Neutral Citation Number: [2014] EWCA Civ 482

Case No: C3/2013/2403

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
The Hon Mr Justice Norris, William Allan, Prof Gavin Reid
1204/4/813

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 14th April 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

- -

Between :

AKZO NOBEL N.V.	**Appellant**
- and -	
COMPETITION COMMISSION & ORS	**Respondent**
METLAC HOLDING S.R.L.	**Intervener**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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(instructed by **SLAUGHTER AND MAY**) for the **APPELLANT**
DANIEL BEARD QC and ROB WILLIAMS
(instructed by **THE TREASURY SOLICITOR**) for the **RESPONDENT**
ROMANO SUBIOTTO QC and MARIO SIRAGUSA
(instructed by **CLEARY GOTTLIEB STEEN & HAMILTON LLP**) for the **INTERVENER**

Hearing dates : Tuesday 25th March 2014

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Judgment

Lord Justice Briggs :

1. This appeal from the Competition Appeal Tribunal raises questions of interpretation and application to particular facts of Section 86(1) of the Enterprise Act 2002 ("the Act"). Section 86(1) seeks to identify the circumstances in which an enforcement order made under Chapter 4 of the Act may extend to conduct outside the United Kingdom. It provides as follows:

> "(1) An enforcement order may extend to a person's conduct outside the United Kingdom if (and only if) he is –
>
> (a) a United Kingdom national;
>
> (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
>
> (c) a person carrying on business in the United Kingdom."

2. The enforcement order in issue in these proceedings was one which the Competition Commission proposed to make (in the absence of receiving satisfactory undertakings) to prohibit completion of the indirect acquisition by Akzo Nobel N.V. ("Akzo Nobel") of 51% of the shares of Metlac Holding S.R.L. ("Metlac Holding"), following an investigation of the proposed transaction by the Commission, on a reference by the Office of Fair Trading, and a report by the Commission dated 21st December 2012 ("the Report"). In bare outline the Commission concluded that the proposed transaction would, if carried into effect, result in the creation of a relevant merger situation which might be expected to result in a substantial lessening of competition ("SLC") within the United Kingdom market for the supply of metal packaging coatings for beer and beverages ("B&B"): see Section 36(1) of the Act. Having decided that this would give rise to an anti-competitive outcome within the meaning of Section 36(2), the Commission concluded in its Report that the only remedy likely to be effective was prohibition of the transaction.

3. Akzo Nobel is incorporated in the Netherlands. Metlac Holding is incorporated in Italy. The proposed share acquisition arose from the exercise of an option to purchase the 51% shareholding held by Akzo Nobel's wholly-owned subsidiary Akzo Nobel Coatings International BV ("ANCI"), also incorporated in the Netherlands, which had been granted by members of the Italian Bocchio family. ANCI already owned the remaining 49% of the shares of Metlac Holding. Completion of the transaction triggered by the exercise of the option would not involve any conduct within the United Kingdom by any of the parties to that transaction.

4. The Akzo Nobel Group of companies, of which Akzo Nobel is the ultimate parent company, enjoys a substantial share in the UK market for metal packaging coatings for B&B. Metlac S.P.A, another Italian company, owned as to 55.56% by Metlac Holding and 44.44% by another subsidiary of Akzo Nobel had a smaller but significant share of the same UK market. The Commission's conclusion that there was an SLC arose from its perception that the merger between those two participants in that UK market would give rise to a loss of both actual and potential competition.

5. Akzo Nobel applied for a review of the decision of the Commission on a number of separate grounds. They were all rejected by the Competition Appeal Tribunal (Norris J, Mr William Allan and Professor Gavin Reid) by its judgment of 21st June 2013. Akzo Nobel's appeal to this court has been limited to what is in substance a single ground (although pursued under two limbs), namely that the Commission had no jurisdiction to make an enforcement order against it, because the conduct to be prohibited was conduct outside the United Kingdom and because it was not a person carrying on business in the United Kingdom within the meaning of Section 86(1)(c). The two limbs of Akzo Nobel's appeal are:

   i) That the Tribunal's conclusion that Akzo Nobel was a person carrying on business in the United Kingdom involved an error of law; and

   ii) That the Tribunal based its conclusion upon a factual analysis which was not to be found in the Commission's Report.

