IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1072/1/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

15th December 2006

Before:
LORD CARLILE QC
(Chairman)

DR. ARTHUR PRYOR CB
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED
PLASTIC BUILDING MATERIALS LIMITED — Applicants

and

OFFICE OF FAIR TRADING — Respondent

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

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

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HEARING

THE CHAIRMAN: Good morning.

MR. COOK: Before I start, Sir, there is one preliminary matter I would like to mention. The first Appellant DQS has changed its name to Sepia Logistics Limited, and I think I ought formally to ask that the name of the first Appellant for formal purposes be changed to that. I do not intend to mention that name again during the course of my submissions, simply for the sake of avoiding confusion, but I think formally that probably ought to be the correct position and I would make that application, Sir.

(The Tribunal confer)

THE CHAIRMAN: Yes, you have permission to do that.

MR. COOK: I would mention, again strictly for clarification, that Plastic Building Materials has also changed its name, I do not see any need to trouble you with the details of that change, Sir, it is obviously not an Appellant, and again I am simply going to carry on using the existing name in order to prevent ongoing confusion; there are already enough three letter abbreviations.

MR. SCOTT: There is one follow-up question: does this mean that they are, as it were, back in business and not simply shell companies?

MR. COOK: They are not currently in business, no. There is an ongoing process of simply winding-up the business, realising assets, collecting in debts, paying creditors, people like that, but no, they are not in business in that sense. Sir, thank you.

Before I go in to my main submissions what I would like to ask you to do – I understand from my learned friend he has no desire to cross-examine Mr. Jones, at least at the moment, but Mr. Jones is very keen to have the opportunity for two minutes simply to provide some real life flesh to the dry black and white ink on his witness statement.

THE CHAIRMAN: Mr. Cook, you can first of all assume that we have read all the major material at least in this case. Secondly, as far as the evidence is concerned it is a matter for you and for Mr. Ward what witnesses (if any) you call. The Tribunal will not seek to influence you in any way, it is your decision.

MR. COOK: Sir, in which case I would like to call Mr. Jones simply for that purpose, Sir.

THE CHAIRMAN: Just remind me where we find his statement?

MR. COOK: It should be in a separate file marked “Witness statement of Mr. Jones”.

Mr. RICHARD GWYN JONES , Sworn

Examined by Mr. COOK:

THE CHAIRMAN: If there is a seat please sit down, Mr. Jones; as long as we can see and hear you we will be content.

MR. COOK: I was just going to formally get the witness to prove his statement. (To the witness) Can you state your full name and address for the court, please? A. Richard Gwyn Jones, 15 Llwynmawr Close, Sketty, Swansea.

Q Do you have in front of you a witness statement that is stated to be made on your behalf, by yourself? A. I do, yes.

Q And could you turn to the final page of that statement, it is not the exhibits, and you will see there a signature. Is that your signature? A. It is, yes.

Q And are the contents of that witness statement true to the best of your knowledge, information and belief? A. They are.

Q Mr. Jones, that witness statements stands effectively as your evidence-in-chief, I just wanted quickly to ask you to summarise briefly for the purposes of the Tribunal the effect that the fine currently levied against you of £180,000 will have upon the business both of DQS and of Precision Concepts, more generally the group generally? A. Well earlier on this year we were facing very, very severe financial difficulties and the only way we saw of getting out of that was to sell the loss making divisions of the business, that was the PBM business and the DQS business. We did have a third subsidiary which was PBM Roof Systems Ltd, and that company has been working at roughly break-even to a small profit for the last two years. So the sale was structured so that the loss making businesses were sold, but that business was retained within the ownership of the PBM Group and ultimately, of course, by Precision Concepts. That business is a manufacturing business based in Swansea. There are 40 skilled jobs based on the Fforestfach Industrial Estate in Swansea working within that business, and it is supplying conservatory roofs to building companies throughout the UK.

The losses which had been generated over the last two or three years, primarily by the PBM and DQS businesses, had meant that most of the net assets of both of those companies and ultimately the parent company and, indeed, Precision Concepts had been eroded to a point where the 2004 accounts of Precision Concepts show that the net assets of Precision Concepts was just £1.196 million. In 2005 the losses within the PBM/DQS Group were in the region of £1.3 million and in the first six months of this year we lost about a further half million, so it can be fairly well understood that those net assets of the whole group were deteriorating very, very rapidly as those losses were being generated, which means that the overall net assets remaining within the group are very small having been eroded in that way. So a fine of £180,000 will place severe risk that any further upsets within the trade or business of the remaining company – PBM Roof Systems – we will no longer have the sort of asset backing which would give us stable and secure future. There will always be the risk that a fairly minor downturn in business could mean not necessarily that we would lose all 40 jobs, but it may

mean that we would have to look at making further cuts, it may be five jobs, it may be 10 jobs, we will do whatever we need to do to maintain the business to go onwards into the future, but we will have to look a the assets that we have available, the overall position of the company and take such decisions as are necessary going forward.

The fine of £180,000 is currently against Double Quick Supplyline, that company is strictly insolvent; its liabilities are greater than its remaining assets. The only remaining assets within that business are some accounts receivable, and we are working at recovering those and as we are recovering those the creditors are being paid. If we are able to get to a position where we have recovered all the debtors and there is a relatively small deficiency there of funds we would look to cover those so that those creditors do not get impacted.

Put a fine of £180,000 into that company and a relatively small deficiency becomes one which is just totally unworkable. That will mean that those remaining creditors will get substantially less pay out in the Pound than they are likely to now and that is something which, just in reading some of the various authorities put forward by the OFT, in particular there was the *Tokai Carbon* case [*Tokai Carbon Co. Ltd & Others v Commission of the European Communities* [2004] ECR 11-1181 T-236/01] which they have quoted from. I read para.371 which states:

> "... An undertaking's reliability 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 or a deterioration in the economic sectors upstream and downstream of the undertaking concerned."

So where we are looking at the remaining creditors within DQS receiving a lower pay out than they current would that, I believe, is deterioration in the economic sector upstream from that business.

THE CHAIRMAN: Can you put some figures on the exposure of such creditors? A. The remaining creditors amount to somewhere in the region of £100,000.

Q And their general type? A. They are now mainly trade creditors, suppliers of materials.

MR. SCOTT: You said in your evidence that the fine was against DQS. Technically that is held jointly and severally with Precision? A. It is, and my understanding of that is that by holding Precision Concepts jointly and severally liable it means that were DQS put into formal liquidation any unpaid element of the fine – so if the OFT were to receive, for example, 50p in the Pound, the other 50p in the Pound they could look at recovering from Precision Concepts.

Q Have the Directors of DQS given consideration to recovering any such fine from either Precision itself, or from Mr. Sander for any breach of fiduciary duty, and from Precision under

the Shareholder Agreement? A. I don't believe that the Shareholder Agreement, to my knowledge, would specifically allow that, but that has not been considered at the moment, no.

THE CHAIRMAN: Well we may have to return to the Shareholder Agreement. Can I just ask you another question that arises from this? If the residual liability for the fine falls upon Precision Concepts Ltd., can you tell us what plans have been made provisionally for the way in which that fine would be met? I think we are entitled to assume that there is more than one way of meeting such a fine – obviously the fine has to be paid, but it is not necessarily straight off the bottom line? A. It is a case that we would need to look at the cash flow. We would basically I think need to borrow the money.

Q Yes, well presumably you have looked at that. You have had this looming in front of you for a long time, are you saying that it is not feasible for you to borrow the money; it is, or you just do not know? A. I believe that the money could be borrowed, but I think that that further erodes, it reduces the net asset value of the group ----

Q Yes. A. – to a point where it increases the risk ----

Q But if the money is borrowed can you give us an idea, because we have to assess the overall effect of the fine. Can you give us an idea of the effect on your bottom line that borrowing £180,000 would have? Are we talking about a few thousand pounds a year? A. No, I think the key is looking at the net assets – the borrowings would have to be against some collateral and currently we are borrowing with in the PBM Roof Systems business against the debtors, and the headroom within that facility varies throughout the month but it goes from perhaps, a peak headroom of about half a million down to the point where we have paid all the salaries, where there may be £150,000/£200,000 available.

Q Yes, sorry, can I try and ask you to address the question? You said to us a few moments ago that the fine would have to be met by borrowing money? A. Yes.

Q And my question was, what would be the net effect on the bottom line of the company of borrowing that money? Would it be a few thousand pounds a year? A. It would be roughly 6 per cent. of £180,000.

Q £11,000 or £12,000? A. Yes.

Q What are the assets of PCL (as we have been calling it) post-sale? A. Strictly of PCL itself, it is simply a holding company, its only assets, I believe, are the shares in St. Gerard's Holdings. St. Gerard's Holdings has a number of investment properties. My responsibilities do not include St. Gerard's Holdings so my knowledge of all of the assets there is not complete, but I know that when we were looking for collateral, when we were getting a parent company guarantee, there were I think two or three residential properties. The other major asset is the PBM Roof Systems business.

THE CHAIRMAN: I am sorry, we interrupted, is there anything else in chief?

MR. COOK: Sir, it was actually more a couple of follow-up questions based on the things the Tribunal themselves have asked, if I can, quickly?

THE CHAIRMAN: Yes.

MR. COOK: Mr. James, you said it would cost about, I think the calculation was 6 per cent. of £180,000 in terms of managing a debt of £180,000. Is that just interest, or would there be a principal ----? A. That would be the interest. Obviously any loan you would be paying the interest and look to make capital repayments, so it would depend if you were borrowing that over five years you would also be repaying one-fifth of it per year and that would have to come from cash flow generated.

THE CHAIRMAN: Well it depends on whether it is part of your evolving credit with the bank or not, does it not? A. That again is what I was saying, we are borrowing against debtors, and we look at the headroom within that facility.

MR. COOK: You also mentioned some of the assets that are held by St. Gerard Holdings, are there liabilities as well? A. There is a mortgage within that business, again I do not know the full details of that.

MR. COOK: Those are the points I wanted to clarify.

THE CHAIRMAN: Yes, Mr. Ward?

MR. WARD: Sir, I may ask the witness one question in a moment but before I do I would like, if I may to make clear what the OFT's position is in regard to Mr. Jones's evidence. You will have seen from the OFT's skeleton that we drew attention to what we said were gaps in the documentation and unanswered questions, and I will of course be coming back to that in my submissions. I will also be drawing attention to certain aspects of the documents which have been produced and making submissions on ability to pay in a broad sense.

I will also be submitting that in certain respects broad propositions asserted by Mr. Jones are not substantiated by the documents and therefore the weight that should be attached to those propositions ought to be adjusted in the light of that fact. I do not propose to cross-examine Mr. Jones on any of those matters, because it seems to me that there is no positive case that I must put to him, but I want to make that clear now and the reason the OFT wrote in the terms it did yesterday was essentially to open the door to such questioning. If my learned friend thinks there is some case that is not being put to the witness and fairly should be then I would be very glad to do so. But it really is more a case about what the documents appear to say and, indeed, more importantly what the documents do not say. In those circumstances my submission would be there is nothing for me to positively put to the witness, save for one question arising out of what you have asked him already this morning.

THE CHAIRMAN: Well let us pause for a moment, if we may, Mr. Ward. Mr. Cook, are you content with that position?

MR. COOK: I am not, Sir. I am somewhat concerned at the notion that at any point Mr. Ward is going to turn round during his submissions and suggest you should discount or ignore bits of Mr. Jones's evidence without having Mr. Jones an opportunity who, when it comes down to it, certainly knows the financial details of these businesses much better than I do, without giving him an opportunity to explain some of those points; in some cases there may be a simple answer to it that he can give. I would not by any means want Mr. Ward to go through at considerable length, and if there are some headline points that can be dealt with I would suggest the most efficient way, while we are on the topic of essentially this financial effects point, on an evidential basis, would be for Mr. Ward to ask those questions now.

THE CHAIRMAN: An alternative would be for you to have permission to recall Mr. Jones if any such issues arise during the course of the hearing which would seem to me to have the potential of saving hours without any injustice being done to either side. Does that not sound sensible? I am sure Mr. Jones would rather that as well, frankly. He is nodding in agreement! (Laughter) I think we have an agreement. Thank you, Mr. Ward.

MR. WARD: There was one matter I just wanted to ask Mr. Jones.

<u>Cross-examined by Mr. WARD</u>

Q Mr. Jones, you made clear that you do not work for St. Gerard's holdings, or that you do not have any detailed knowledge of its affairs. Do you work for Precision Concepts? A. I am employed by Plastic Building Materials Ltd., so no, my responsibilities are up to that level within the Group structure.

MR. WARD: I see, thank you very much.

MR. SCOTT: Can I just confirm one point which comes from the sale agreement. In the sale agreement mention is made of the salaries of those employees in Schedule 1 of the group managing director, the group commercial director and of yourself, without going into the specific figures they fall in the range £50,000 go £60,000? A. That's right, yes.

Q And those are full year salary levels? A. Yes.

Q Just for comparative purposes, as we understand it from the accounts for Precision, Mr. Sander was paid in 2001- £60,000, in 2002 - £155,000 and 2003 - £144,000; and 2004 - £135,000. I do not have the figures for 2005 or 2006 to hand; the initial assumption that he is being paid a salary in relation to his responsibilities as a director rather than as an investor? A. Yes.

Q That sounds sensible to you, and we are right in thinking that that is the ----? A. I think that again St. Gerard's Holdings had other assets. There is some share trading, there is the property investments and so on which he is handling at that level and during part of that period there

was another company, Cogent Passenger Seating Ltd., in which Mr. Sander had very much a day to day involvement, and so the salaries which were quoted were not only for his duties within the PBM Group but for duties conducted within other parts of it.

THE CHAIRMAN: It is salary for work done, it is salary not dividend, obviously? A. That is right, yes.

Q It is not investment income? A. No, no.

MR. COOK: In which case I will take your suggestion of Mr. Jones standing down for the moment, and possibly calling him back if the need arises. Sir, the only point I would make in relation to that is the sort of normal practice when a witness is half way through giving evidence is that you cannot talk to them, and in part I am going to be relying on Mr. Jones to tell me what type of points ----

THE CHAIRMAN: I am sure Mr. Ward will not object to you talking to Mr. Jones.

