IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1068/2/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

24th October 2006

Before:
MARION SIMMONS QC
(Chairman)

PETER CLAYTON
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

CASTING BOOK LIMITED
(in Administration) — Applicants

and

OFFICE OF FAIR TRADING — Respondent

Mr. Ray Assirati appeared for the Applicants.

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

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HEARING

THE CHAIRMAN: Good morning. Mr. Assirati, the hearing today is to decide whether the OFT has taken an appealable Decision, and a Decision is appealable if the OFT has decided either that there is an infringement, or that there has not been an infringement. Now, the OFT say they have not taken an appealable Decision, but instead they stopped their investigation on the grounds of administrative priority. You understand that?

MR. ASSIRATI: Yes, I understand that, yes.

THE CHAIRMAN: You say that the Decision that they took is an appealable Decision, as I understand it ----

MR. ASSIRATI: Yes.

THE CHAIRMAN: -- because the Decision they took, you say, was a Decision of non-infringement?

MR. ASSIRATI: Correct.

THE CHAIRMAN: Now, at pp. 3 and 4 of your submissions for today you refer to the "OFT's paperwork"?

MR. ASSIRATI: Yes.

THE CHAIRMAN: It is not clear to us whether what you are referring to is paper work assuming that they have taken a non-infringement Decision and the question of whether that Decision was the correct Decision or whether what you are referring to is that you need to see the paper work in order to make your submissions on whether they closed the file, or whether they made a non-infringement Decision.

MR. ASSIRATI: Yes.

THE CHAIRMAN: Do you understand the distinction?

MR. ASSIRATI: Yes, I understand.

THE CHAIRMAN: So perhaps you could clarify what you were saying?

MR. ASSIRATI: It is the former.

THE CHAIRMAN: It is the former. If we decide they have made a Decision of non-infringement, then you would need the paper work to see whether or not that was the correct decision?

MR. ASSIRATI: Yes.

THE CHAIRMAN: Well we have clarified that. Now, the normal procedure would be as it is your application so you would go first, and you would explain to us why you say that they made a non-infringement Decision and not just close their file. Then the OFT would go and then you would have a chance to reply. Are you happy with that?

MR. ASSIRATI: Yes, yes.

THE CHAIRMAN: Right. (To Mr. Pickford) Now, you were getting up, were you getting up for ----

MR. PICKFORD: It was simply to make the point, madam, that we certainly understood Mr. Assirati's reference to documents as being in the former sense, which is what he has just confirmed.

THE CHAIRMAN: I wanted to make sure that that was the case. Well, Mr. Assirati?

MR. ASSIRATI: As I have put in my submissions, I asked the OFT to look into this because I believed there was wrongdoing by TRAP and my discussions with the OFT led me to believe that they were of the view, following an initial look at it, that there was possibly infringements, and they decided then to take the case up.

In very simple terms if they have taken the case up and they have decided there is not enough evidence it must be that they have implied that there is a non-infringement, because if they were of the view that there was an infringement then they would have carried on with their investigations. They then said that it was an administrative decision, and I can understand the logic, they only have a limited amount of resources, etc. But I think the administrative decision is one thing, it is what lay beneath that decision which is that they believed there was a non-infringement. I believe that if we had access to all of the papers then we have good grounds for an Appeal because we believe that there was an infringement. The sort of things that lead me to that conclusion are, for example, when you read the statements of the OFT and the witness statements they came to the conclusion that the market was not as large as was first indicated to them, and that was one of their considerations. They were relying on figures given by TRAP and those figures were substantially less than what I put forward.

The figures that I put forward were as a result of asking around in the trade to get ball park figures to give the OFT a guide as to the size of the market. Obviously, had the OFT continued on then those figures would have needed to have been clarified. However, the OFT appears to have just taken on face value TRAP's figures, and this – if I use the word "outrageous" I think it is probably too emotional – is clearly wrong. In the figures that the TRAP quoted to the OFT, for example they say that the wholesale value of the official calendars are £11 million, and not £100 million that I indicated.

This is clearly, clearly wrong, because there are a number of companies producing official calendars, and just one company alone – a company called "Danilow Calendars", 95 per cent. of their product is official calendars, and their turnover in the last three years recorded at Companies House, is circa £11 million per year. So this is just one company, and there are many, many companies, yet TRAP stated £11 million.

On the poster side they quote the official value is £2 million. Again, I say that this is clearly wrong. One of the companies – a company called "Pyramid Posters" – their turnover is £6 or £7 million and their range is predominantly licensed character posters. There is "GB Posters"

(now called "GBI"), who claim to sell to 4,000 stores across the country, their turnover is of a similar sort of figure. These are just two of the many, many companies that are in the market place. If you take T-shirts they are saying it is only 5 million. If you look at the figures from a company called "Bravado" and "Atmospheric Apparel" I think they are called – they are predominantly licensed T-shirts – between them their turnover is something like £20 million. So I believe these figures are hugely questionable, and had the OFT continued to investigate and clarified that they would have found that that figure is wrong.

Again, I may have mixed up the administration Decision and the Decision of non-infringement here a bit, and I apologise if it appears that way, but another of the claims made by the OFT is that to go further with this could jeopardise the good bits that TRAP are doing; that they are attacking bootleggers. Now, I have nothing against that, that is absolutely admirable; bootlegging is wrong and it should be stamped out. But, TRAP were using a sledge hammer to crack a nut. They were embracing in the bootleg product the legitimate copyright product, and there is evidence that shows that TRAP were persecuting the distributors and recommending that their companies do not supply the companies with official product if they continued with unofficial product.

