to the two places where the net profit is referred to in that sum.

THE CHAIRMAN: I just want to be clear whether the documents that were before the OFT included the document which shows that that amount going into the profit figure was derived from the dividend paid across by Grosvenor Paper.

MR. KENNELLY: Madam, I have taken instructions, and, yes, the OFT did have, for 2002, the full financial statements, including p.4 for Achilles.

THE CHAIRMAN: That is not the page I am thinking of. I am thinking of the actual figure of what the dividend was. (After a pause) It is p.18 of those accounts. That is where it says the gross profit is the figure given, and then it sets out the dividend so that one can see that the net profit for the year figure at the bottom is divided in part from the dividend from Grosvenor Paper.

MR. KENNELLY: I will just check and see whether that was included. (After a pause) Madam, just to confirm - yes, the OFT did have p.18. Of course, this page simply states 'Dividend/Grosvenor Paper Supplies Ltd.'. It does not indicate whether it is trading income or accumulated reserves. There is no indication, and the OFT had no indication at this stage that the funds were non-trading.

MR. COLLIER: May I just point out that in the accounts to March 2002 for Grosvenor it does show the dividend paid as well.

THE CHAIRMAN: Yes, and those also show that there was no trading in the year 2002.

MR. COLLIER: Yes.

THE CHAIRMAN: Now, were those also with the OFT at the time of the decision?

MR. KENNELLY: Madam, I will have to take instructions. (After a pause) Madam, in relation to whether the OFT considered the Grosvenor accounts, it is not possible to give the Tribunal a definite answer now. It would probably be dangerous to do so. It is better, in my submission, to check and then to tell the Tribunal and the parties in writing. That would be the safest course of action. Of course, if they were considered, it would have been done as part of the investigation, but it would have been to a limited extent. The short answer is that we do not know at this point in time, and it is safer to check the file, and then to tell the Tribunal in writing.

THE CHAIRMAN: Yes. I am not so concerned with whether they considered them, but simply whether they had them available to them.

MR. KENNELLY: Yes. I meant, yes, that we had them indeed.

THE CHAIRMAN: With regard to the third point of appeal about the reduction in the shareholders' funds which Mr. Collier took us through, do you have any separate submissions in relation to those?

MR. KENNELLY: No, madam. As the Tribunal gathered possibly from my cross-examination, it is not disputed that the shareholders' funds reduced as indicated in the accounts. That is one of the reasons why I do not dispute that Achilles was experiencing difficulties. The question is: how severe and why was it happening? That was the basis of my questioning of Mr. Collier, and the basis of my submissions today.

THE CHAIRMAN: Thank you very much, Mr. Kennelly. Mr. Collier, you now have an opportunity to respond to the points that Mr. Kennelly has made. We will come back at ten to two.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Collier, I think it is now your opportunity to say anything you want to say in response to the submissions that were made this morning by Mr. Kennelly.

MR. COLLIER: Thank you. There are just a few points that we would like to mention. Firstly, with regard to the availability of the accounts for Grosvenor, we are fairly confident that the Grosvenor accounts to March 2002 were supplied, but in any event the Grosvenor accounts to March ... on p.9.

MR. KENNELLY: I hesitate to interrupt, but I ought to have said before Mr. Collier spoke that we have checked over the adjournment, and the Grosvenor accounts were supplied. The 2002 Grosvenor accounts were supplied to the OFT.

MR. COLLIER: Thank you. I also have to say that we also struggled with reconciling the hard line view of the consequences of going out of business that the OFT are taking ... reconciling that with the discretion available on the financial circumstances. We cannot imagine any more extreme circumstances than actually going out of business.

With regard to the levels of remuneration, we feel it is too simplistic to say that it was only the remuneration which gave rise to the poor results. There are, of course many other factors that affect a business's results during the course of a year. We would hardly describe the remuneration shown on the schedule attached to the letter of 7th September as being excessive for five people.

We would also make the point that Mr. Kennelly was saying that there did not appear to be many obstacles to setting up a manufacturing business, but if that were the case then why has no-one done so in the last few years? One of the reasons would be the cost of purchasing and maintaining specialised equipment.

Finally, I would just like to refer to a point that was made in the OFT's decision again, where it is talking about market share. It is said there on p.11 at Footnote 54 – it refers to Achilles having a 20 percent market share, and the combined share of Bemrose and Achilles being 70

percent, and therefore if Achilles did exit the market for whatever reason it would leave Bemrose in a very dominant position.