(The witness withdrew)

MR. COOK: Sir, there are in essence two issues before the Tribunal today. The first relates to the level of the penalty imposed, which the Appellants contend is excessive and disproportionate; and the second issue relates to whether or not the OFT was correct to make Precision Concepts Ltd., jointly and severally liable for any penalty imposed upon DQS, whatever that might be. I am going to start by looking at the penalty point and we make two types of complaints in relation to the penalty point.

The first set of complaints are specific complaints about the way in which the penalty has been calculated by the OFT in the context of the OFT's guidelines on the calculation and we would argue there that in a number of situations the OFT has either proceeded on some incorrect basis – it has either ignored a relevant consideration or taken account of something irrelevant – and, as a result the notion of some form of margin of appreciation simply does not apply because it has proceeded on the wrong basis. Or, alternatively, what has happened is simply so wrong that it is outside any margin of appreciation that does exist.

The second complaint, Sir, that we make is to ask the Tribunal very much at the end of that step by step process to stand back from the detail and look at the penalty as a whole and, obviously in that context determine whether or not a penalty of £180,000, given all of the matters that are relevant here, is excessive and disproportionate as we would argue that it is. Those are the two key types of complaint that we are making.

I will start, Sir, by going through the various steps of the OFT's calculation of damages, and the first of those, Sir, is the starting point percentage of 7 per cent., based as it is upon the seriousness of the offence.

The fundamental complaint made by the Appellants in relation to the starting point percentage is that the OFT failed to take account of what we would say is a very material consideration in this regard, namely, the fact that there was no actual effect from this agreement. Because we say that very relevant consideration was simply not properly taken into account the OFT proceeded on the wholly wrong basis and, as a result, we are not in a situation (which is what Mr. Ward essentially pushes) of saying 7 per cent. is close enough, it is in our margin of appreciation. I would say there is no margin of appreciation here because they performed that discretionary exercise on the wrong basis so it is flawed right from the beginning.

On a factual basis, Sir – I do not understand it to be challenged by the OFT – that they did not give express consideration to the absence of actual effect. What is stated in the Decision, and it is quoted in various places, is that the OFT focused upon the effect that the overall agreement and/or concerted practice had, or would have on consumers had it not been curtailed by the OFT's intervention. I obviously accept that potential effect is something that is relevant and material, so they took account of one material factor. What I would say is the floor here is they did not simultaneously draw particularly to their attention the fact that, in fact, as a result I admit of the OFT's intervention there was no actual effect. I would submit that that is a very important consideration that they should have taken into account but did not.

THE CHAIRMAN: Correct me if I am wrong, but it seems to me that the starting point of the starting point, as it were, would be what would have been the appropriate percentage if it had been carried into effect; and secondly, what percentage reduction does one make from that for the fact that it did not come into effect albeit because the OFT intervened?

MR. COOK: That, Sir, I think would be an absolutely correct way of approaching it.

THE CHAIRMAN: This is not a case in which there is any evidence of any decision not to put the agreement into effect, it is quite to the contrary, it was intended to put it fully into effect on a continuing basis until abandoned or caught?

MR. COOK: Sir, absolutely. I would be very happy, Sir, to accept that formulation of it as being effectively a process you start off by thinking ----

THE CHAIRMAN: It would be helpful to the Tribunal if you were to address us as to what the starting point, as a percentage of relevant turnover, should have been had this been brought into effect?

MR. COOK: Sir, on that basis I am not challenging the OFT's conclusion that 7 per cent. would be reasonable in that context.

THE CHAIRMAN: But I think they are saying it would have been more in that context and it has reduced to 7 per cent. because it did not come into effect.

MR. COOK: There was absolutely nothing in the Decision which indicates that process took place and, if we were in that situation where they had done that two-stage process, Sir, then there would be a question potentially of whether that was within their margin of appreciation.

THE CHAIRMAN: It might just be a failure of reasoning, might it not? It may be that the appropriate percentage – for the sake of argument – would have been, say, 10 per cent. of turnover as appears, I think, in part of Mr. Ward's skeleton argument (from memory) and then one would have to look at whether 30 per cent. reduction of that 10 per cent. was reasonable.

MR. COOK: Sir, I would not accept that in any way 10 per cent. would be reasonable in those circumstances, but the fact is that we have always relied upon in terms of the degree of our involvement in any event, and the fact remained that for all the points we have already set out in the notice of appeal DQS very much turned up to a meeting without serious pre-warning ----

THE CHAIRMAN: Forgive me for interrupting you. I think I derive that proposition from something like para.15 of the OFT's skeleton argument, but you carry on, I will not interrupt you again in this part of it – well, probably not, anyway.

MR. COOK: What Mr. Ward I think is saying there, he is drawing a distinction – and he will no doubt help you when he stands up – between the previous guidelines which, in these cases suggested that in these type of price-fixing market sharing arrangements the appropriate starting point percentage would be at or near 10 per cent., that was the old guidelines. The current guidelines, the ones the OFT were proceeding under, adopt a more flexible approach and do not require the starting point to be that high. So there is certainly nothing that is being said there which suggests they would have gone for 10 per cent., or should have gone for 10 per cent. on that first stage as you are putting it, Sir. So I would suggest that when one looks at the level of involvement in DQS, the extent to which it had pre-planned and thought about these things 7 per cent. taking account of the fact if the agreement had in fact been put into effect would not be unreasonable, and I am not going to criticise the OFT at that level. What I suggest is the failure, Sir, and while you say it could be a failure of reasoning, the OFT has put forward its case in the Decision and it has not been suggested that there was some underlying double stage reasoning, I would say they have simply missed out the second stage of thinking about whether there should be a discount.

MR. SCOTT: If one turns to the Decision, I think you are referring us first to para. 555 and then in particular to para. 560 where they say:

> "There is no merit in the suggestion either that the short duration of the agreement and/or concerted practice means that it did not constitute an infringement of the Chapter I prohibition or that the nature of the infringement was for that reason any less serious."

MR. COOK: That is a duration point, I think, sir. But as a Step 2 – if you give me a second ----

MR. WARD: Sir, if I can help, the relevant paragraphs for the purposes of Step 1 are 571 and 572.

MR. SCOTT: Right, yes. I was really going back to the reference back to the nature of the infringement when you come to the specifics in relation to DQS.

MR. COOK: Sir, I simply stand by the point that there is no suggestion that they actually went through the process of the second stage that has been suggested by the Chairman. That is the point, Sir, I think 560 we were referring you to that is about duration and we are not suggesting today, which is the point the OFT dismissed there (i) that a 15 day infringement is no infringement at all, I am not suggesting that, or 30 days, depending what you find as being the duration, and I am not suggesting the intrinsic seriousness of the agreement is any less serious due to duration. It is relevant, I would say, to the level of the penalty at Step 2, and that is really the point I make, or I come to Step 2 in counter to Mr. Ward, but actually duration is separate from seriousness because there are two stages to it. But simply in term of seriousness I am not suggesting duration has anything to do with that particularly.

MR. SCOTT: Your point in essence has to do with effect?

MR. COOK: The absence of any actual effect and it simply comes back to the point I would say that, as a matter of life, a matter of practice in general law, we always view something which actually it is wrong simply to come up with the idea, but it is more serious once you actually start harming people with it, and that is my submission ultimately.

MR. SCOTT: Yes, the basic law is object or effect, and this is a case where you are saying that there was certainly an object, that there was little effect thanks to OFT's timely intervention.

MR. COOK: Absolutely, sir, but I think that is the key point to understand. I accept that effect is not necessary in order to show there is a liability point, I am making a different submission. I recognise object or effect, once you have got one or other that is enough to bring it within Chapter I and it is then an infringement and it is then punishable. What I am saying is when you come to the starting point, percentages assessing seriousness you are required at that stage to look at something that had actually been executed and has caused harm to others is more serious than something that is not, for whatever reason.

THE CHAIRMAN: Can I just go back to where we were before? As you have reminded us, the OFT's previous guidelines suggested a percentage likely to be at or near 10 per cent. of the relevant turnover as the starting point. That in itself has a degree of flexibility built into it, at or near. What do you point to particularly as assisting the Tribunal to come to the conclusion that the new 'greater flexibility' as you put it, should make a 30 per cent. reduction in the appropriate starting point to 7 per cent. with other factors to be taken into account thereafter. Has there been a policy change you can point to?

MR. COOK: First of all, at or near would probably encompass a range, I would suggest, in any event of down to perhaps 7 or 8 or so and there has been a change of language, and when you start off from a language that says it shall be within this small bracket and then you say actually "Let us remove that language and move to a broader formulation", in those circumstances that is an indication, I would submit, of a policy change, making clear there is a broader area of discretion there, a broader width, depending on the nature of actually what happens in the infringement in a particular case, and that is the point I would make, Sir. But I come back to the point that I have no desire at stage 1 of the process to disagree with the OFT's formulation that 7 per cent. was appropriate, I disagree and my submission is they got it wrong by not going into the second step of what you suggested and deciding how much discount should be then included and that is the omission, and I would suggest there clearly should be a further discount regardless of the cause, the reason why the agreement did not in fact go forward, which was obviously OFT intervention, it nonetheless should be proportionate in all appropriate circumstances. If you have two people in front of you, one of whom had carried out an agreement and it had been successful, caused harm to competition and consumers, and somebody else – as here – who had the agreement, had committed the infringement but had never in fact caused that harm for whatever reason, it is clear which one, in my submission, should be punished more severely, and there are enormous analogies I would suggest from general criminal law – the difference between dangerous driving and death by dangerous driving, assault occasioning actual bodily harm, manslaughter, we are looking in those situations at the intrinsic initial act as being one step and then its consequences as making something more serious depending on whether if you get caught drink driving just as you stepped out of the pub and not in the car you get one level of penalty. If you got away with it, drove home and killed somebody you would be much more severely punished, and that in my submission is simply an appropriate way of dealing with things. You look at consequences as well as the underlying initial wrong.

MR. SCOTT: We read your argument about dangerous driving before the hearing. There is a difference here, and the difference is that what you are suggesting is a driver who gets into his car, deliberately drives with the intention of causing death but, owing to the vagaries of accidents, death is not caused. So that is the situation you are looking at here, not the difference between dangerous driving and causing death by dangerous driving. The wording of the Statute here is "object or effect" and here you are talking about a driver deliberately trying to cause death.

THE CHAIRMAN: These are broad analogies, are they not, I mean if one were to take the very crude analogy of murder and attempted murder, thinking of real examples, five shots were

fired but the lady who is shot happens not to die, which is certainly within my own experience as a practitioner at the Bar, the sentence usually is somewhat different. But there are two issues here: is there a defect in the OFT's reasoning, or is there a defect in the result? If there is a defect in the result, obviously the fine is too great, but if there is simply a defect in the stated reasoning, if you are right that there is a defect in the stated reasoning though I am not sure that the OFT would agree with that having read Mr. Ward's skeleton, then we have to, as it were, start again and look at what would have been the appropriate percentage of turnover and how much we reduce it by the fact that this is attempted murder and not murder – something like that?

MR. COOK: Yes.

THE CHAIRMAN: Carry on, we understand the point, we have go the point, let us move on.

MR. COOK: That is the point the starting point on percentage. I would suggest that 7 per cent. is what the OFT thought it was on the first half of the ----

THE CHAIRMAN: We have got the point.

MR. COOK: -- calculation and then it should come down, and so I leave it to you as to the appropriate amount for it to come down by.

Step 2, Sir, is duration, and to what extent we should take account of short duration of the infringement at all. The OFT say that you should not and simply apply the standard, the one year calculation here. Its case in the Decision, and it is not its case now, is set out at para.574 of the Decision and it is set out in my skeleton at para.18, or we can go quickly to the Decision itself. In the context of duration it is stated infringement lasted from at least early November 2002 and continued until the latest either 18th December 2002 or 14th January 2003. So at that stage it was looking at at least six weeks and hesitating on the basis it might be 10. We suggested they were wrong in both start date and end date there. In relation to end date the OFT has immediately accepted it was wrong elsewhere in the Decision it concluded, as really I would say it had to on the evidence, but in any event it did conclude that the agreement on concerted practices was terminated on the date the warrants were signed i.e. 5th December 2002, so we immediately lop off a bit at the end. Then we come to the start date.

In terms of the start date here, the key is the difference between the Appellants who suggest the key date is 20th November 2002, which was the date of the key meeting here, and the OFT that suggests it was involved in the infringement from at least early November 2002 – or some point there. I appreciate, Sir, we are to some extent chopping fine hairs, but they are not irrelevant, I would suggest. It is an important point to determine how long it was before looking at duration and the OFT got it wrong at both ends.

THE CHAIRMAN: Are you suggesting that those who turned up at the meeting were completely taken by surprise by the agreement of a price fixing agreement at that meeting? Surely there was preparation for the meeting – there is evidence of that, is there not?

MR. COOK: Well there is little evidence, Sir, that we were actually prepared for the meeting, in fact the contrary is suggested in many cases that we were not prepared for the meeting. But, in any event, Sir, the key is the point at which an agreement was reached, it is only an infringement when an agreement or a concerted practice comes into being, and coming to a meeting potentially thinking about these matters, and there is nothing in the evidence to show that we were actually told expressly what it was about. Even if you had been coming to a meeting thinking about considering the possibility, the wrong happens – an infringement takes place – at the point when an agreement comes into being, or effectively a concerted practice is adopted between the parties, and there is simply nothing, I would say, on the basis of the evidence, which shows anything at all to show that either DQS knew what the purpose of the meeting was in advance, or that DQS was involved or communicated that it was willing to participate and there was this agreement that concerted practice should go ahead.

There virtually no mentions of DQS having involvement or anything at all prior to the date of the meeting itself in terms of the evidence quoted by the OFT, and I have dealt in para.26 of my skeleton with the key point Mr. Ward relied upon in the Defence, which was an email in terms of arranging the meeting and play was made of the wording in that email about "all is booked, confirmed" as though that demonstrated in advance that the agreement was in place. I then set out the email, it is from a secretary to her boss saying "All is booked, confirmed with the hotel", that is obviously an example of somebody who has been asked to arrange simply the logistical arrangements of a meeting who said "I booked a room, you've got lunch arranged, these people are turning up", and it is really of no assistance to him and I note Mr. Ward does not push the point much further in his skeleton.