In relation to the bootleggers I think it would be worth explaining to everybody, as this may be the only chance I have, as to the history of this industry. I came into this industry in 1969. What I am about to describe to you is the birth of an industry and what we are now watching is the death of an industry that was created. In 1969 merchandising was at a very young stage – the big companies were not in the slightest bit interested in merchandising – there was odd bits of merchandising being sold around the world.

In the case of posters, where I had most experience, there were 'hippy' posters from San Francisco and film stills from an American company that were producing film stills such as Steve McQueen from the "Great Escape" on a 2' x 3' poster, selling in those days at 10/6 a time. There were hippy posters, psychedelic posters coming in from America selling for a similar price; that was the extent of the market.

I, with a colleague, looked at this market, and we thought there was an opportunity for selling posters with the new, up and coming pop and rock stars, as opposed to what was on the market available, because at that point there was no rock star, pop merchant posters on the market. We could have taken photographs from a magazine, reproduced them and produced them as posters, but we knew that that was wrong – infringement of copyright. We took legal advice and applied to a firm called "Rubenstein Callingham" in Rainham Buildings. Michael Rubenstein (a senior partner), who has now unfortunately died, looked at the legal situation for us and his and counsel's advice was that there was no reason why we could not use

photographs from legitimate sources, i.e. a photographer, providing the photographer owned the copyright, and providing that you were responsible and the picture was not used in a derogatory manner, or to endorse other products, so there were restrictions on how we could use the photographs.

We then started to publish posters on that basis and a whole new market developed. A new industry came about, other people followed suit, producing other products, using the same methodology of acquiring photographs from photo libraries. In 1975 there was a group called "Abba" who decided that they wanted to merchandise the "Abba" name - Abba merchandise and Abba garments – and they were concerned that the activities of the company that I was involved in at the time (Anabas) and other companies, were able to publish images of these stars without necessarily going to the artists themselves. They instigated proceedings in the High Court which lasted for several days and the Judge ruled in favour of the practice that we were using. I believe that this legal precedent of *Abba v Anabas* is cited in all the law books, and over the years many people have tried unsuccessfully to overturn that decision, so it is firmly established that that is a perfectly legal way of doing business.

Following 1975 and the *Abba v Anabas* decision that encouraged a lot of new companies then to come into the market because now the law was clarified, before it was perhaps unclear but this decision clarified the situation. Young companies came into the market producing all sorts of things T-shirts, key rings, caps, handkerchiefs, scarves, etc. There was a very healthy market, plenty of competition and I would say hardly any bootlegging was going on in that time, because there was no need for anybody to go and bootleg because they could go to a photo library and, for a relatively modest sum, could acquire a photograph and produce product. There was no need for them to go underground.

This situation continued until the late 1980s and then the record industry were experiencing a downturn in their revenues, and they suddenly woke up to the idea of merchandising – this was a revenue mechanism. They then started granting licenses to various companies, and there was a healthy competition between licensed product and copyright – there was a bit of a war going on, but it was a healthy war and it was a level playing field because all the stores realised that they could buy either the copyright slightly cheaper, or they could buy the licensed (slightly more expensive) but it was their choice. There was plenty of both products around and, as I said, it was a level playing field and very, very healthy.

However, in the late 1990s the whole situation suddenly changed dramatically; this war hotted up, culminating in HMV, who were one of the biggest retailers selling both licensed and copyright product quite healthily, suddenly put an edict out that the managers were not to buy any unofficial product, copyrighted, although they accepted that it was legal it was their policy

not to stock unofficial product. On asking them why we were told by the buyer quite categorically on several occasions – it was not just to me, there are other people in the industry that received the same response – that they were told by the record companies that if HMV continued with the unofficial product then not only would HMV be not supplied with licensed merchandise, but they would be in grave danger of not getting the new releases of records out at the time that they should do. The buyer at HMV said to me "This is too big a business, we cannot jeopardise our record business for the sake of a few posters, so therefore we have no alternative but to stop selling them."

That was one blow. Then it started to spread. Virgin Records started to follow – at that time Richard Branson was not so much involved in it; in his earlier years he was involved very intensely in the Virgin Record Stores, but when he was going out playing aeroplanes he was not involved in the record side. Virgin took the view that if there is not a licensed product around then they will carry the unofficial one, but if there is a licensed one then they would not stock the unofficial one. Again, they said that they were afraid of losing out on their relationship of selling records. So the word started to spread giving encouragement to the companies that were granted licences, such as Pyramid and GB and they were continually bad mouthing and depressing the copyrighted market as much as they could.

Then we follow through into 2000 when we have the TRAP saga, and there is all the documentation and so no need for me to repeat what they have done. Basically now the industry of legal unofficial product is almost at an end because the stores will not stock the product because they are afraid of attacks by TRAP, therefore the publishers that are involved are coming out of the industry and there is hardly any unofficial copyright being sold. As a result of all of that, the product in the market is actually reduced and therefore, these bootleggers then see the opportunity that there is a restricted market, the market is insatiable, the public want the product and all they offered is just a few titles from a limited source, and that has encouraged the bootleggers, and the bootleggers are now rampant. So this business about TRAP trying to stop the bootleggers – there will always be the odd bootlegger, you will never stamp it out completely – the majority of the bootlegging would stop if copyrighted product was allowed to be sold on the open market.