That is everything. Thank you.

THE CHAIRMAN: Thank you very much.

(TheTribunal confer)

THE CHAIRMAN: I think the one thing remaining therefore is to deal with you, Mr. Clough.

MR. CLOUGH: Thank you, madam. I am happy to say that I have one very brief application to make, if I may.

In his opening, Mr. Collier - I am sure with no specific thoughts in mind - said something to the effect that Bemrose Booth would have achieved what it sought to achieve through its predatory pricing behaviour in the past. I just wondered if, first of all, Mr. Collier would mind withdrawing that statement because it is not relevant to his client's appeal today. I understand the OFT would have no objection to that being taken out of the transcript - if that is physically possible. I can refer you to a number of paragraphs in the decision which talks about the period prior to the factual findings of the decision - for example, para. 39 on p.13; para. 106 on p.29 (which talks about the background to the agreement and refers to the period of intense competition). The OFT's final analysis of the evidence in this context is in para. 121 on p.32. Achilles' own remarks are pretty consistent with those of Bemrose - for example, para. 108, p.29; para. 112, p.30; and p.43, para. 157. They all refer to the aggressive price war and that sort of intense competition language. That is prior to May 2000.

THE CHAIRMAN: So, is your point that there was aggressive price competition and that the term predatory pricing should not be regarded in a technical way?

MR. CLOUGH: Indeed. The evidence and the findings in the OFT's decision are to the effect that there was a period of intense competition prior to the events of May 2000. There is no suggestion that one, or other, party was engaged in predatory pricing. As you know, madam Chairman, predatory pricing assumes dominance, etc. There is certainly no discussion of that. That is the only example - however minor it is - that I have noticed during the course of the proceedings. Thank you.

THE CHAIRMAN: From the Tribunal's point of view I think that the only evidence that we have before us as to the state of the market and what conduct has taken place in the market is from the OFT's decision. I certainly do not think we will be taking anything else into account to your client's possible detriment. Whether we can excise from the transcript something which was said is something that we will need to look into and consider. If you would be content to leave it at that, then we will see what we can do.

MR. CLOUGH: Madam, I appreciate your indication that your decision will make no reference to this. May I leave it like this: if technology permits, I would ask you to take these words out. I am sure Mr. Collier will not find it affects his own main arguments. But, our clients are very sensitive, as you can see by the fact that we have sat here this morning. I do not fully understand the historic sensitivities involving these parties, but there must be something rather important that lies behind this. I would just say: if you can, please do. Thank you.

THE CHAIRMAN: Mr. Collier, do you accept what has been said - which is that you were not then, in what you said, making an allegation of predatory pricing in the technical sense that the OFT and this Tribunal might use it as a particular way in which a dominant company sometimes abuses its position, but simply referring to aggressive price competition?

MR. CLOUGH: (After a pause) Madam, perhaps I should just butt in at this point. My main point is that it is not relevant to the Appeal. Slightly overhearing the discussions taking place beside me, there are a lot of irrelevancies being discussed.

THE CHAIRMAN: I think the point is that you were saying, Mr. Collier, that if Achilles exits the market it leaves Bemrose in a very dominant position, and the question is therefore what weight the OFT needs to give to that fact, and to any possibility that Bemrose in the future might behave in an anti-competitive way – the way in which there is a risk that dominant companies will behave. What their past conduct was in relation to their competitors, it seems to me, has little relevance to that question. So, I do not think, as far as I see it, that what you said is an important part of your submissions to us today.

MR. COLLIER: I think we accept the point about that particular phrase. It is simply part of the letter that we were quoting from at the time. I think the point has been made that we wished to make.

THE CHAIRMAN: Thank you very much. I am not sure, Mr. Clough, where that leaves your application to intervene. Is that it? Do we have you withdraw that now, given ----

MR. CLOUGH: Madam, I am happy to do whatever is the most appropriate and proportionate step. Our application to intervene was always intended to enable me to do what I have just done. So, I think if it is easiest, we can withdraw it.

THE CHAIRMAN: I think that probably would be ----

MR. CLOUGH: There are obviously no costs consequences.

THE CHAIRMAN: Thank you, Mr. Clough.

(The Tribunal confer)

THE CHAIRMAN: We will reserve our decision and notify you in the usual way as to when it is going to be ready. It only remains for me to thank everybody - particularly Mr. Collier, for his

very concise and helpful submissions, and all the other parties as well. We will retire and deliberate.

(The hearing concluded at 2.10 p.m.)