MR. SCOTT: So what you are saying is that although it is clear that DQS felt under pressure, were putting pressure on their supplier to do something about the situation that was not headed towards misfeasance, that was merely headed towards legitimate commercial adjustments?

MR. COOK: What you normally do in circumstances when you are having a problem with the market is to say to your supplier "Cut your prices".

MR. SCOTT: Yes.

MR. COOK: And there is absolutely nothing wrong with that at all, and I am not suggesting that there is. So yes, I am happy to say that DQS knew it was having problems in the market and might well have been putting pressure on for reductions in prices, but there was absolutely nothing in the evidence which demonstrates anything else, that it even had knowledge of

anything else, certainly there is no suggestion that it suggested anything at all. There is no indication that it had knowledge of anything prior to the meeting itself, and certainly no suggestion that we had entered into anything approaching an agreement prior to the meeting. So what you are left with is, I would suggest, simply a period of between 20th November and 5th December, which amounts to 15 days. That is important because what it means is once again the OFT, I would submit, has proceeded on an incorrect factual basis. It is 15 days rather than the six to ten weeks it thought, and that is a significant difference; the period is less than an third, or even lower – based on the six to ten week bracket – than the OFT thought it was, and that I would suggest again shows the OFT proceeded on the incorrect basis. Again that means the margin of appreciation in my submission simply does not apply here.

The consequence of that, I would submit, is that when you have an infringement that is genuinely that short, it is simply absurd to apply exactly the same penalty to an entity, an undertaking, as you would if they had had the agreement in place for a full year; the point becomes that simple. Again, you have two people in front of you, one of whom has been involved in an anti-competitive agreement for a full year, one of whom has been involved in it for 15 days and there should not be the same penalty for both, and that is the broader point outside simply the confines of this case.

In terms of the OFT's guidelines, they do talk about having the ability to reduce the starting point on a time basis here, in exceptional circumstances take account of duration, and my submission is that if 15 days is not exceptional it is hard to imagine what would be. Part of the reason, of course, why the OFT might well have taken this position is because it was looking at a longer period. Once you do come down to 15 days it certainly would have been appropriate in my submission to make a reduction on that basis. I am not suggesting a full pro-rata reduction down to 15x 365ths, but I would submit that a substantial reduction is appropriate in those circumstances to reflect the comparatively less serious nature of this because it is short.

My learned friend makes the point that he says he goes back to the OFT's case and said the key point, the OFT's Decision was that the reason why it was so short was, of course, that the OFT intervened and, as a result, one should ignore the short duration. I would suggest the fact that the OFT intervened is a relevant consideration to be taken into account at Step1 in terms of seriousness, because certainly you would say if parties voluntarily give up on wrongful conduct that is less serious than somebody who only stops when they are caught, and that goes without saying it is not relevant in a context of a very short duration. You should have taken account of the point at Step 1, you should not then bring it back in at Step 2 again. There is a very short period for whatever reason and it comes back again to the point that two identical parties, one of whom was involved for 15 days and then got caught, one of whom was involved

for 365 days and then gets caught, the 15 days should be punished less severely in my submission.

MR. SCOTT: Earlier on I referred to 560 – and it may be that Mr. Ward will address this – and what it says is that there is no merit in the suggestion that either the short duration of the agreement means that it did not constitute an infringement, or the nature of the infringement was for that reason any less serious, that is why I went to that, because it is making both points really. It is looking at the duration as a matter of fact.

MR. COOK: As a matter of avoiding the liability completely.

MR. SCOTT: That is right. So it is going to both points really; it is going both to the nature and to the seriousness.

MR. COOK: I do not think, sir, with all respect that 560 is quite doing that. First, it is saying a very short duration does not mean that it is not an infringement, the question is whether 15 days is an answer to there being no offence at all; I am not suggesting it is, that would clearly be incorrect. Then it says whether a short duration makes it less serious and I suggest what you are looking at in Step 1 is seriousness of the offence, and I am not suggesting that you should look at duration in Step 1, duration in Step 2, and that really is the point I am making, that is the second mistake the OFT made here they got the duration wrong, but the second mistake was in some way looking at why it finished as being determinative, in my submission it is only relevant to step 1 anyway but even if you can take some account of it in Step 2 it should not mean that you completely dismiss the whole point.

THE CHAIRMAN: Why it finished is surely a factor in considering duration? In one case you might find that an agreement finished because the parties decided it had run its course, or that perhaps they had a change of mind and should not do it, and in another case – this one – it finished because the OFT stopped it, nipped it in the bud. Those are factors we are entitled to take into account, are they not?

MR. COOK: Certainly when it comes to the broad matters, of course they are. I would suggest that that is something you probably should look at in Step 1.

THE CHAIRMAN: Why can we not look at it in Step 2 as well? I am afraid I do not understand the logic of that?

MR. COOK: The simple point is really the whole basis of this step by step process, which I accept in many ways is slightly artificial because it does require you to put something in a box and look at it in an appropriate step, and while on a commonsense basis of course you are going to take that into account generally when you are coming to a number, which is more the Tribunal's approach to it, under the OFT's step by step process, I would suggest it is

appropriate at the point of determining seriousness, but when you come to duration you should just be looking at duration *simpliciter*.

MR. SCOTT: Would you put it to us that in any reconsideration that we make, given the interconnected nature of these two steps in this particular case, that we ought to be considering the two steps in an overall sense?

MR. COOK: My submission is generally going to be when the Tribunal comes to look at it as a whole, as it will ultimately do so, you are not required to follow, or even give accounts to the OFT's guidance and follow their step by step process. You will look at the penalty as a whole, certainly with the guidance and the background and, of course, you will take into account then the fact, I would submit, it as a very short duration. It was a certain degree of seriousness and the cause of it stopping without an effect was the OFT's involvement, and the fact the OFT stops it, I accept, makes it more serious than if they had volunteered to stop it.

THE CHAIRMAN: Okay, unless you think something important has been omitted I think we have got that point. We might be just about to move on to the issue of multiplier.

MR. COOK: Sir, deterrent multiplier. Having gone through the first couple of steps the OFT came out with the penalty £80,000 and then increased that by £100,000 by adopting a multiplier of 2.25. This was said to be justified in order to create a sum significant enough to act as a deterrent for DQS.

The first criticism we make, Sir, is simply looking in the Decision there is absolutely no basis to understand how the OFT came up with 2.25. I obviously accept, as Mr. Ward points out, that the OFT has said that we need to increase it for deterrence and matters like that, and I am going to come on to criticise that. But does not in anyway tell you whether you need a multiplier of 1.25, 2, 3, 10 or anything else. I am not suggesting that this would be some hyper-sophisticated way which would allow you to determine that 2.25 was right, 2.1 would have been wrong and 2.4 would have been wrong. However, in my submission there should be sufficient reasoning in there to allow you to determine why the OFT picked on the area around that number, in the same way as you get with the starting point percentage. One might not be able to say specifically 7 per cent. is better than 6 or 8 necessarily and there is going to be some bracket around that, but there should be sufficient reasoning to explain in general terms why a multiplier of this general scale has been adopted. In my submission there is nothing in the Decision which does anything of the kind, and this, on a general policy basis, I would submit is a very serious flaw. What it means is it makes it almost impossible for parties, or legal advisers to have any idea of the type of penalty the OFT might impose, and that is a flaw as well, because if there is not this underlying reasoning to it which, if it was there, should have been presented in the OFT's case, how is the OFT itself ensuring it is treating similar

cases alike? In the same way as one has a notion with ... percentages of scale from 0 to 10, one would expect there to be some underlying justification expressed in reasoning as to why one comes to this sort of level.

THE CHAIRMAN: What you are saying, Mr. Cook, implies that the multiplier applied to the other infringers is capable of the same attack?

MR. COOK: Sir, there is an absence of reasoning generally in this context.

THE CHAIRMAN: So you are not making a disparity point, you are making a point that there is no reasoning to justify 2.25 as opposed to any other figure you might like to pull out of the air?

MR. COOK: Absolutely, Sir, and that is the general point I would make in relation to that.

THE CHAIRMAN: Given that this is a deterrent regime, and that penalties are meant to deter and hurt, is it part of your case to put forward what you submit would be an appropriate multiplier in a case of this kind?

MR. COOK: Sir, I will certainly come on to - I would actually submit ----

THE CHAIRMAN: With reasons, presumably?

MR. COOK: Well ultimately one does come down to some sort of looking financially at what the business can bear, what is going to hurt it, and one I think can do some form of basis area of tying it in to financial capacity and looking at that; so yes, I will come back to that. I am going to submit that £80,000 was already certainly high enough and I would actually go further than that and suggest that it was a bit high in the context of this business, but I will come back to that when I actually come to the numbers, Sir. But that, in my submission, is the first omission here; I put a silly example, there is no way for me to tell, anyone to tell on reading the Decision whether 2.25 was something like a spelling mistake, it could have been intended to be 1.25 or 2.75, without some sort of justification for why it is there you cannot test what process was gone through in terms of determining why it was and if it was – as Mr. Ward has attempted to do in his skeleton argument, some sort of calculation by references to turnover – percentages and things like that. It is that type of calculation process that one can look at and, at the very least, simply check the OFT has done it correctly and without reasoning we cannot even test that.

MR. SCOTT: I think the typographical error suggestion really does not stand up against the wording of para.625, because they are there referring to DQS's overall turnover, they are giving an actual number so they do not just have the multiplier in mind, it is not plucked from the air, it is related to other matters and actually results in a solid number.

MR. COOK: The point I was essentially making, at some point you would have come to a multiplier and in whatever way, we simply do not know how that was done. If there was a typing mistake at that point in simply working out what it was, writing it down, transcribing it, what

would have followed is then simply a calculation, so you simply apply that multiplier. I am not suggesting that there would be at this point simply a mistake that the numbers would not tie up, if that happened that would be easy enough to see there had been a mistake, but it is the fact that you cannot at any point work out why it has come and therefore test what process led to it in any way at all, and that is where you can get that mistake. I am not impugning the OFT as having done it here, or even that it is likely to happen, but it is this sort of absence of reasoning which means there is no way to test how and why they did it and if, for example, they had based it on some sort of increase or decrease in turnover percentages, they could have made a mistake, we simply do not know because they had not given us that kind of level of reasoning that would justify it, and do not appear in fact to have done it. But regardless of that, Sir, whether or not you are with me on that point ultimately I say when you look at the financial position of the company that is relevant at this point and it is one which demonstrates that the percentage applied was simply outside any reasonable ambit of discretion that could possibly exist.

In terms of what the OFT should have taken into account, if I can quickly take you to the guidelines that they adopt in relation to this, the current guidelines are at tab 26 of the second bundle of my learned friend's authorities, paragraph 2.11, under "Step 3 – Adjustment for other factors" and in the middle of the paragraph the sentence starts: "Considerations at this stage may include ..." and the second half of that sentence in particular.

MR. SCOTT: In looking at the reasonableness of the OFT's position, we have to have regard to what they knew of the position of the undertaking and our understanding is that they knew a great deal less about the position of the undertaking than the materials subsequently made available to us.

MR. COOK: Sir, that is absolutely right, and the information they had been provided was up to the level of PBM it was not all the way up to Precision Concepts, no. In relation to that, Sir, I would suggest it is actually a fault on the part of the OFT. We had submitted evidence in relation to PBM, and in particular DQS on the basis that our submission at the time, and it remains it, was that only DQS was relevant. It was not correct to go all the way up to Precision Concepts, and we submitted evidence on that basis while making that submission. If the OFT felt that it did not have sufficient information it had every opportunity to say "We are not going to be persuaded by that", or "we may not be persuaded, provide us with statutory accounts for Precision Concepts", and it makes those requests right the way through investigations when it needs to.

One must bear in mind that the peculiarity of the way in which the OFT operates – a peculiarity in one sense – is that while you get a statement of objections which sets out

everything in relation to the factual position you do not get anything similar in relation to the calculation of the penalty and, as a result, all of these paragraphs come only at the point of the Decision.

THE CHAIRMAN: You are not attacking the lawfulness of the guidance? I am just interested to know what you say is the thought process that the OFT should have gone through in relation to your clients to reach a figure or a multiplier given the very broad nature of Step 3 and the wide discretion it provides with the purpose of deterrence and one notes that it is not merely the deterrence of the infringing parties, the deterrent effect on the world at large?

MR. COOK: Sir, the process I suggest you should have gone through, and it is one that the Tribunal has in part hinted at today , first I say you look at the financial position of whatever undertakings you think are appropriate, you determine matters over several years in terms of turnover, profitability, and consequently ability to pay and what type of effect that is going to have in terms of a company's ----

THE CHAIRMAN: What is the objective side of this, Mr. Cook? Reading Step 3 it contains a very substantial objective element. The words are fairly vague and that, no doubt, is deliberate, but what you have submitted just now is strongly subjective and I am just trying to tease out what the objective process is?

MR. COOK: The starting point, Sir, I think the objective estimate of economic and financial benefit is perhaps in many ways what is being looked at as the objective basis. So what you are in part doing in Step 3 – and it is not relevant here – is saying: "Has this company made £ ½ million in profit as a result of a price fixing arrangement?" One of the first things you will do then in a fine is say "You are going to be punished, but we are also going to make sure we have taken away your profit", and that in part at least is the objective basis there.