I am semi-retired now and so it really does not matter, but I saw the industry start in 1969, I saw it developed, and now I see it has all been trashed. It is so sad because if copyright was allowed, this product was allowed to be sold, there are a lot of young kids who would want to start in business. This is a way of getting into business with a very low entry level – there are not huge costs – and technology has moved on enormously. In 1969 there were only a handful of printers that could print large size posters. Today, everyone can produce them, the

technology has moved on that most printers can produce them at very, very low cost and very low runs. In 1969 you had to produce 10,000/20,000 units to get the price down to a certain level, but with today's technology you can produce 1000 units and still buy it at the right price. You can acquire the photographs for a few hundred pounds, not £20,000, £30,000, £40,000 that these licensors demand by way of advances. So there is a lot of new businesses that would be created – young kids who would come in, they like the music, they like celebrity, they have the affinity with it, there are opportunities there and business would flourish. The market would build, there would be competition and there is an in-built quality control because as there is a low entry they might produce rubbish, but the public will not buy rubbish, and I will give you an example of this. If you had two photographs of Donny Osmond – back to my days – one was a glowing picture of Donny Osmond and the other was a rubbishy picture and you put those photographs in front of a consumer and said "Which one do you like?" 99 times out of 100 they would point to the good photograph. Then if you asked them: "Why do you like that photograph?" they cannot tell you why, but it is instinct, they appreciate the quality. So what would happen, had these companies been able to flourish with the competition, the better quality product would sell better and that would encourage everybody to go for better quality. The lower prices would sell more and that would encourage everybody to keep their prices low. The licensors and the record industry can still have their piece of the cake – the market is big enough for everybody to have a piece of the action and make a good living.

All of that before our very eyes is being totally and utterly destroyed. That was the reason why I wanted the OFT to come in because this was the only way I could see of bringing some sense into the market place. I just did not have the funds to try and do it privately, and it would be prohibitive to try and stop it all by private litigation. The OFT are there to help the consumer. There was wrongdoing going on, it was destroying an industry and that was why I went to the OFT. I helped them, and other people in the industry gave them sufficient evidence to show there was this wrongdoing but they decided, due to insufficient evidence, that there were no infringements and that is why I want to appeal, to get to the bottom of it because the non-infringement is totally wrong. I am afraid there is not much technical stuff I have given you there.

I think that is about all I can say really. I believe they made a decision – it is logical they have made a decision – because if they were of the belief that there was an infringement then they would have made a decision there was infringement. They did not have enough evidence so therefore they must have made the decision that it was a non-infringement. They listened to the representations of TRAP and they were sucked in – that is not a very good expression,

forgive me – they were persuaded by TRAP for the wrong reasons and that clouded their judgment. I think that is about all I can say, really.

THE CHAIRMAN: Thank you very much.

MR. PICKFORD: Thank you, madam, members of the Tribunal. As the Tribunal indicated at the outset the question before it today is whether the OFT's Decision to close its investigation into the alleged collective boycott by TRAP constitutes an appealable Decision within the meaning of s.46 of the Competition Act. It is only if it does so that the Tribunal has jurisdiction.

We have heard from Mr. Assirati today that Casting Book claims that the case closure decision constituted a Decision of no infringement. The OFT's case is plainly that it does not constitute a Decision of no infringement, and I have three points to make in support of that submission. First, the case closure decision was taken squarely on the basis of administrative priority and not on a negative view of the merits of the case.

The second point is that the OFT was not in a position to form any concluded view on the merits of the case in this instance because it had not completed its investigation. The third point is that insofar as it expressed any provisional view at all the OFT's view tended towards infringement and not non-infringement, and in the remainder of my submissions I intend to expand upon those three points, but before doing so it would be helpful very briefly if the Tribunal were able to turn to the case of *Claymore*, which is in the authorities' bundle, and in particular, para.122, which is effectively the stepping off point for consideration of what constitutes an appealable Decision. If the Tribunal would just take a moment to read that paragraph.

THE CHAIRMAN: (After a pause) Yes.

MR. PICKFORD: It is clear from para. 122(2) that the key issue is whether or not the Director has made a decision as to whether the Chapter II prohibition has been infringed either expressly or by necessary implication. Quite clearly there is no express Decision of non-infringement in the present case so the question that the Tribunal needs to determine is whether it should find that there is such a decision by necessary implication, and in my submission it should not.

If we turn to the facts of this particular case, the OFT has provided two witness statements, one from the principal case officer, Mr. Edward Ray, and one from Mr. Simon Priddis, who was senior director of competition case work, and is the person who took the decision to close the investigation in this case. Those witness statements describe fully and openly the process that the OFT took in considering the case and ultimately taking the decision to close the investigation. I assume the Tribunal has been able to review those statements. I am grateful. I will not therefore go through those statements in any detail save to highlight certain points that are relevant to my submissions as I continue.

Turning to the first point that I made at the outset, that the decision was taken on grounds of administrative priority. If one goes to the case closure letter, which is to be found in my bundle at tab 6. Paragraphs 10 to 12 of that case closure letter set out the grounds on which the OFT took the decision to close its investigation. The first reason given is at para.10, and it says that first and most importantly the OFT took the view that there were other higher priority cases. It may be helpful if the Tribunal takes a few moments to read paras. 10 to 12.