I would then suggest that in terms of special characteristics one can do a certain amount of objective matters, simply in terms of looking at matters of financial reporting and accounting that should be relatively clear cut in terms in terms of turning profitability, turnover, percentage, getting that raw data in. Once you have that raw data in I would suggest that there is scope to adopt some form of accounting process to assess the ability of a company like that to fund a fine of any particular size in terms of what its net assets are that it can borrow against, what its borrowing capacity is, what profitability it has which will allow it to fund repayment of borrowings ----

THE CHAIRMAN: I understand all that – I did not make myself clear. What I am concerned about is, setting aside what I call the subjective factors relating to this company on one side of the page, what about the other side of the page? We are talking here about the building supplies' market in which there is a multiplicity of companies operating and one of the purposes of this

exercise is to deter other companies, they may have nothing to do with double glazing – they may be supplying paving stones or something, kitchen equipment – what about that objective part, as I call it, the purpose of deterring others? Is Step 3 not the point at which that is particularly to be taken into account?

MR. COOK: It is certainly the place that it is taken into account, and it is a very important aspect of that. But once again I would submit that in part what is being done is that if other people know a company of this size and scale was fined this amount that gives them some idea of what they would get fined potentially in a different financial position if they got caught doing something wrong, and it is not something where, for any minor infringement you say "Let us stick a million Pounds on because it sounds good and impressive"; there should within this be an aspect of proportionality because everybody else recognised that if they are a bigger undertaking then obviously it will be proportionately larger.

THE CHAIRMAN: I understand, thank you.

MR. COOK: In terms of what the OFT actually considered, and I address your colleague's question about the fact that the OFT only had limited information, I would suggest it was entirely its fault in part, there was a certain shared responsibility, but the OFT had it well within its power to ask and did not. Nonetheless the information is now all here and I would suggest it is fully appropriate that the Tribunal takes that all into account.

MR. SCOTT: Just pausing there, to make sure we understand this. Long before the Decision the OFT had made it clear that they were regarding this as a single economic entity with joint and several liability so that in terms of the presentation of the financial circumstances of the undertaking, your clients – leaving aside for the moment the fact that you are seeing them as distinct, and the OFT as ... we are on notice that from the OFT's perspective it was the financial position of the entire group that was important. Are you also suggesting that the OFT should have known about the sale which took place some eight days before?

MR. COOK: No, sir, no.

MR. SCOTT: Do you think your clients had any duty to inform the OFT of the sale?

MR. COOK: Sir, in the same way that we informed the Tribunal of it, it is something that the OFT would have been informed about at the time, but I think it was simply a situation that everyone was involved in running the sale and it was not particularly thought about as being something that was immediately urgent – it happened in six days.

MR. SCOTT: Yes, it was very clearly in contemplation during the sale because it is referred to in the documentation of the sale. What you are suggesting is that the burden lies with the OFT in a situation where your clients were well aware of the OFT's approach, were well aware that the OFT were approaching the matter on the basis of an undertaking and it lay within your clients'

choice what information was provided. What you are suggesting is that the OFT should have been more proactive in seeking to ameliorate the fine by seeking further information which would have given them a justification for ameliorating the fine. I am not sure that that is a very attractive approach because you are asking the OFT when not knowing circumstances to be in some way prescient about the circumstances.

MR. COOK: I certainly make clear I am not in any way suggesting the OFT was at fault for not being aware of the sale, there is no reason why it should have been. I am suggesting that when the OFT is assessing a penalty in circumstances in which, under its guidance it is required to take account of the particular financial circumstances of the undertaking in question, in circumstances in which it does not have appropriate information, it certainly should make an information request, and it can do it on a voluntary basis or very simply saying: "We are going ahead on this basis, do you want to provide us with the accounts?" But going ahead knowing that you do not have key data, when you have not made any attempt to get it is, in my submission, simply wrong.

THE CHAIRMAN: Sorry, I do not begin to understand that proposition, with respect, Mr. Cook. If you are a Board of Directors of a company and you know you are going to be fined by the OFT for an infringement or, for that matter, to take an analogy, if you are Board of Directors and you know your company is being prosecuted under health and safety legislation, one of your first thoughts is to mitigate the potential penalty that you are going to receive. In order to do that, any commonsense applying Board of Directors decides what information it wishes to give to the regulator or to the court in order to mitigate the penalty. In the analogy of the Health and Safety prosecution you surely would not expect the Health and Safety Executive to come rooting around for financial information which you have a complete liberty to provide and in commonsense should if you want to; it is a matter for the Directors of the company to decide what information to provide not a Government Department to go rooting around, is it not?

MR. COOK: The first point to make, Sir, is that I am not suggesting that DQS and Precision Concepts were blameless here – they could and should have done more and they did not, and that is not something I am going to suggest was a desirable or appropriate thing to have done. They were at the time, and the reason I understand why it was being limited like that, saying "This is who you should be looking at, here is the date that you should be looking at". I am not suggesting the OFT has a duty to root around for it. I am suggesting that in circumstances in which it actually has a positive obligation as it does here, and it is not like the Health and Safety Executive which is going to take somebody to court, which is essentially an adversarial process, the OFT is making a decision, and is required to make a Decision based on particular circumstances and factors.

I would suggest in those circumstances it was incumbent on the OFT to take at least minimum steps to ensure it had pertinent information and the point to bear in mind, of course, Sir, is the OFT did not know whether Precision Concepts was very valuable or not, and it was equally relevant for the OFT to find out if Precision Concepts was worth hundreds of millions of pounds and consequently that it should have been potentially applying a higher multiplier rather than in reality as it is, it is worth virtually nothing. It is not just simply us putting something forward in mitigation it is the OFT to have the proper data to do its job. if it had asked and we had failed to provide that might be slightly different, but not even to make that step of asking I would say is something that is to be criticised.

THE CHAIRMAN: I understand, thank you.

MR. COOK: As I said, Sir, the key paragraph that deals with this financial point is para.632 in the Decision. The OFT dismisses, for two reasons (one of which I have just dealt with) the fact it did not have information on the top co. but also dismissed it on the basis that there had been a deterioration in DQS's financial performance during this period and, as a result, the relevant turnover went from £1.49 million to £1.14 million, a fall in that turnover. That is relied upon as a reason why – they have already had a reduction, there is no justification for any more. In my submission that is simply just wrong and is not something that should have been adopted as relevant consideration at all.

The purpose of the OFT's guidelines, which provide that you calculate fines based on the previous financial year is, at least in part, to ensure that you are fining the company based on its capacity to pay at the time. So looking at the turnover at the time is the starting point and looking at it as at now to see whether you should go up or down. So the fact that it is previously gone down is certainly not the be all and end all of the story by any means – if it is even that.

Moreover, Sir, and it is a point about how the OFT does it the opposite way round, generally since most companies hope their turnover is going to go up over time, the OFT's process of basing fines on the point at which it is actually calculated nearly always results in fines which are much larger than they would have been had the OFT completed its investigation (in many cases because it is frequently not that fast) a couple of years earlier. Sir, Mr. Ward will tell you if it is different, but I have certainly never seen an OFT Decision which has given anybody credit on the basis that your turnover has gone up, your fine is higher, but we will reduce it to take account of that fact. It is always simply done, this is the turnover now, that is what we need to punish you on the basis of. This, in my submission, demonstrates a Body that is focused more on trying to produce some good headline fine numbers to justify its existence, and not a body that is actually to be carrying through this process, trying to work out the right

answer, because it is only looking at factors that will allow it to ensure its fine remains high, not factors that might lead to proper reasons to reduce it.

MR. SCOTT: To be fair to the OFT in relation to their guidance their concern – quite properly – is to have fines which have an effective deterrent quality, and it seems to me that we have a similar duty, to ensure that fines have an effective deterrent quality. You are not challenging that, your suggestion is that they are doing this for some other reason?

MR. COOK: I am not suggesting obviously it should not be done for deterrent reasons, I am saying when you are looking at somebody as at today, the person that is in front of you, and fining him on that basis, to simply have a one-sided approach which says: "We are not going to engage any more reduction because you have already had a fall off in your turnover" is inconsistent with the fact that they never say: "Your turnover has gone up and therefore we are going to punish you as though you were a couple of years ago". Once you have adopted an approach as they have done, and it is very logical of saying "In order for this deterrent reasoning I have to look at you as you are in front of me at the moment, as you can actually afford to pay as at today's date" To then adopt an approach of sometimes pushing in "Well, five years ago you could have afforded to pay more" is simply wrong; that is the point I was seeking to make.

THE CHAIRMAN: Right, just bear in mind, out of sympathy for the shorthand writer if for no other reason – and there may be other reasons - we will break for coffee at about half past eleven or at a convenient moment.

MR. COOK: Sir, in terms of the financial position of DQS we have put a lot of numbers before you in various different formats, and I was just very quickly going to look at the most up to date ones, just so you have some of the summary numbers there. I hope you will have a letter that was submitted only in the last week, I believe, by Sepia Logistics (DQS) attaching the most up to date documentation and summaries, and this arose out of complaints that were made in Mr. Ward's skeleton about a lack of data. It was searching data that it had not previously been suggested was lacking from us.

THE CHAIRMAN: What is the date of it?

MR. COOK: 15th December. (After a pause) Sorry, Sir, I apologise, I have actually printed it out this morning off my computer and it has presumably automatically updated the date as sometimes happens, it was the 11th it was sent, Sir.

THE CHAIRMAN: Yes, our paper 35.

MR. COOK: Sir, I wanted to refer you initially to appendix 2 to **this** which is an analysis of the accounting statements 01 to 04, the various multiple pages of that that has been submitted, and it has simple set out there, it starts with turnover figures, net profits and net assets of the

various companies, and that is up until the point where we have audited financial statements which is the end of 04. Just to draw some particular numbers to your attention, Sir, in the net profit, looking at the two key companies – Precision Concepts Ltd., and Double Quick Supplyline Ltd. – looking at the various dates but the most recent one was 04, you can see that Precision Concepts made a loss of £708,000.

THE CHAIRMAN: Could you just point to the page where we find that figure?

MR. COOK: Sir, it should be the second table of data, headed "Precision Concept Ltd and Subsidiaries Analysis of Accounting Statements".

THE CHAIRMAN: And the figure you were pointing to again was the figure of?

MR. COOK: It is the net profit, Sir, it is in the 2004 column, for Precision Concepts it is 708, and all those figures are in thousands, then Double Quick Supplyline – again it is a loss in each case of £836,000.

MR. SCOTT: Again, we have to draw a distinction between what the OFT knew at the time they made the decision and what we know now, what the OFT say in their Decision at para.632 is that Precision Concepts is equally liable. "... the OFT does not consider it necessary because no representations have been made regarding the financial position of DQS apart from the parent, Precision Concepts Limited." So in terms of reviewing their Decision we have to keep bearing in mind what they did not know as compared to that with which you are presenting us today.

MR. COOK: Well subject to a couple of factors, sir. One is the point I have dealt with, namely, whether or not the OFT were partly responsible for that. The second point to bear in mind is that of course we were under no obligation to participate in the administrative process at all, but are entitled to come to this Tribunal *de novo* in any event and advance anything we want to advance at this stage. It is not desirable to do it completely *de novo* – very few people do it – but we are nonetheless entitled so we are not stuck in any event with what was there earlier.

MR. SCOTT: Can we just address you for a moment in your capacity as counsel for Precision rather than in your capacity for DQS? You have not, as I understood it, in your skeleton put forward an argument of lack of due process in relation to Precision?

MR. COOK: No, sir.

MR. SCOTT: So you are not suggesting there was any sense in which Precision were not permitted the opportunity of addressing the OFT ----

MR. COOK: Precision was aware of what was going on.

MR. SCOTT: So just to be clear, there is no point there; Precision knew what was going on, had the opportunity but what you are saying is that OFT should have inquired into the position of Precision and not simply said "We didn't hear anything"?

MR. COOK: Certainly, sir, that is the first point and the second point is it does not matter in any event in the context of this Appeal, it is effectively a hearing *de novo* and consequently if there is evidence that is available before you, you assess whether the Decision was right, based on all of the evidence, regardless of whether it should or could have been before the OFT.

So quickly those are the numbers, and then we have net assets going down below, it is £1.2 million and about £500,000 for net assets at the end of 04.

MR. SCOTT: So just sticking on that point, had the OFT – and, as we understand it, they did not – gone to Companies' House and checked the latest available accounts at the date of their Decision they would have found the 2004 accounts, as I understand it, would have disclosed net assets in Precision of £1.2 million?

MR. COOK: That is correct.

THE CHAIRMAN: But we are not looking at a crude position in which one sets the fine, whatever the appropriate level of the fine is, as a capital sum against either the net assets or the net profit of any material business. We are looking at more sophisticated question of what is the effect of that fine, in a normal business environment which would include borrowing the money and therefore paying only a proportion of it off the bottom line against the net assets and the overall profitability of the company. That has to be right, has it not? Shall we break for coffee now?

MR. COOK: Sir, yes.

(The hearing adjourned at 11.30 a.m. and resumed at 11.40 a.m.)

MR. COOK: Sir, before the short adjournment you were suggesting it was a slightly more sophisticated process than it appeared I was going to suggest it was. I am not arguing for a more sophisticated process, what I am doing at the moment is simply establishing for you the basic data and I certainly then recognise that it is going to be a slightly more ----

THE CHAIRMAN: I understand completely, Mr. Cook, thank you.

MR. COOK: Sir, I had got as far as simply showing you the various calculations that were available based on the audited accounts which go up until the end of December 2004, that is as far as we can take you in terms of audited accounts, because DQS's accounting year has not finished at the moment. We do have management accounts for both 05 and the first five months of 06. The Management accounts for 05, and these are in relation to the PBM Group, so it is PBM/DQS and PBM Roof Systems, and that is what is available before you, Sir. You can find those exhibited close to the very back of the exhibits to Mr. Jones's witness statement. It is appendix 1 to what is called the "Tenon Report". This was an accountant's report into the financial position of the PBM Group at the point when sales and things like that were being considered, but it was prepared for the benefit of the banks that were lending money at the time.

THE CHAIRMAN: It is an appendix to Mr. Jones's statement?

MR. COOK: It is appendix 1 to appendix 8, which I appreciate is unfortunately confusing. Appendix 8 is the Tenon recovery report and it is then appendix 1 to that.

MR. SCOTT: Just clarifying the relevance of this, this is a document which was not available to the OFT, it is therefore not relevant to our review of the OFT's considerations except insofar as you say they should have been asking for it?