THE CHAIRMAN: Mr. Assirati, do you have this bundle?

MR. ASSIRATI: Yes, I have.

THE CHAIRMAN: I was just checking we were not referring to something you did not have.

MR. ASSIRATI: Yes, it is in the second witness statement of Edward Ray.

THE CHAIRMAN: Yes. (After a pause) Yes.

MR. PICKFORD: So it can be seen that the OFT's first reason was that there were other higher priority cases and that point is supported by the witness evidence of Mr. Priddis at para.31(d) – I do not propose to take the Tribunal there, there has been no dispute raised about whether the OFT took a view on relative priority. It is important to emphasise here that the priority attached to a case may well change. Cases are continually reappraised in terms of their priority at key milestones during the investigation, and that is a point that is made – again, for the Tribunal's reference it is para.13 of the witness statement of Simon Priddis, but I do not propose to take the Tribunal to it directly.

The other point to be made here is that the case closure decision in this case was taken at a time of refocusing and streamlining within the OFT. The OFT had taken the view that it needed to spread its necessarily limited resources less slimly than they were being spread at the time and, as a result of that, it needed to reappraise the priority to be attached to the various cases that it was currently investigating. Again, that point for the Tribunal's reference is to be found at paragraph 30 of the witness statement of Simon Priddis.

The second reason for the case closure decision is that there was a change in the view of the OFT as to the likely consumer detriment. I will deal in just a moment with the points that Mr. Assirati has made in relation to that. For the Tribunal's reference the OFT's explanation of its change in its view of the figures is to be found at para.43 of the second witness statement of Mr. Edward Ray. Before going to deal with Mr. Assirati's points on that, the third reason was the view taken about the potential disruption to TRAP's legitimate activities; again an explanation of that point is to be found at para.35 of the statement of Mr. Ray.

As a precursor to dealing with the point about the level of consumer detriment, I would be grateful if the Tribunal were able to turn to tab 4 of the authorities' bundle, which is the case of *Aquavitae*, and in particular if the Tribunal is able to turn up para.206. I will read from a

selection of parts of p.58 of the Tribunal's Judgment, because it is not necessary to go through all of it. Paragraph 206 begins:

> "In normal circumstances where the OFT or a concurrent regulator has expressly indicated that they will consider the complaint on its merits, the Tribunal will expect that investigation to reach an outcome. If the outcome of that investigation is to close the file the Tribunal will normally infer that that is because there is insufficient evidence of an infringement."

If one then continues to para.208:

> "However, in the present case, it seems to us that there were exceptional circumstances which negate the inference that might otherwise be drawn ..."

and the Tribunal continued in the rest of para.8 to set out what, in that particular case, were the exceptional circumstances. Then it concluded at para.209:

> "In those exceptional circumstances, we accept that the Water Bill and the associated issues arising ..."

and this the key point that I would like to emphasise:

> "... constituted a genuine independent reason for closing the file in this case which did not involve a decision that the Chapter II prohibition had been infringed."

In my submission the three reasons that I have just gone through, that were articulated in the case closure letter, constitute genuine independent reasons which are not reasons based on a view of the merits of the case, and therefore do not constitute a decision that the Chapter II prohibition – or in this case the Chapter I prohibition – had not been infringed.

THE CHAIRMAN: The genuine reasons, the independent reasons that were referred to here, are all third party reasons – "Queen's Speech, consultation paper", they were very independent, clear, undisputable.

MR. PICKFORD: That may very well be the case, but my point is that the key question is: are they reasons connected with the merits of the case, in which case they may go to informing whether the OFT has formed a view on the merits and therefore whether it is a decision of infringement, or a decision of non-infringement, or whether they are independent reasons. In my submission the use of the words "genuine independent" there does not mean "independent" in the sense that they are indisputable, it means "independent of the merits."

THE CHAIRMAN: Yes, but here there were reasons which were independent, third party, and indisputable – it may or may not go to merits in one sense, did not necessarily go to merits. Here, you have evidence from Mr. Assirati that the size of the industry is X. You then get evidence from TRAP that the size of the industry is Y. That is not independent evidence in the same sense, is it?

MR. PICKFORD: It is independent of whether or not there is an infringement.

THE CHAIRMAN: It goes to your priority ----

MR. PICKFORD: Quite

THE CHAIRMAN: -- rather than to the infringement?

MR. PICKFORD: Quite, and that is the absolutely key point here, that the distinction, which I would submit the Tribunal is drawing in *Aquavitae*, is between reasons that go to whether or not there is in fact an infringement decision and reasons that are independent of that. The information on market size had nothing to do whatsoever with whether there is infringement. It simply went to what was the likely consumer detriment.

THE CHAIRMAN: The one Mr. Assirati will say is that if you got information which is questionable from a non-independent party – because TRAP is not an independent party, it is not like the House of Commons, or whatever information is in the Queen's Speech – then your decision about closing the file is questionable, because you have not used independent evidence, you have taken what the other side said in order to come to that. He might say "You have to cross that out", and therefore once you have crossed that sort of evidence out you are getting nearer to the non-infringement decision because you cannot take it into account.

MR. PICKFORD: My submissions in relation to that are twofold. First, the point I have just made, that when one is talking about what is independent here it is not the issue whether it is independent of the parties, it is whether it is independent of whether or not the OFT has taken an infringement decision.

THE CHAIRMAN: You are saying it does not go to the substance of whether there is an infringement or non-infringement decision. It goes to the question of administrative priorities?