MR. COOK: No, this is something actually that was available to the OFT, they were provided with, certainly the data coming from the management Accounts at a meeting in January 2006, so they were aware of this PBM level material at this point.

MR. SCOTT: Were they served with the Tenon Report?

MR. COOK: They would not have been served with the Tenon Report, no, but the report says many other things, I am simply going to it as the most convenient place to find these management accounts.

MR. SCOTT: It is appended to Mr. Jones's witness statement.

THE CHAIRMAN: My file with Mr. Jones's witness statement runs out at appendix 7. I am sure I have seen it.

MR. SCOTT: Yes, I am sure I have seen it.

THE CHAIRMAN: I know I have seen it and I do not know where I have seen it, so can somebody please ----

MR. COOK: I was only going to take you to a couple of numbers.

THE CHAIRMAN: Why do you not give us the numbers and we will make a note of them, that is going to be quicker.

MR. COOK: That showed that the PBM Group made a loss before tax of £1.25 million.

THE CHAIRMAN: This is 2005?

MR. COOK: 2005. Then there is also a balance sheet which shows net assets, again at the same point, of £93,000. Also exhibited to the most recent material sent in in the last few days under the Sepia Logistics' letter – again I do not think there is any need to turn it up, I am just going to tell you the numbers – this shows for the first five months, again the management accounts, the same PBM level group, for the first five months of 2006, i.e. pre-sale a further loss of £574,000 was made. We can see from that the last position we saw with the management accounts, as with the audited accounts, there has been £1.5 million of losses subsequently up until June 2006, so up until the point of the sale, wiping out effectively all the net asset value of these companies.

I then turn to the sale itself, and my learned friend has made a certain something in his skeleton argument of the fact that we received £3.9 million in the context of that sale. Sir, it is very

important to bear in mind that that was not £3.9 million for the business, that was £3.9 million for certain assets that were sold, and what happened is when some of the assets of the business were sold all of the liabilities remained and, as a result, the £3.9 million that technically came in, the vast bulk of this it was £2.8 million went immediately to pay off secured creditors, and one can see that, for what it is worth, it is appendix 7 to Mr. Jones's witness statement, which is a completion statement prepared by solicitors who undertook that transaction, which shows various amounts paid – they are also not insignificant costs associated with the sale which might not surprise you.

Under the heading "Release of Encumbrances", ... Creditors, and you can see various costs of sale there as well. Mr. Jones set out at the end of his witness statement where effectively the rest of the funds have gone, and they have been used to pay, or predominantly will be used to pay unsecured creditors and that was the final couple of paragraphs in his witness statement which explained that DQS was, even without the fine, balance sheet insolvent, to a comparatively small degree, about £30,000 or so, but nonetheless balance sheet insolvent even before the fine and, of course, DQS is not trading so it is not in a position to make up those losses.

MR. SCOTT: The position of an undertaking is, of course, rather strange, and we are in a situation here where the OFT were unaware that the business had been sold. Had they been aware they would have had to have regard to should the fine be being paid by the business, or by the shelled out legal entity.

MR. COOK: Sir, as I tried to explain the business was not sold, all that were sold were certain assets, so the business effectively sold a factory, sold some trucks, matters of that sort. That is no question of the undertaking being transferred it was simply an asset sale. I do not think there could be any question of the liability of this fine transferring across to the entity that purchased that.

MR. SCOTT: You had me a bit confused, when I look at the sale agreement, the sale agreement seems to refer to a large number of employees. It looks as though the ongoing business was sold.

MR. COOK: I have checked the position, and as you rightly pointed out some of the business was sold, all liabilities remained behind including ----

MR. SCOTT: Well, as we understand it, as between the sellers and the guarantor, Mr. Sander, the liabilities remained with the legal entities. It is far from clear that as a matter of competition law the liability to pay this fine could be dealt with by private treaty and, indeed ----

MR. COOK: So it is not being dealt with, it remains with the undertaking which is liable for it and nobody has tried to move it.

MR. SCOTT: No, no, but to be fair to OFT, OFT were unaware of the sale of the business, so they gave no regard to who should be paying the fine in June of this year because they were unaware of the sale. Both the purchaser the SIG Group and the sellers, and the guarantor were aware that OFT had in mind to fine the undertaking, however OFT were unaware that part of the undertaking was being sold. There is a guarantee by the guarantor, Mr. Sander, as I recall up to £500,000 to indemnify SIG. As we understand it SIG, although a quoted company, did not give notice to the Stock Market of the purchase.

MR. COOK: I could not help you, I am afraid, sir.

MR. SCOTT: So we are in a rather strange situation here where everybody but the OFT seems to have known what was going on, but there might have been a different result, or a different set of fined parties had the OFT known how the business and the moneys were being disposed.

MR. COOK: Sir, I cannot, off the top of my head, see any particular basis why SIG would end up with paying the fine in circumstances in which the business was being sold on arms' length terms at a fair and proper value?

MR. SCOTT: If the fine lies with the business then it may be a matter ----

MR. COOK: It is interesting you should raise this, sir, because there was a previous DQS case before this Tribunal in which exactly a similar point arose, and in that case DQS had acquired a business which had committed infringing conduct and, in that circumstance, the OFT accepted that it did not have any liability for wrongs committed by the business it had purchased, given that it had purchased the business, the limited company that was liable and was nothing to do with DQS.

MR. WARD: To be more accurate, it was not liable for the wrongs committed in the period before it acquired the business, it was only liable for the wrongs committed after it had acquired the business.

MR. COOK: The wrongs by the business when it was actually owned by it. So it did not pick up the liability that the previous limited company which had run the business had acquired on the basis that it had committed wrongs, or might have committed wrongs. It is a point that has arisen in very similar cases for these parties, and the OFT accepted in that situation that liability did not move across to the party who purchased on an arms' length basis a chunk of the business.

THE CHAIRMAN: Forgive me for interrupting you. Given your submission that we should take account of the financial position of the company as it now is, hence your reference to the management accounts, for example, which plainly show a deteriorated position, to what extent should we take account of other arrangements, for example, the guarantee given by Mr.

Sander, which appears at first blush to impose a potential liability upon Mr. Sander to make certain payments if they arise?

MR. COOK: Can I clarify what you are talking about? Are you talking about the guarantee that arises in the context of the SIG purchase agreement?

THE CHAIRMAN: Yes.

MR. COOK: That would arise only if the OFT was to try and fine, and I would suggest it would be unsuccessful, but if it was to try and fine SIG on the basis that having acquired the business it was liable – only then does the guarantee bite in.

THE CHAIRMAN: I am just concerned, there is a lot of material in this case – whether they should have asked or not – the OFT did not know, and it represents shifting financial sands in the life of the entities with which we are concerned. I am just concerned about the point as to what extent should this Tribunal take account of those shifting financial sands now, given that we are dealing in this case with a fine relating to activities at an earlier stage?

MR. COOK: Certainly, Sir, I would say sales is a slightly different category perhaps, but the OFT had the information in relation to PBM Group and that sort of ongoing movement in that through 05, and predictions for the first four months of 06, so it knew about those losses and that material and had it asked for it, it would have had it for a wider Precision Concepts basis as well. The sale as a matter of fact, Sir, does not make any particularly positive or negative difference to the value of these businesses or their ability to bear the fine particularly – effectively it was a sale at f air value. What it does, and the reason I have not pushed those submissions, is it makes the submissions we made in the context of DQS about jobs being at risk no longer valid, though of course those submissions remain in existence in relation to the other company within the Precision Concepts Group – the Plastic Building Materials Roofing Ltd., which because it is part of the Precision Concepts Group will bear in part the pain – because it is the income generating subsidiary – of meeting any fine that is levied upon Precision Concepts.

THE CHAIRMAN: Are there any other figures you would like to draw our attention to, as we can move on?

MR. COOK: Sir, those are the ones that I wanted to draw your attention to.

MR. SCOTT: Sorry, as a matter of fairness I should put to you the point I put to Mr. Jones, that in the Shareholder Agreement there is the warranty about not breaching competition law, and there is also the provision that the company should be put in the position that it would have been had there not been a breach of warranty. Now, the company in that case is the intermediate PBF, I just need to ask you whether either in relation to the question of undertaking to which you will come in due course and you may well want to come back to it

then, or in relation to the financial position of the PBM Group, we should be bearing in mind the fact that those who are directing PBM could look to Precision to put the PBM Group back into the position they would have been had they not been fined? Do you see what I mean?

MR. COOK: I understand the point, sir. If I could perhaps reserve my position and deliberate it over lunch and go back to those clauses.

MR. SCOTT: You will understand why this is important – for two reasons – and no doubt you will come back to the undertaking, the single economic entity point in due course.

MR. COOK: Sir, those are the figures that I wanted to refer you to and I would suggest that all of those figures are ones you should take into account, and the sale, while very significant in fact ultimately does not affect the position either particularly positively or negatively. Against that background, Sir, that is a background in my submission the OFT should have assessed the fine against in terms of deterrence; it did not. Had it done so, and when you come to do so, I would submit that the level of fine imposed is simply excessive and disproportionately large for a company in this position. It is an organisation that is effectively close to loss making, it is now breaking even, but it has made historically very large losses, and a fine of this level – even if you look at it as being paid over four or five years through borrowings, and the figures we were talking about earlier were £11,000 a year in interest, but if you repaid it over a five year period that would be another £36,000 a year in capital repayments, so nearly £50,000 a year over five years. The alternative suggestion you made, Sir, was the idea that it might just sit there as bank borrowings *in perpetuum* essentially. The trouble with that is that any company to block up its bank facilities with £180,000, and Mr. Jones suggested that the bank borrowings, the headroom was effectively ----

THE CHAIRMAN: It is a gearing point.

MR. COOK: It is a gearing point, you have lost the ability to ever use that again.

THE CHAIRMAN: I understand.

MR. COOK: That is a very significant impact on a company of this type of size and scale. The point is, Sir, it is well to look at it and say to this type of level of profitability £180,000, £50,000 a year, the loss of £180,000 long term borrowing capacity, these are all enormously serious and, in my submission, excessively serious. The type of thing that a much smaller fine, and when we start from the point that we are looking at the original fine as being £80,000, that would, in itself, impose very serious problems for companies in that type of financial position. There is simply no justification for any increase, I would submit, and I would go further than that and say a slightly smaller fine of, perhaps, £50,000 would in itself, and obviously Step 3 allows scope to go both up and down, based on the financial position, a slightly smaller fine – say, £50,000 – would have produced a very serious deterrent effect for this individual company

from ever doing anything like that again, and also would send out a powerful message to other companies that you get a fine of £50,000, which is a very large amount of money; you get a fine of that level when you have been involved in something for 15 days and you did not actually make any benefit from it, it did not actually cause any harm and a small company with a limited turnover gets a fine of £50,000; that sends a very powerful message as to what somebody who does something much worse, or a more powerful or bigger company is likely to get. So it does send a very strong deterrent message, even with a lower level of fine, to everybody else, which is the other consideration at this Step 3.

Step 4, Sir, which is the Mr. Sander point, very briefly: the OFT made a mistake, he was not in fact managing director, he was chairman. The point in the skeleton argument, sir, it is a matter for you to consider whether an increase of that size was proportionate given it has been made on an incorrect basis. I really have little to add to the points made in the skeleton argument.

THE CHAIRMAN: It is very clear in the skeleton argument, thank you.

MR. COOK: Sir, those are the Step by Step points that I have taken you through. Whether or not you view the OFT has having been particularly within some form of discretionary ambit in looking at this obviously on the case law of the Tribunal the Tribunal nonetheless looks at the generality of the fine as a whole and determines whether or not that penalty was broadly right, or grossly disproportionate to the infringement itself, and it is this wider basis I now come to. I am not going to repeat all the points I have already made, I will do it fairly quickly. I will just remind you of the points Mr. Jones made about the serious harm that a high level of fine can do to the company. I come back to this infringement, while I accept it was wrong, it was an infringement, it did not cause any harm, it did not in fact allow this company to make any money from it. The duration of the infringement, as I hope I have demonstrated, was 15 days and while I am not suggesting you pro-rata it down to a mere $^{15}/_{365}$ths one should, in my submission, bear that in mind and recognise that for a 15 day infringement a fine of £180,000 works out as £12,000 a day, which is probably the highest fine the OFT has ever imposed. If one compares it to DQS's turnover in the relevant market at the time, a turnover a day was just over £3,000 – that is in the relevant market – so the fine ends up being four times effectively their daily turnover. Now, I am not going to push the point too far but that is the point one should bear in mind in seeing just how large it is given the very short duration it was, and then obviously DQS's financial position generally. It is difficult to see that there are many viable companies around that are in a worse financial position and, in my submission, increasing the fine (as happened) was grossly disproportionate and a smaller fine – I suggest £50,000 or so – would have been more than sufficient to provide both a deterrent message to this company and the undertaking generally (if you find there was a broader undertaking), but also it will provide

a message to anybody else who is out there thinking of infringing, that that is what you get for a small infringement, for a short infringement you are going to get a very big fine if you do it. On that basis I would submit the fine is grossly disproportionate on any sort of broad sweeping basis and should be reduced.

I turn now to the final point, which is whether or not you should treat Precision Concepts as being jointly and severally liable for the fine. The simple background point to this, Sir, is that this is a situation in which there is obviously the holding company, PBM above, but you have a situation in which Precision Concepts, which indirectly is an 80 per cent. shareholder in DQS, picks up liability for 100 per cent. of the fine, the previous 20 per cent. shareholder picks up none. Now, that is simply advanced as a sort of "starting understanding" of the point, I am not suggesting the 80 point in any way is the end of the position at all, it is simply the factual basis. The point ultimately comes down to control and whether or not you view the level of control that Precision Concepts was capable of exercising over the business of DQS was such that effectively Precision Concepts should be treated as liable for the actions of its subsidiary.

MR. SCOTT: Mr. Sander was at the meeting, are you suggesting that if Mr. Sander had thought his action was inappropriate he could not have put a stop to it at once?

MR. COOK: No, sir, I am not suggesting that. I am suggesting though that you should bear in mind that Mr. Sander was there in his capacity as a director of DQS.