MR. PICKFORD: Quite. My second point in relation to that is that in the majority of the cases that the OFT is involved in – or at least in very many of them – it has to rely on information that it gets from the relevant parties and that may well involve information from the complainant, which is what it based its initial assessment of market size on. It may well involve information from those that are complained about.

THE CHAIRMAN: Yes, but it does not know, it has two interested parties giving opposite evidence. If it has two interested parties giving opposite evidence neither party is independent, that is not the best evidence. How does it manage to relay – this is what Mr. Assirati says – on TRAP and not say "Well actually, I cannot rely on the TRAP evidence, because that is evidence from one side. Maybe I cannot now rely on Mr. Assirati's evidence, because that is evidence on the other side and it is challenged. I need to find out what the size of this market is." Apparently it is not very difficult to find out what the size of the market is because you just need to look at the companies in the market and if you look at the companies in the market and their turnover,

and the sort of products they are making you will soon find out – he says – that in fact TRAP have misled you; or you would be misled if you followed the TRAP evidence.

MR. PICKFORD: As to whether or not it is easy, I am not in a position to debate that.

THE CHAIRMAN: I am only saying what his submission is.

MR. PICKFORD: Yes, I am not in a position to debate that on the facts that Mr. Assirati has put before the Tribunal today because they were put before the Tribunal today.

THE CHAIRMAN: Well you have the facts, the OFT had the facts because they had his evidence, they had the TRAP evidence, and the know that both maybe prejudiced, it is not the best evidence because it is not independent – in that sense – evidence, and therefore why should it rely on TRAP rather than rely on Mr. Assirati? What is in that evidence that gives it some special significance that means that it is more reliable?

MR. PICKFORD: There are two principal points to be made in relation to this. First, the OFT is entitled to exercise its judgment in relation to what evidence it considers should be preferred in relation to a particular point. It is important to emphasise here that the issue about the market size is merely being used as a very, very rough proxy for the likely consumer detriment. As I emphasised previously, this is not an issue about market size that might, for instance, go to dominance where it would be relevant to the merits of the case. This is simply being used as a proxy for consumer detriment which is itself part of a mix of reasons that the Authority takes into account in forming its view on administrative priority.

THE CHAIRMAN: Yes, but it has to be reasonable in taking those into account – I am just putting Mr. Assirati's point rather than looking at our jurisdiction and the Administrative Court's jurisdiction. Mr. Assirati will say that that Judgment has to be taken on the proper basis, and if the evidence is not the sort of evidence that you should rely on, then it is not taken on the proper basis and therefore we should exclude it for the purposes of looking at whether or not you have taken a non-infringement decision, so you can weave it back in to the question that we will have to consider.

MR. PICKFORD: My submission is that the OFT is quite entitled in relation to questions of administrative priority to form its own view on what evidence is or is not to be preferred, and for its reasons in this case it took the view that the TRAP evidence was likely to be preferred to the evidence that had been provided by Mr. Assirati. I should point out here of course, that there is no reason to assume that TRAP would have an interest in underestimating the market size, because TRAP did not necessarily know that one of the bases on which the OFT would rely on that evidence is to inform its judgment on consumer detriment – another issue which might possibly arise in the future, or has arisen in the future in relation to this case, is whether TRAP perhaps had market power. If that were the case TRAP certainly would not have an

incentive to be underestimating the size of the market, in that case they would have the incentive to overestimate the size of the market in order to try to demonstrate that they did not really have market power that the OFT should be worried about. In my submission it would be wrong for the Tribunal to form any *a priori* assumption about whether one could or could not rely on certain evidence.

My second point, which is actually far more fundamental, is that this whole discussion about the nature of the administrative priority decision is one which lies outside the domain of the Tribunal because it is a question for the Administrative Court and the Administrative Court alone and in support of that submission if we could turn to the case of *Floe*, which is in the authorities' bundle at tab 6. I am conscious, madam, that you will be familiar with this case.

THE CHAIRMAN: I know this case very well, yes.

MR. PICKFORD: It is probably helpful nonetheless to turn to it briefly.

THE CHAIRMAN: It is not the same members, I do not have the same Panel.

MR. PICKFORD: Indeed.

THE CHAIRMAN: And it is necessary in order for Mr. Assirati to understand – so you can say what you like.

MR. PICKFORD: At para.34 the Court of Appeal deals with the division of roles between the Administrative Court and the Tribunal, and it notes the point:

> "The Tribunal, as a statutory body, has the task of deciding such appeals as are brought to it in accordance with the provisions of the 1998 Act and the rules, but it does not have a more general statutory function, of supervising regulators."

Then if one turns over the page, the final sentence in para.34:

> "If the regulator fails to discharge its duties, then it may be amenable to an application for judicial review in the Administrative Court but, unless and until it has given a decision which is subject to a statutory right of appeal, the CAT will have no jurisdiction in the matter."

THE CHAIRMAN: Yes, that is why, when I was putting it before, I was linking it back and saying that if the evidence is unreliable and has to be crossed out then that cannot be part of your reasons for the administrative decision and that that might assist, Mr. Assirati would say, in showing that it is a decision of non-infringement. That is why I said it is a "weaving back".

MR. PICKFORD: In my submission that would be an artificial weaving back, because it still is information, even if it were wrong it is still evidence which goes to the administrative priority to be attached to the case. Supposing that the OFT were entirely wrong to rely on that evidence, *ex hypothesi*, what that would demonstrate is that potentially there was some flaw in its administrative priority decision, but it would not tell you anything about the merits of the

case as in whether the OFT had formed a view that this was a non-infringement decision. So even taking that point at its highest, in my submission it does not bring one back within the statutory framework. Moreover, in my submission the OFT is quite entitled to form its own view on the evidence, and even if we were before the Administrative Court unless there was a cogent challenge which explained why the OFT's view was actually wrong, then that still would not advance Mr. Assirati's case, simply because they were competing views ----

THE CHAIRMAN: I think what you say is that unless and until the Administrative Court tells this court that there is something wrong with that decision, the Judgment of the OFT, we cannot look behind it and therefore we have to accept that that was taken on a proper basis.

MR. PICKFORD: That is correct. It may just be helpful in relation to this point if one continues to read paras. 36 and 37 of the Judgment of the Court of Appeal in the case of *Floe*.

THE CHAIRMAN: (After a pause) Yes.

MR. PICKFORD: In my submission those further paragraphs make it quite clear that there is a clear division between the responsibilities of this Tribunal and the Administrative Court relying heavily in that case on the Judgment of the Court of First Instance in the *Automec II* case. I should also point out that it may give the Tribunal some comfort if one actually turns to the witness statement of Mr. Edward Ray at para.43.

THE CHAIRMAN: Do we find that in your bundle, or shall we take our copy of it? It is probably not in this bundle.

MR. PICKFORD: It is in the Defence. This is where Mr. Ray deals with the question of the relative figures that have been provided and, as I say, my primary submission on this is that it does not actually need to concern the Tribunal because if there were any challenge to it it should be in front of the Administrative Court, but that in any event it might just be helpful to see what Mr. Ray says in relation to those figures. If one looks at the table the first point to make, which is a very minor point, but in relation to the comparison that Mr. Assirati was seeking to draw the comparison here is in relation to retail figures, because the s.25 figures gave trade value and retail value, and then the TRAP figures gave wholesale official and then official retail, unofficial including legal, and then a total, and the only comparable figures out of those two are the total ones, and those are the ones that were taken into account by the OFT when it made its decision, so the difference is not quite as stark as Mr. Assirati was suggesting.

THE CHAIRMAN: We have not got the figures.

MR. CLAYTON: The figures have been redacted.

MR. PICKFORD: I should explain in relation to that redaction at the time the OFT was originally able to provide its witness statement it did not have permission to disclose the figures. The point that I was making, and it is a very minor one, but simply for the record, the appropriate

comparison was drawn in relation to the retail values that are given in the third and seventh column, which where "calendars – 250 million, posters – 25 million, T-shirts – 125 million", as compared to the TRAP figures of 73 million, 14 million and 32 million, that is the small point. The more significant point here is that Mr. Ray notes in this statement, in the text below the table, that:

> "These revised figures were provided by TRAP in a response dated 15th August 2005 to a notice under s.26 of the Act. The magnitude of the revised figures was also cross-checked against contemporaneous documents."

THE CHAIRMAN: And of course it is a s.26 notice that you got those figures, which has clearly written on it criminal consequences.

MR. PICKFORD: Indeed, and I am also assured by those behind me that the figures that they rely upon were themselves contemporaneous figures. They were not figures that were produced for the purposes of the case.

THE CHAIRMAN: And the information you got from Mr. Assirati was that under a s.26 notice?

MR. PICKFORD: No, it was not.

THE CHAIRMAN: But there is the provision in the Act which says that any information which you receive has similar consequences?

MR. PICKFORD: There is, madam, but the first point is that it is really not appropriate for the Tribunal to be attempting to go behind these figures. The second point is that the OFT conducted itself perfectly properly in relation to forming a view, and it was entitled to form a view, and it did so. In many ways the point that we have just been exploring lies at the heart of what we would say is Mr. Assirati's misapprehension about this case. He clearly feels very passionately about it and one has some personal sympathy for the fact that he would like the OFT's resources to be devoted to investigating his case, but the OFT has statutory responsibilities, and it has to take tough decisions about where it will focus its limited resources.

THE CHAIRMAN: It also has limited funds.

MR. PICKFORD: Indeed.

THE CHAIRMAN: Its own resources.

MR. PICKFORD: And it needs to take those decisions if it is going to be an effective competition authority, and so far as there is any review of the OFT's decision making in respect of those kind of decisions, it really is a matter for the Administrative Court and unfortunately therefore Mr. Assirati is not before the correct Tribunal today.

THE CHAIRMAN: You would say that even if he was before the correct Tribunal you had sufficient information in those TRAP figures on a s.26 notice to rely on it, and so it is something that the Administrative Court would say was within your judgment?

MR. PICKFORD: Absolutely. This is not merely a technical knock-out. We say that the Appeal would be bound to fail if it were in the form of a Judicial Review.

THE CHAIRMAN: On that point.

MR. PICKFORD: On that point, but that does not actually need to concern the Tribunal. My second point is that in this case the investigation was far from complete at the time when the case closure decision was taken. There were significant further steps that needed to be carried out before the OFT were in a position to take any view on the merits of this case, and this is dealt with in the witness statement of Mr. Ray at paras. 45 to 54. There is no need to read those several pages in detail, I propose merely to summarise the points that Mr. Ray makes there. The further steps that would need to have been undertaken in the present case include:

- identifying specific instances of the alleged boycott and analysing them in detail,
- obtaining evidence as to the particular businesses of the boycotted firm,
- the specific products that were withheld and the period over which they were withheld,
- whether the boycott was genuinely collective or the consequence of unilateral conduct,
- any other relevant features of the context for the alleged boycott.