MR. SCOTT: Mr. Sander is a director of DQS, he is the chairman of DQS, he is the chairman of PCL, he is in all the relevant accounts named as the ultimate controlling shareholder, yes? As I recall your skeleton you raise the 80:20 argument. The minority shareholder had made it very clear in the Shareholder Agreement that they expected a warranty that they were not engaged in anti-competitive practices. As we understand it there is no evidence that Mr. Sander consulted the minority shareholder, so that with regard to the minority shareholder Mr. Sander can be implied to have believed that he could proceed on this basis – this illegal basis – without consulting them and rendering them potentially liable – correct?

THE CHAIRMAN: Well without necessarily personalising it to quite that extent, I was somewhat troubled by para.58 of your skeleton, in which you say at the end: "This factor demonstrates that it cannot be correct for PC to be jointly and severally liable for the fine". Then in the next phrase, the word "only" slightly took my breath away at first sight, I must admit, Mr. Cook, "... since PC only had an *indirect*..." and that caused a small intake of breath as well, "... 80 per cent. share in DQS." To anyone who has ever been, even a non-executive director of a company, an 80 per cent. share in a company is a dictating share at first blush, is it not?

MR. COOK: It is generally a dictating share. What makes it slightly different here is somewhat unusually, in most cases a 20 per cent. shareholder will effectively have no control or power at

all. In this context the Shareholders' Agreement provides fairly considerable restrictions on the freedom of the majority shareholder as a result of the minority shareholder ----

THE CHAIRMAN: I appreciate that, I mean in a big public company a 20 per cent. shareholding would be huge, and might well, effectively create control; pension funds with 10 per cent. shares in very large companies in effect control them. But where one is looking at an entity like this, returning to Mr. Scott's point now, can one really say that effective control was not ultimately in the hands of Mr. Sander, subject to consultation with the minority shareholder?

MR. COOK: It was controlled subject to the restrictions set out in the Shareholders' Agreement.

THE CHAIRMAN: I am just thinking of an analogy with Trading Standards' cases, cases like *Doble v David Gregg* immediately spring to mind.

MR. COOK: They unfortunately do not do the same to me, Sir.

THE CHAIRMAN: There is a run of cases about whether supermarket managers and their employers, for example, are liable for breaches of the Trade Descriptions Act, and there are discussions about matters of control in those cases, and in the context of those cases an 80 per cent. shareholder, who is present at relevant meetings, would be in real difficulty showing that he was not in control of the company.

MR. COOK: The distinction I am drawing, sir, is between Precision Concepts and Mr. Sander as an individual, and Precision Concepts is not owned by Mr. Sander, it is owned by a variety of other people, many of whom are connected to him and one or two trusts, but it is not owned by Mr. Sander; you should not see Mr. Sander and Precision Concepts as being one and the same 'undertaking', for want of a better word.

THE CHAIRMAN: I take that point.

MR. COOK: That is the point, for what it is worth, that yes, the same individual also had a role in Precision Concepts, was present at the meeting and was involved in it. However, to say that when you come to control should Precision Concepts be liable for all of those actions, there is no suggestion that Mr. Sander in that context was acting under Precision Concept's instructions. So that is the point, you come back to underlying control.

THE CHAIRMAN: My last question I promise on this point, can I just look through the other end of the telescope. If there was any action proposed by others involved in DQS, is there anything that could have been done against Mr. Sanders' agreement, realistically?

MR. COOK: I am not sure of the question, Sir?

THE CHAIRMAN: This is a "who called the shots" question. In general terms in the entities we are dealing with is it not realistically the case that nobody could do anything significant without Mr. Sander's agreement that "he called the shots", if I can use the vernacular?

MR. COOK: He was not involved in day to day management of DQS, that is the point of course, he was not the managing director.

THE CHAIRMAN: In policy terms, yes, in policy terms.

MR. COOK: In policy terms he obviously had a very important say.

MR. SCOTT: Sorry, I need to take you back to the Shareholder Agreement, to put to you the fact that Precision, and you tried to distinguish between Mr. Sander and Precision, but as my recollection is, it is Precision that undertakes to make good to PBM what happens if there is a breach of the warranty?

MR. COOK: I appreciate you asking the question again, I think again I ----

MR. SCOTT: I just need to put it to you in this context as an argument which puts Precision back in the spotlight again, because it is they, I think, along with Mr. Sander, who are giving the warranty to the minority shareholder, which in fact benefits PBM. So that just to think that Precision, who have notice of the breach of competition law because Mr. Sander is present at the meeting, cannot just slide out that easily, they are present, they have given a warranty, they are in breach of the warranty and they are on notice.

MR. COOK: I understood the warranty point, so I need to go back and look at the details ----

THE CHAIRMAN: Yes, and address us on the matter if you want to later.

MR. COOK: Sir, unless you have further questions, I have nothing further to add.

THE CHAIRMAN: Thank you for bearing with our questions. Yes Mr. Ward?

MR. WARD: Sir, Step 1 – The starting point. DQS's case is that the starting point is unreasonably high given the nature of the infringement. You will have seen in the OFT's skeleton we have set out – perhaps at inordinate length – a series of documents, OFT guidelines and European Commission publications, emphasising just how serious price fixing and market sharing are. I shall not take you back through them.

You have also referred my friend, Mr. Cook, to the fact that the earlier version of the OFT's penalty guidance says that a starting point of "at or near 10 per cent." is appropriate for such infringements. As Mr. Cook rightly says, the current guidance is more flexible, it does not adopt those figures, it allows the OFT more room for manoeuvre. But it still says – rightly, in my submission – that these are amongst the most serious of all competition law infringements. Mr. Cook does not really seek to dispute that proposition. He says that actually in this case a lower starting point would have been appropriate or, if I may put it this way, the OFT has exceeded its margin of discretion in adopting the starting point that it did because the infringement was not put into effect. We make three answers to that point.

First, as the Tribunal said earlier this morning, competition law is concerned with both object and effect, not just effect. That is why the criminal law analogy is inevitably inapt however

one frames it – I would not dare to venture further than that on the subject of the criminal law, but clearly the analogy is inapt.

Here the OFT was fully aware that it was fining an object only infringement. Can I ask you to turn to para.510 of the Decision, in fact the discussion begins at para. 504 (p.131). You will see: "Object or effect, prevention, restriction or distortion of competition", and then the OFT sets out the fact that effect and object can both give rise to liability. Then at para.510 it quotes some of the guidance, which we have cited in the skeleton argument, that comes from the Commission: ".... 'Restrictions that are identified as hard core restrictions ...'", which of course include price fixing and market sharing:

> "... 'are generally considered by the commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers.'..."

So in competition law terms, there is no distinction qualitatively between object and effect, that object infringements are less serious. On the contrary, the most serious kinds of infringement can be viewed as object infringements by their very nature.

Secondly, as again the Tribunal put to Mr. Cook, the only reason why it was not put into effect was the OFT's intervention. That point is set out in the Decision essentially at para.526 – you have already seen that. It is perhaps worth picking it up at 524:

> "The precise duration of infringement is less important in this case since the infringement lasted for less than one year."

Then para.526 states that the OFT considers on the balance of probabilities, that the infringements were terminated on the date the warrants were executed. So the OFT has very much in mind that this is an object only infringement and that it came to an end because of the OFT's intervention.

MR. SCOTT: Just to highlight that, if the "OFT considers it most likely" that the agreements were terminated on the date of the warrants, then there are the other possibilities which are by implication less likely?

MR. WARD: Yes, and that is important when one comes to the point on duration. But now returning to the part of the Decision dealing with Step 1, if I could ask you to turn to para.551. In the structure of the Decision, if you recall, each of the five heads are dealt with at a level of generality before specific decisions are given on each of the undertakings, and this is from a general points section dealing with starting point and the relevant paragraph is 571, 572, because here one comes back to Step 1 itself. What it says, if I may paraphrase it rather colloquially, is while we do not know how much damage you would have done if we had not stopped you, it is pretty clear that this was very serious indeed.

Now, Mr. Cook, because he wants to get around the problem that the OFT has a discretion here, tried to construct a kind of error of law by saying there was something that the OFT had failed to have regard to; it had failed to have regard to the fact there were no effects. Reading the Decision as a whole or even, admittedly, still selectively in the way that I have, those selected extracts make it absolutely clear that the OFT had well in mind the kind of infringement it was looking at; it cannot possibly be said to have been oblivious to the absence of apparent effect, but also had in mind why there were no such effects – very different indeed than if DQS had repented, or said "Hang on a minute, we can't go forward with this, this is madness. It is clearly an infringement".

That takes me to my third point, which is the starting point that was adopted was, in truth, by no means a high one given the seriousness of these infringements. It was, in my submission, well within the OFT's margin of discretion.

Step 2 – Duration. It is helpful here to refer briefly to the OFT's guidance on duration, and I have quoted it in para. 28 of the skeleton argument or, indeed, it is in bundle 2 of the authorities.

THE CHAIRMAN: Is this para. 2.10 of the guidance?

MR. WARD: 2.10, yes. What it says is: "The starting point may be increased or, in exceptional circumstances ..." and that is very important,

> "... decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years ..."

So quite often one encounters an infringement of, say, two years and eight months where the OFT might have chosen to round it up – or they might have chosen to round it down. That is not our case today. The two important points there are that there is a general rule that part years may be treated as full years, but most relevantly for present purposes it requires exceptional circumstances to show a reduction to less than a year. Mr. Cook says: "Well if this case is not exceptional, what would be?" The answer to that, we say, is perhaps a case where the infringement was not brought to an end because of the intervention of the OFT. What we had here was an infringement that barely got started and, in the words of Lord Carlile: "... was nipped in the bud." But it was absolutely clear that otherwise it was going to continue, it was not a one-off operation, and if there is any doubt about that, one could look at the letter sent by EWS to DQS after the meeting, and it is at tab 23 of the documents annexed to the Defence. It is quoted in the Decision, of course.

THE CHAIRMAN: Could you take us to the paragraph in the Decision, it just makes it more manageable, if that is not going to cause you difficulty?

MR. WARD: Yes, it is para.576 of the Decision, if that is more convenient. In fact, that is more helpful because, of course, it shows how the OFT actually dealt with this in its decision. The paragraph begins reciting what I have just taken you to from the guidance:

> "The OFT will not in general reduce the penalty where an infringement and/or concerted practice lasted for less than one year, particularly where, as in this case, there is no evidence to suggest that the Parties abandoned the agreement and/or concerted practice prior to the OFT's intervention. Indeed there were clear plans to hold a further meeting to discuss the same issues two months after the Meeting. It was agreed that the next meeting would be held at the same time, in the same place, on 15 January 2003, and this was confirmed in letters from EWS to each of the other three Parties. Furthermore, it was clear from that correspondence that this next meeting was to constitute, at least in part, a continuation and reinforcement of the agreements and/or concerted practices arising out of the first meeting – to Ulmke. '*These* [targets] *can be added to at the next meeting* ... and to DQS ..."

and this is the letter I was about to take you to:

> "... *'it really would do your corner a great deal of justice if you did some homework and came up with a second list of where we should all attack'*."

Of course, stepping back from it the nature of this infringement is an ongoing infringement. This was not a one-off event. What they were saying is "We want to kill off this competitor, and we are going to do it through price fixing and market allocation." That is not an overnight process, it is an ongoing process. True it is it was nipped in the bud by the OFT, but the reason why that is critical is it goes to whether or not exceptional circumstances. Mr. Cook says: "Why is it relevant?" "What does it matter to Step 2?" The answer is because one is looking for exceptional circumstances and here in truth the exceptional circumstances point entirely the other way.

Just dealing with the actual duration of the infringement very, very briefly, I wanted to pick up on a point that Mr. Scott just made, which comes from para.526 of the Decision. It is not right to say that the OFT made an actual finding that the infringement lasted into the middle of January. Can I just remind you what it actually said?

THE CHAIRMAN: Does it matter whether it lasted 15 days or 45 days?

MR. WARD: Sir, that is our central submission, it does not matter at all. The reasoning is quite clearly about whether there is a reason for going below the one year threshold, whether it is 15

days, 30 days, 45 days does not make the slightest bit of difference, none whatsoever. One could comb the OFT's reasoning to find any suggestion that it does, but it is just not there.

THE CHAIRMAN: Does it make any difference if it lasts 15 days as opposed to 10 ½ months, for example?

MR. WARD: Can I give a slightly evasive answer to that?

THE CHAIRMAN: Yes.

MR. WARD: Those would be different facts, and would be a different exercise of the OFT's discretion. Here the undisputed facts are a very short infringement brought to an end for a very clear reason, and an infringement that would have gone on and on had it not been; in those circumstances whether that short period of 15 days, 30 or 45 does not matter at all.

THE CHAIRMAN: So you are saying the OFT took into account that it was short ----

MR. WARD: Yes.

THE CHAIRMAN: -- as opposed to much longer, and whether it was short, as in 15 days or, say, 30 or 40 days, really does not make any difference, that is how you answer Mr. Cook's ----

MR. WARD: Yes, and if you assume in Mr. Cook's favour that he is absolutely right about the duration of the infringement, it does not unravel any of the OFT's reasoning on this point, because the OFT's reasoning is about the reason for the infringement coming to an end. They did not say "Exceptional circumstances would only kick in if the infringement was less than 20 days", or something like that, or even the precise length of it was in any way relevant. What was relevant was why it came to an end, and that is what one finds reading the actual reasoning of the OFT.

THE CHAIRMAN: Yes, thank you.

MR. WARD: Step 3 – The deterrent multiplier. It is perhaps useful just to step back for a moment and ask why the deterrent multiplier is there at all? The reason, of course, is this: the legislation – the Competition Act – puts on a statutory maximum of 10 per cent. of overall turnover, i.e. the entire undertaking, yet the starting point for the penalty is a maximum of 10 per cent. of the relevant turnover, and that is the market in which the infringement took place. Here, we have a fairly narrow market definition – aluminium spacerbars in the UK. For your note that is para.621 you can see that referred to, amongst other places. That creates a common problem, particularly in building industry cases where undertakings will deal in a whole range of different markets, building products and services – they may be involved in very serious infringements – and may be part of a much larger undertaking. That indeed is, of course, this case, because the aluminium spacerbars' part of the DQS undertaking – never mind the other companies in the group, just DQS itself – was a very small percentage. We have set out various figures in the skeleton argument but with deference to the problems of confidentiality I

shall not read them out. We know that one of the crucial policy aims of the penalties' regime is effective deterrence, and as Lord Carlile observed earlier it is not just deterrence of the undertaking itself, it is deterrence of other undertakings in the field. Here, there is a particularly acute problem because this is in the building industry and as you will be aware and as a matter of public record there have been a large number of cartel penalties imposed by the OFT (on occasion upheld by this Tribunal where challenged) in the building industry. You will see this referred to at paragraph 578 of the Decision, deterrence is a very important policy objective in the glazing sector and one might add, although in fairness the OFT did not, and in the construction sector more generally.

So there one sees a problem. One needs effective deterrence, and yet the individual markets in which the infringements take place are small relative to the size of large (construction industry in particular) conglomerates, but the same problem of course arises in other sectors. The solution that has been adopted, both by the OFT and by the European Commission is to apply an uplift for deterrence in order to make the penalties effective for the purposes of deterrence. Here it is relevant to recall and, in my respectful submission, not lose sight of just how small the penalty was in relation to turnover even after the uplift had gone on, and we have set out the relevant figures at paras. 41 and 42 of our skeleton argument. It still remained very, very small and way, way below the statutory maxima of 10 per cent.

Mr. Cook says "Where is the reasoning?" In my respectful submission the reasoning here is entirely sufficient; it is in paras.64 and 65. I cannot read words into it but read fairly they encapsulate what I have just said. His criticism in a nutshell is not that this is somehow perverse to take this approach to the problem of deterrence at all, it is that the figure of 2.25 he says is arbitrary in some way, or there is no justification for the figure. But the justification for the figure comes from the policy concern that is expressed. Alighting upon the figure is an exercise of the OFT's Judgment, and as you have already seen whilst the guidelines emphasise the importance of deterrence, they do not indicate any method by which effective deterrence is to be achieved. It is left to the OFT's judgment and, of course, picking on any figure at all is bound to be an exercise of judgment. Here we have a penalty of X, that seems very small compared to the overall size of the undertaking, we need to increase it; as a matter of our judgment what would be appropriate? Every bit an exercise of judgment as fixing the original starting point is an exercise of judgment. If you had a scale of 0 per cent. to 10 per cent. and , as the regulator it is the OFT's responsibility to fix upon an appropriate figure. Here, one understands where the figure comes from, from the rest of the reasoning. It is a very serious infringement, there is a strong need for deterrence, particularly in this kind of industry, and the figure that we would have otherwise alighted upon is way, way below the statutory maximum

– vanishingly small, almost. So the 2.25 become simply an exercise of judgment. Can it be impeached in this Tribunal, only if you consider it to be outside the bounds of the OFT's discretion, in a position where the OFT's discretion is particularly wide.

We submit that not only is the reasoning sufficient, but the level of the uplift, modest as it is, is entirely appropriate and within the OFT's discretion. With that, if I may, I will move on to financial hardship.

The general principle here, as we have set out in our skeleton argument, and as the CAT has reiterated recently in the *Achilles*' case, which we refer to in our skeleton argument, is the OFT was not obliged to consider financial hardship, but it is right to say that it did consider it in this case, because of course it was looking at size and financial position. It considered it but decide it was not a sufficient basis upon which to reduce the penalty. The question is: has it committed any error of law in so doing? We submit, as you anticipate, that it has not. In fact, the argument that it did, in my submission, has an air of total unreality about it because, just to remind you of what has been much discussed already this morning, at the time of the OFT's decision, 26th June 2006, it was considering the material that had actually been put before it and that material was about DQS, or DQS PBM, which indicated DQS PBM was making losses – we accept that. That, of course, is just to say that here is an undertaking entering a cartel that is getting in financial difficulty, but what we know now and did not know then was of course that it had been sold; it had been sold on 20th June, the relevant business – not the undertaking but the relevant business – and the OFT had not been told anything about this. It is not just the fact of sale, which was only six days before, but the negotiations for sale were well advanced, or anything of the kind. So actually the OFT decided the case on a completely false basis which was DQS was continuing in this business and continuing presumably to run up serious losses as a result. But that was a wholly historical problem, it had gone – we will talk about the after effects in a moment. But the basis on which the Appellants had advanced their case was essentially false. I am not saying it was false at the time it was advanced, but no longer represented the position when the decision was taken. So it is almost bizarre to come before the Tribunal this morning and say "There is something wrong with the reasoning of the OFT on the material that was, in any event, irrelevant by the time the decision was taken", it just beggars belief.

What Mr. Cook said this morning is that it was somehow incumbent on the OFT to find out more about the financial position, particularly in respect of Precision Concepts, and I want to emphasise something that Mr. Scott said this morning, which is indeed correct, that Precision Concepts had been notified that it was to be held liable for the penalty. It is in the supplementary statement of objections. Now, that is not in fact in the bundles before you, but

if you would like to see a paper trail of this proposition, in the observations put in by DQS on 22nd December 2005, which are their so-called "supplementary observations", they record this fact at para.4.2 of that submission. I hope I need not therefore burden you with the supplementary statement of objections as well.

MR. SCOTT: Just to say it was at that document that I was looking when I made the point, because that was the document that made me think about the point that you are making.

MR. WARD: Yes, and Mr. Cook very fairly has not sought to make any kind of procedural point here at all, because Precision Concepts was notified it was at risk of a penalty here under the supplementary statement of objections. But Precision Concept strategy throughout this litigation has been to keep its head down, and not to explain itself, and not to get involved. Mr. Cook is quite right to say that that was within its rights. I do not suggest for a moment it was obliged to do so but you will recall it was only added in to this Appeal by way of a late amendment.

So Precision Concepts chose to hold its fire. I fully understand, of course, that part of what is being said is that it is not liable here in any event. But what was being advanced here was a case on mitigation in effect – using the word rather loosely – a positive case was being advanced on behalf of DQS to say "You really should not put a large penalty on us because we do not have any resources." What the OFT said, quite fairly, was "That is all very well, but you have not chosen to tell us anything about the resources of Precision Concepts." As we saw from the balance sheet that Mr. Cook took you to earlier, at least at the end of 2004 Precision Concepts had £1.2 million in net assets, so there were certainly some questions to ask about that had that been put before the OFT.

The reason why Precision Concepts is so important here is that it is quite wrong to see DQS as a stand alone entity, it is not. It is part of a group of companies, and it enjoys privileges as a result of its status in that group that are highly relevant to its ability to raise the necessary funds to pay any penalty, because of course financial position is not just the function of the current balance sheet; and I do not want to labour the point, it has been well ventilated this morning already. When one asks "What is DQS's financial position at any one point?" it is critical to its ability to pay to look at the relationships within what I might loosely call the Precision Concepts' Group. Could I ask you to pick up the Appeal bundle itself? At annex 1 to the one of the sets of representations, is a chart – Appendix 1, Structure Chart. My bundle is not paginated, but it is behind a blue divider 3, which contains DQS's supplemental written representations and very roughly it is the middle of the file.

What we see here is the structure above the level of PBM which was, of course, all unknown to the OFT at the time of its Decision. You see here the 20 and 80 per cent. shareholdings of St.

Gerard Holdings and Hayward Williams, and then Precision Concepts and then various people and trustees. What we see from this is that this is effectively a family trust for the Sander Family. We know that because it is not just the name "Sander" that appears repeatedly, but in fact from Mr. Sander's oral observations to the OFT at the administrative stage, he explained that if I may just pick it up – "Charles Alan Garnet Sander", that is the Mr. Sander with whom we are primarily concerned. "Christopher Andrew Sander" is his son, "Susan Sander" is his wife, and then on the right hand side of the tree, "Susan Clare Nunn" is his daughter, "Lynn Parnell" is the widow of a founding director. "Phillip John Sander" is his son, "Louise Jane Turner" is his daughter.

We know that the Board of Precision Concepts Ltd., consists of Mr. Sander and his wife. We also know that Mr. Sander is regarded as the ultimate controlling party of Precision Concepts itself. We know that from Precision Concepts 2004 accounts, and for your note it is para.30 in those accounts. We know that Mr. Sander has a controlling interest in the PBM Group, and we know that from the way Mr. Jones described it in his oral representations to the OFT. Just to save you looking it up it is appendix 4 to the Notice of Appeal and the para. I am referring to is on p.1. It says:

> "I am accompanied by Mr. Charles Alan Garnet Sander (known as Jim Sander) who owns the controlling interest in the PBM-DQS Group through his companies St. Gerard Holdings and Precision Concepts Ltd."

If it is helpful to turn that up it is appendix 4 to the notice of appeal so it is towards the back of this bundle: "Transcripts of Oral Representations".

MR. SCOTT: Page 9, line 21 to 29.

MR. WARD: Exactly. Of course, this will all be relevant in due course to the question of whether this is all one undertaking, but the reason it is relevant at the moment is that the relationships between these companies are perfectly appropriately in the case of a family trust rather different to the kind of relationships that exist between wholly independent entities in the market place, and we know that by looking at a little of the detail of their published accounts. I hope you have somewhere a bundle of the disclosure made by the Appellants following the first CMC – it came under cover of a letter from M&A on 5th October 2006.

I do not know if I have the same tabs as you, but the first tab I have contains the subscription and Shareholders' Agreement, which I need not trouble you with at the moment, and the second tab contains the guarantees provided to Enterprise Finance Europe.

THE CHAIRMAN: We have those.

MR. WARD: If I could ask you to turn to p.8 of the first of those guarantees, it is Schedule 1, Part 1 of the guarantors. What you see is on this occasion there are guarantees provided on behalf of

Double Quick Supplyline by PBM, St. Gerard's Holding, Cogent Passenger Seating and Precision Concepts Ltd itself. I am not suggesting there is anything wrong with that, I am just suggesting this is obviously very beneficial to DQS.

Then if we move on behind three further tabs, we come to the accounts themselves. What we have are accounts for DQS and PC for each of the years 2001 through to 2004. In each case what I would like to draw very briefly to your attention is s.20 (or s.21 in some years) dealing with related party transactions.

THE CHAIRMAN: Are we looking at the notes to the accounts?

MR. WARD: Yes. I am not suggesting for a moment anything improper is happening here, I want to make that absolutely clear. In the 2001 accounts for DQS we see (p.14 of the notes) s.20 – "related party transactions: CAG Sander, a director of the company has entered into a guarantee in respect of the amounts owed by the company to the invoice discounting company which amounted to £951,000." So a personal guarantee. Then we see that St. Gerard Holdings has also provided unspecified guarantees. I am on p.14 of the 2001 accounts at the moment.

THE CHAIRMAN: This is replicated each year, is it not?

MR. WARD: With variations.

THE CHAIRMAN: With different figures.

MR. WARD: I will not take you through year by year, but I wanted just to highlight a couple more points arising out of these accounts. Each year you will see Mr. Sander of St. Gerard Holdings giving these guarantees, Mr. Sander giving personal guarantees that amount to more than £3 million by the end, in respect of this discounting facility. Also, interestingly, PBM made loans, interest free loans, to other entities in the group – and other interest free loans moved in other directions. Just by way of illustration if you can look at the first set of accounts for Precision Concepts, 2001, p.27? It starts by referring to the various guarantees that have been provided within the group, then there are purchases made within the Group, and then: "The company has received an interest-free unsecured loan of £142,000 from St. Gerard Holdings. The company has received an interest-free unsecured loan of £16,000 from Plastic Building Materials."

Then other loans have been made.

Then just a further illustration, and this is the final one, I hope I am not taxing your patience, if one turns to the Precision Concepts' accounts for 2003 at p.27, around the middle of the page: PBM paid management charges of £141,000 to St. Gerard Holdings. PBM paid management charges of £10,500 to Cogent Seating and then there is a reference again to the guarantees given by CAG Sander in the following line.

These are all really by way of illustrations and I am simply illustrating the point that the relationship between these companies is close, and there is a clear ability to draw down on the

financial power of Precision Concepts and, of course, its owners, because Mr. Sander personally is giving very large guarantees here where it suits him to do so. I think £3.5 million is the largest that I have found in these documents anywhere. That is not the same as a free-standing company seeking to go to market to borrow money on the strength of its balance sheet.

The pattern continues into period of the sale of the business where at a late stage Enterprise Europe were trying to get yet more personal guarantees from Mr. Sander and, as you have seen moments ago, Mr. Sander gave a guarantee to SIG as part of the sale, so his personal involvement has carried on throughout. What I say is that of course we do not know the detail of this, we know very little about PC and its activities. We learned today from Mr. Jones when he gave his oral evidence that St. Gerard Holding obviously has some kind of independent activities – investment activities, property holding of some kind – and there are hints of that in the accounts, I am not suggesting that is an ambush, it is just that we do not know much about it.

What we do see from this though is that the OFT was absolutely right to say "If you are going to make a case on financial hardship, we had better understand the position of the parent company, because DQS's role in the group is vital to understanding its financial position, its ability to pay, it is just not a free-standing entity with a negative line on the bottom of its balance sheet.

MR. SCOTT: Sorry to interrupt you, just a moment. Earlier on you referred to "Family Trust relationships"?

MR. WARD: Yes.

MR. SCOTT: My recollection of the chart, which I have now closed, was that there were some non-beneficially held at the top right of it?

MR. WARD: It might be wisest to turn the chart up again because I do not want to speak with confidence about it. Just to remind you, it is appendix 1 to DQS's written observations that are described as supplemental. It is roughly in the middle of the Appeal bundle.

MR. SCOTT: Here we are, so James David Jones is a Trustee ----

MR. WARD: For Mr. Sander.

MR. SCOTT: Yes, and then of ----

MR. WARD: Mrs. Sander. And then Mary Isobel Taylor is trustee of Mr. Sander and again a trustee of Mrs. Sander.

MR. SCOTT: The reason I raise that is that I realised in the Articles of Association of PBM there is a reference to family trust, but as I understand it from this diagram there are no direct family trust holdings in PBM, they are actually in PCL?