I can see, madam, that members of the Tribunal are turning through the pages, would it be helpful if I allowed a few moments for you to read those pages? I think it is quite easy to summarise what is said.

THE CHAIRMAN: Do you want to make sure we are on the right paragraph, that is all.

MR. PICKFORD: The relevant paragraphs are paras. 45 right through to the end of Mr. Ray's witness statement. They cover several pages and, in my submission, it is not necessary for the Tribunal to read all those in detail – you have read them already.

THE CHAIRMAN: I just want to make sure for the note that we had the right page.

MR. PICKFORD: Yes, paras. 45 to 54, which is pages 12 through to 16.

THE CHAIRMAN: Yes.

MR. PICKFORD: I have already mentioned one category of further issues that would need to be investigated. A further category is obtaining information from those that were not included in the original round of s.26 requests, in particular rights' licensors, because they might well have an important role to play in relation to the alleged boycott.

A further issue which needed to be considered is whether or not the collective boycott constituted an object restriction or a restriction by effect, and that was a point on which the Tribunal will have seen from the evidence of Mr. Ray was a point on which the OFT's view changed during the course of the investigation, partly as a result of other investigations that were contemporaneous with it.

Another issue which would need to have been investigated would have been market definition. We have heard obviously that there were some estimates about market size, but that is very far away from conducting a proper investigation of the parameters of the relevant market.

Another area which would have needed to have been investigated is the economic effect of the alleged boycott. Finally, it would have been necessary to consider whether the conduct could have been justified under s.9 of the Act, or alternatively Article 81(3) of the EC Treaty. In my submission this point is critical when one has regard to the Tribunal's remarks in the *Claymore* case. If one turns back to that case, which is at tab 3 of the authorities' bundle, at para.145. It may be helpful if I read this, because there are some points I would like to emphasise:

> "Similarly, in our view that conclusion by the Director was to all intents and purposes a final conclusion subject only to re-opening on the basis of compelling new evidence. In our view there is nothing provisional or tentative about his conclusion that no infringement could be established on the evidence. In our view the Director has reached a firm decision that no infringement of the Chapter II prohibition is established on the evidence before him."

If one then goes on to para.151 on that approach:

> "The Director's decision in this case is to be contrasted with other kinds of decisions to close the file such as where the Director, without going into the merits, decides not to open an investigation because he has other cases to pursue in priority. The situation dealt with by the Court of First Instance in *Automec* cited above..."

to which reference was made by the Court of Appeal in *Floe.* Then if one continues to the end of that paragraph a further potential justification that is advanced by the Tribunal is that if it is for some other reason which does not involve him taking a considered position on the merits of the case.

Then in para.152, the Tribunal went on:

> "In this case the Director has investigated the matter exhaustively for the purpose of reaching a conclusion on whether the Chapter II prohibition has been infringed."

Then at para.155 the Tribunal helpfully sets out the process by which the OFT first investigates and then comes to a decision and it states:

> "Under the Act the Director has the functions of both investigation and decision making. Initially the Director is engaged in a process of investigation. The object of that investigation is to come to a conclusion that the Chapter II prohibition has been infringed. In the nature of the process that conclusion can be reached only on the basis of the evidence available. At some stage in the investigation the Director reaches the point when he considers that he has all the evidence he needs or can usefully obtain. At that stage he assesses the evidence and makes up his mind."

Now, it is abundantly clear that the Tribunal's view in *Claymore* was that the investigatory process had, in effect, finished. In the Tribunal's view the OFT had all the evidence before it that it needed, and that is to be contrasted sharply with the present case where, as I have explained, there were a considerable number of further steps that needed to be undertaken in order to form a view on the merits in this case. So in my submission that second reason is also fatal to Casting Book's case.

If I can turn to my third point. To the extent that the OFT reached any view on the merits that view tended towards infringement and not non-infringement and, in my submission, that is clear from the contemporaneous documentation – particularly if one goes to the witness statement of Mr. Ray and exhibited to that statement at tab 3 is a case summary note prepared by Mr. Ray on 17th October 2005. Under the heading "Administrative Priorities" Mr. Ray notes:

> "Whilst the evidence for the existence of an infringement is promising there is the question of whether this case is an administrative priority for the OFT."

In my submission that single sentence, if any, encapsulates the nature of this case. The OFT was not forming a view that this case looked like one that was not promising, it was simply considering that notwithstanding that there was promising material it was one that should not be pursued on administrative priority grounds, and if one also goes to the following exhibit to Mr. Ray's statement (tab.4) which is a further note which was forwarded to Mr. Priddis, and was the note on which Mr. Priddis relied when he took the decision to close the investigation, one sees again at para.2 that Mr. Ray refers to there being promising material. He says:

> "In terms of possible infringement first there is promising material relating to several instances where some of TRAPs members collectively refused to supply certain distributors that also stocked unofficial celebrity merchandise."

So it is quite clear here that as far as the merits of the case were concerned, in terms of whether or not there was an infringement, the OFT took the view that there might be – there was promising material. But, in my submission, that is fundamentally irreconcilable with there being a decision of non-infringement in this case. If I could turn briefly to the *Bathhouse* case

in support of that proposition – tab.5 of the authorities' bundle at para.166. Again, it would probably be helpful if I quote it here because I do not intend to read everything that is there.