MR. WARD: Yes.

MR. SCOTT: And we do not have the Articles for PCL.

MR. WARD: You will appreciate, sir, that the way the OFT puts its case is not that we have unravelled the secrets of all this, but that we cannot, and that the information before the OFT and now before the Tribunal is partial. What you do not have is a cogent account of DQS's true financial position, even if now it is merely a shell company selling off the residue of its assets.

MR. SCOTT: When one looks at the most recent material that has been put forward by the renamed DQS that also raises many questions, because what you were shown this morning by Mr. Cook were management accounts that went up to May 2006, which is the period just before the sale. Obviously, it would be asking rather a lot to have audited accounts for the last six months of 2006, I am not suggesting we should, but what you do not have is any documentation at all dealing with the current position of any of the entities in the PC Group, nor do you have any documents in particular about the current position of the remaining company in the PBM Group, PBM Roof Systems. What Mr. Jones said in evidence this morning – if I may paraphrase, I hope not unfairly – he said it was just about breaking even and it would not go bust if it had to bear this penalty, it would just be very undesirable and place a strain on the business. Of course the transcript will tell you exactly what he said, but that was the flavour of it, and of course I will say that is nowhere near sufficient to demonstrate there should be any reduction of the penalty.

As to DQS itself, Mr. Jones has explained that basically it has no money left. My primary submission is that that is just not a good enough reason for reducing the penalty when one asks the broader question which is what about its ability to pay? For the reasons I have given that ability to pay is rather greater than the Appellants would have you believe. The one aspect of Mr. Jones's evidence that I wanted, very respectfully, just question on the basis of absence of underlying documentation is in his actual witness statement, and I think it is only right that I make clear that we are not accepting this. It is the last couple of paragraphs of what he says (38 through to 40 of his witness statement) he is talking here in para.38 about what one might loosely call the fate of the sale proceeds, and why there is nothing left in order to pay the fine.

MR. SCOTT: I am missing para. 40 in that copy.

MR. WARD: It is 38 through 40 I want to draw to your attention and in fairness to my learned friend make clear what we say about this.

THE CHAIRMAN: The last three paragraphs?

MR. WARD: The last three paragraphs.

THE CHAIRMAN: And then you choose a moment to break.

MR. WARD: This would be a very convenient moment. Very briefly, para.38 he talks about what the remaining balance is of the £3.9 million pounds of sale proceeds, and says there is a deficit of £27,000. I have nothing at all to cross-examine Mr. Jones with on any of these figures, because I do not know, because like you I have not seen any underlying documents whatsoever which relate to this. But a question which immediately arises in the mind when looking at these figures is to what extent do these liabilities relate to inter-group liabilities, and we do not know. We did ask actually in our skeleton argument, in the sense that we said in the skeleton argument in particular in respect of this, it needs to be substantiated with documents. Then at paras. 39 and 40 Mr. Jones does give some evidence about PBM Roof Systems' ability to pay the fine. He says in para.40: "I believe a deficit in the order of £20,000 to £30,000 could be managed by PBM Roof systems Ltd, but funding a deficit of over £200,000 from this source would be impossible. That, of course, is not substantiated because we know nothing at all about the true financial position of PBM Roof Systems and indeed, critically, the ability of Precision Concepts to help, or indeed Mr. Sander personally. That is why I asked Mr. Jones whether he was able to speak on behalf of Precision Concepts and he cannot, he is not employed by them. Of course, he knows something about their business by virtue of working within the Group, I am not suggesting he does not, but he is not here to speak for Precision Concepts at all.

So what I say about these paragraphs is not: "I put it to you, Mr. Jones, this is all a pack of lies", I am not in a position to do that at all. But what I am in a position to say is that even taken at their face value they do not answer the larger questions about ability to pay. Even if my friend, Mr. Cook, recalls Mr. Jones, we will respectfully sound a note of caution given the degree to which documents relating to Precision Concepts and its ability to raise funds have not been put before this Tribunal at all. With that, if it is convenient, I will stop for now.

THE CHAIRMAN: Ten past two.

MR. COOK: Sir, simply the warranty point that was raised earlier, and rather than waiting until my friend had finished, it was simply in case anyone wanted to look at the clauses over lunch– I cannot imagine why they would want to – I think the answer to your question is going to be , Sir, that the warranty was given obviously at the date the contract was signed, that contract was actually signed in 2001 and, like all warranties, it is a snapshot at that particular point, it is not a warranty for ongoing future, so the warranty is irrelevant to this proceeding, I think.

MR. SCOTT: I would look at the agreement more carefully.

MR. COOK: That is why I stood up now so that if you wanted to do so you were not doing it on the hoof during the hearing.

MR. SCOTT: Yes, to be fair to you, we are not trying to do contractual interpretation here, but I think I would look at 18 in the Warranty and then in the main agreement, 5 – particularly 5.1.3 – 16.2, 16.1 and 5.2. I have not done a contractual interpretation on it, but I think it would be worthwhile looking at those.

THE CHAIRMAN: Right, ten past two.

(The hearing adjourned at 1.05 p.m. and resumed at 2.10 p.m.)

MR. WARD: I had finished with Steps 1 to 3, and I have remaining Step 4 and the question of PC's liability. I am not going to say anything on Step 4 to add to what has already in my skeleton. My friend relied on his skeleton, I rely on mine. It makes no difference whether Mr. Sander was managing director or just chairman.

On Step 5 the liability of Precision Concepts, again I really just rely upon the skeleton. We set out the authorities, we have explained why we say Precision Concepts is jointly and severally liable. Mr. Scott put our case to Mr. Cook in a nutshell; that is indeed our case. I was just going to refer briefly to a couple of points by way of response to the way Mr. Cook put it in argument.

If I understood him he was saying that one might somehow distinguish between Mr. Sander, the man who was acting in his capacity as chairman of DQS when he became involved in the infringement, and Mr. Sander the chairman of Precision Concepts, as if somehow Mr. Sander could have left his Precision Concepts' hat at the door when he attended the meeting in question. Of course, that is not right, it is a wholly unreal proposition. The reality is that he was chairman of both, as well as the intermediary organisations and of course, if he had seen something of concern to Precision Concepts it was obviously incumbent upon him to act on Precision Concepts' behalf in that situation. So we say that essential proposition is flawed, and indeed, I would just very briefly draw attention to three passages in the documents that show how closely Mr. Sander personally is to be associated with Precision Concepts and how the two are treated as almost interchangeable indeed by Mr. Sander, Mr. Jones and by Precision Concepts itself. I already referred you to a passage in the DQS oral representations shortly before lunch, which I will just read again – there is perhaps no need to turn it up – Mr. Jones said:

> "I am accompanied by Mr. Charles Alan Garnet Sander (known as Jim Sander) who owns the controlling interest in the PBM-DQS Group through his companies St. Gerard Holdings and Precision Concepts Ltd."

That is a very natural way to describe it and we say it is a fair and proper way to describe it, and the more one looks at the law and the detail, the more closely that appears to reflect reality.

Then there is Mr. Sander himself who said in his witness statement, and this is quoted in para. 46 of the skeleton argument for the Appellants. Talking about the DQS business, "I was new to the business having only acquired it on 11th June 2001", talking quite naturally and understandably as if he had personally acquired it.

Then finally there is the statement which appears at the end of the Precision Concept's accounts, each year in slightly different formulations, and 2004 will do: "CAG Sander is the ultimate controlling party of the Company". I make these points really on the evidence just in addition to the submissions we have made in our skeleton argument by no means instead of, and the gist of our case there, as you appreciate is, Mr. Sander is the chairman of all of these entities, is a director of most of them, and was personally involved in the infringement, as Mr. Scott said, he could have put a stop to it and he did not. That is good enough, we submit, on the case law.

Unless I can assist further those are the submissions for the OFT.

THE CHAIRMAN: Thank you very much, Mr. Ward.

MR. SCOTT: You have given us a number of authorities, and we have had a chance of reading the authorities. Just on the last point, would I be correct in thinking that you adopt *Hydrotherm* [*Hydrotherm Geratebau GmbH v Compact de Dott Ing Mario Andre Oli & C. Sas* (C170/83) [1984] ECR 2 999] in terms of the various legal and natural persons having identical interests and being ultimately controlled by the same natural person who also participates in the agreement, as distinguished from *Dansk Rorindustri* [*Dansk Rorindustri v Commission of the European Communities* [2005] ECR 1-5425C – 189/02] which suggests that having the same natural shareholders is not in itself conclusive, but you have to look at the facts?

MR. WARD: Yes, I would say this: there is case law in the ECJ and some of it is in the bundle, which says 100 per cent. shareholding raises a presumption of control and, in fact, there are cases and indeed decisions of the Commission which suggest less than 100 per cent. can raise the presumption of control. Here we are not relying on any presumption that arises merely by virtue of shareholding. We are relying on the fact that there actually was control by Mr. Sander personally, or PC through Mr. Sander, he was the chairman and he was actively involved, he was not a mere figurehead. Does that answer the question, sir?

MR. SCOTT: Yes, that answers the question, thank you.

MR. WARD: Thank you.

THE CHAIRMAN: Yes, Mr. Cook.

MR. COOK: Sir, I will be very quick. I have a couple of very short points to come back on in response to my learned friend and then I still have the warranty point to try and deal with again.

In response to my learned friend, very quickly, he raised some criticisms firstly of the evidence that we were advancing in respect of the position, particularly DQS and upwards following from 2005 and 2006. The management accounts are as good as we can get at the moment, but they are not audited account. In terms of the position following the sale, the position is set out in Mr. Jones's witness statement, and that is, in many ways, the best evidence that we could produce. It is right to say that PBM and DQS currently only have one employee, it is Mr. Jones – PBM Roofing Ltd. the operative business, still has a number of employees engaged in that business, but there is a single individual, Mr. Jones, engaged in the business of trying to wrap up the tail ends left over following the sale, including collecting in debts, trying to deal with litigation disputes that were outstanding, all of these points. There are not accounts in the way that there will be come April or June next year, by the time they have to be filed by which point most of these disputes will hopefully have been resolved to allow those accounts to have been produced. Now, there could or there would be somewhere or other going back to the underlying invoices and all this type of material to try and substantiate each of those individual points and in my submission that is not something the Tribunal would ever have wanted to have been involved in. Mr. Jones has spoken on oath of what he considers to be the true position based on his knowledge of the company. In my submission that is more than sufficient in these circumstances. What he is saying is credible, it is realistic, it is supported by other documentation that shows where the sale went, the completion statement, etc., and what we know about the historical position in the companies, and that should be, in my submission, sufficient for the Tribunal to accept in the absence of anything to the contrary. It is in many ways the best that can realistically be done in the circumstances.

A brief point in relation to reference being made to Mr. Sander's guarantees being £3.5 million, as though Mr. Sander was immensely wealthy and capable of providing guarantees which are genuinely of that value; one must bear in mind in relation to these, these guarantees stand at the back of quite a long queue in terms of security. First off, the borrowings are secured on all of the trade debtors and things like that. In practical terms, while notionally the guarantee is for the full sum, everyone is aware that all he is ever going to be called upon to pay is any outstanding balance which would always be a minute fraction of that. So the notion that in some way Mr. Sander is immensely wealthy in this regard I am told is simply not supported by that piece of evidence that has been referred to.

The other point was in relation to the question in terms of the breakdown that is provided in Mr. Jones' statement, again of the financial position of DQS following the sale, and there was a question raised as to whether any of the debts included inter-company loans. The figure there is about £220,000 or so. I can bring Mr. Jones back up just to have him answer the

question, if you would like or I can pass it on as instructions. I am told that none of that figure includes inter-company debts. There are, in fact, some small inter-company debts which effectively are on top of that, we have not included them, that is just simply trade creditors, trade debtors.

THE CHAIRMAN: That £200,000 figure includes no inter-company loans?

MR. COOK: None of it includes inter-company and Mr. Jones can very impressively reel off every single one of them with figures if you wish, but I cannot imagine the Tribunal would be interested at all.

Those were simply the points that I wanted to come back on in relation to my learned friend's submissions. With all of the other points there is obviously a huge measure of disagreement between them, and I am not going to repeat everything I said at length this morning.

The other point was the warranty point and, in particular, what if anything arises from that? Having gone back through it, it ultimately does become a contractual construction exercise to some measure. I would suggest the only natural construction of that is the warranties are given at the date of purchase, the language of the warranty that you are particularly interested in, which is the competition warranty, is phrased in the present tense – the company is not party to any agreements, it is at that particular time, and if you look at all of the warranties, and this is always the case with share purchase agreements, and there is nothing that moves in terms of the language that moves it beyond this. It is saying "You were buying into this business and I am promising you at the date you are buying in what you are being told is right and there are no other unforeseen liabilities, or if there are I am accepting them".

THE CHAIRMAN: Well we have the language, do we not? We have the language, it is in a sense a satellite issue, that is clear.

MR. COOK: If it is right – and it is up to you to some extent to look at it and form your own views – if it is right that that warranty pre-dates by 18 months the events here, really I would suggest one could ignore those warranty points (otherwise interesting) as not being relevant; if I can leave it on that basis.

MR. SCOTT: Yes, they put Mr. Sander on Notice of competition law as it were.

MR. COOK: Yes.

MR. SCOTT: One other question which has to do with the termination of the infringement. If one turns to para.525, the warrants were executed against the other three companies, we are assuming that DQS desisted on the same day, is that correct? I cannot remember any documentary evidence about when DQS became aware of the execution of the warrants?

MR. COOK: If you give me a moment, sir, I will see if anyone behind can help.

THE CHAIRMAN: (After a pause) Well I think, Mr. Ward, you would be content for us to proceed on the assumption that they desisted on the same day?

MR. WARD: Our submission is it is irrelevant.

MR. COOK: In which case, thank you, Sir.

THE CHAIRMAN: Thank you very much indeed. Can I express our gratitude to both counsel for the very clear skeletons and presentation and our Decision will be dealt with in the customary way for this Tribunal.

(The hearing concluded at 2.20 p.m.)