> "The Director stated that the views put forward in h is letters of 8th March 2002 to Enviro-Logic and 26th March 2002 to Thames 'amounted to a decision that the Chapter II prohibition had not been infringed'."

So this was another case closure case, and in that case the Director of Water Services Regulation decided that it was going to admit, as it were, that there was an appealable decision and it was a non-infringement decision. If one continues at para.168, the Tribunal noted:

> "It is, however, clear from the correspondence that the Director had warned Thames that the initial access price was potentially anti-competitive on the basis that it did not reflect the discount for large users applicable under Thames's standard tariff. For that reason the Director put Thames under considerable pressure to reduce the price of 27p/m^3, albeit that it took a year of correspondence to reach that point."

The Tribunal then goes on to deal with the correspondence, and it is not necessary to go into the detail of that. If one then turns to the conclusions at para.171:

> "It is thus clear from that correspondence that the Director's view was that the initial access price of 27p/m^3 was potentially an infringement of the Chapter II prohibition unless the large user discount was applied. To the extent that the Director's decision of 8th March 2002 is to be taken to be a decision that the Chapter II prohibition was not infringed in relation to the price of 27p/m^3, which is not disputed on behalf of the Director, any such decision is inconsistent with the contemporaneous correspondence. It follows: that to the extent that the Director's decision of 8th March 2002 is to be taken as deciding that the Chapter II prohibition was not infringed by the price of 27p/m^3 that decision formally cannot stand, on the grounds that any such decision was inconsistent with the Director's view set out in the contemporary correspondence that the price was potentially in breach of the 1998 Act."

Now there the Tribunal was making the clear point that you cannot have a sustainable non-infringement decision when the contemporaneous evidence – to the extent that it indicates that any view has been formed – indicates that the view is that there might be an infringement, it simply does not make sense to construe the decision in that sense.

So, in my submission, for the three reasons that I have articulated the OFT quite plainly did not reach a decision that the Chapter I prohibition, or Article 81, had not been infringed in the present case; it certainly did not do so expressly. The only other question for the Tribunal is: did it do so by necessary implication? In my submission it plainly did not, there is no necessary implication that the Tribunal should draw on the facts of this case that the OFT took

a non-infringement decision. On the contrary, for the three reasons that I have given it is quite clear that there was no such decision taken by the OFT and therefore there is no jurisdiction for the Tribunal to hear the present Appeal.

Unless I can be of any further assistance, those are the submissions of the OFT.

THE CHAIRMAN: No, thank you very much. Mr. Assirati?

MR. ASSIRATI: There are three points on what the gentleman said. First, if I can understand this correctly, with regard to the *Aquavitae* situation, the decision to close the file is implying that there is no infringement unless under exceptional circumstances. There does not appear to be any exceptional circumstances in this case and so therefore the normal assumption should apply – unless anyone tells me to the contrary there are no exceptional circumstances so therefore the normal assumption should apply.

Secondly, TRAP themselves were firmly of the belief that the decision was a non-infringement, and I think that is shown by the article that I produced in my submission that they were putting it around to the trade that it was a non-infringement; TRAP firmly believe that, as I do.

The final point I would like to make, coming back to these figures, and listening to the discussion these may not be relevant, but I think are a point of principle. I accept what the gentleman says that I just quoted on the wholesale figures of a certain part of it, but the very fact that I was able to show that those figures were wrong, then if parts of it are wrong by implication the whole has to be wrong – or could be wrong. The other point I make on that is that the information the OFT had to corroborate those figures was sourced from the s.26 notices. The s.26 notices were not sent out to the whole market, they were sent out to a certain part of the market, and the figures I was putting forward were for the entire market. If the size of the market is relevant – and I accept it may not be – then I genuinely believe that I have come up with discrepancies which say that that needs to be clarified, if there was an Appeal on this situation – because I understand this is only admissibility – if there was an Appeal one would need to look at those figures very carefully as to what the OFT derived the information from, and there needs to be proper clarification on it. They are the three points that are made. I am not able to comment on the technical stuff because it goes above me. But from everything the gentleman has said it is just basic logic that if they believed that here was an infringement then they would have gone ahead at least a little bit further on it; they did not go further so therefore they must have come to the conclusion internally that there was no infringement, even though they did not expressly put it out to the market place. TRAP were of that view, I was of that view and the industry as a whole are of that view from the snippets that they have read in the trade papers. That is all I wish to say.

THE CHAIRMAN: Thank you very much. Thank you both for your submissions today, and in due course we will hand down a Judgment.

MR. ASSIRATI: Thank you very much. This is the Judgment on admissibility.

THE CHAIRMAN: Just on what we have heard today?

MR. ASSIRATI: One more step in the process.

THE CHAIRMAN: Yes, if we hold it is not admissible, then we have no jurisdiction.

MR. ASSIRATI: Sure, I understand.

THE CHAIRMAN: If we hold that it is admissible then is the question of ----

MR. ASSIRATI: What to do next.

THE CHAIRMAN: -- what to do next.

MR. ASSIRATI: Yes, one step at a time.

THE CHAIRMAN: One step at a time.

MR. ASSIRATI: Thank you very much.

(The hearing concluded at 11.55 a.m)