6. Most of the written and oral argument presented to this court focused upon limb (i). We were told that this was the first occasion upon which the Commission had ever sought to make an enforcement order against a foreign company in relation to its conduct outside the United Kingdom, so that the issue of interpretation of Section 86(1)(c) was both novel and of general importance.

The Facts

7. It is unnecessary to recite, or even summarise, the findings of fact which led the Commission to conclude that the proposed transaction would create a relevant merger situation resulting in an SLC. Although aspects of that conclusion were challenged in Akzo Nobel's appeal to the Tribunal, those issues have not been pursued on this appeal. Nor is it necessary to set out the reasons why the Commission considered that prohibition of the transaction was the only remedy likely to be effective. The only factual findings relevant to this appeal are those which relate to the question whether Akzo Nobel is (and was at the time of the Report) a person carrying on business in the United Kingdom within Section 86(1)(c).

8. It is to be noted in that context that it is not a requirement of Section 86(1)(c) that the UK business of the target of an enforcement order must be, or even be related to, the business which gives rise to the actual or threatened SLC. Section 86(1) identifies three criteria, any one of which is sufficient to render the target amenable to the Commission's regulatory jurisdiction. I mention this because the Commission's focus upon the Akzo Nobel Group's activities in the UK was understandably directed to its activity in the metal packaging coatings market, rather than its activities in the UK generally.

9. I have taken the following summary of the relevant facts from sections 3 and 11 of the Report. Parts of the passages from which I have drawn my summary have, throughout the proceedings, been treated as commercially confidential. I have endeavoured as far as possible to avoid trespassing upon that confidence, and the outcome of this appeal does not depend upon a detailed description or analysis of those matters. It means however that my summary of the relevant facts is, in certain

respects, less than complete, and less detailed than I would have preferred, had I been unconstrained in that respect.

10. The Akzo Nobel Group had a global business in the manufacture and sale of metal packaging coatings. Its five operational sites in Europe included two in the UK, at Birmingham and Hull. The Group had entered the manufacture and supply of metal packaging coatings in January 2008 by reason of its acquisition of ICI, a large and well-known UK-based chemical group.

11. By 2011, the Akzo-Nobel Group divided its business into three operational divisions called Business Areas, namely Performance Coatings, Decorative Paints and Speciality Chemicals, which each accounted for approximately one-third of the Group's 2011 turnover. Each of those Business Areas was further divided into Business Units ("BUs"), which were further divided into sub-Units ("SBUs"). Depending on the specific activities and customers served, the organisation of those BUs and SBUs was either by market or by geography. The Performance Coatings Business Area included the following BUs: Industrial Coatings; Automotive & Aerospace Coatings; Marine & Protective Coatings, Powder Coatings, Industrial Coatings and Wood Finishes & Adhesives. The Industrial Coatings BU includes an SBU called Akzo Nobel Packaging Coatings ("ANPC").

12. Like most modern corporate groups, the Akzo Nobel Group consisted of a parent holding company and a large number of subsidiary companies, including a number of subsidiaries incorporated and carrying on business in the UK. The results of all its operating subsidiaries are consolidated in the accounts of Akzo Nobel itself, and that company's annual report sets out the overall strategy of the Group's business, describing its activities and strategic ambitions by reference to each of its three Business Areas.

13. In accordance with Dutch law, Akzo Nobel operated a two-tier corporate management structure, consisting of a Board of Management which reported to an independent Supervisory Board. The Board of Management was responsible for management of the company. The company had appointed senior managers together with the Board of Management, collectively known as the Executive Committee ("ExCo"), as the organisational body responsible for the day-to-day management of the whole Group and for its strategic direction. ExCo included members who had responsibilities for specific Business Areas, and responsibilities for specific countries or regions.

14. Under the heading "Carrying On Business" the Commission made specific findings about the management structure of the Akzo Nobel Group from which it is convenient to quote the following extracts:

> "11.90 We understand that within the Akzo Nobel Group there are a number of wholly owned subsidiaries which are incorporated in different countries. We saw sales contracts entered into by some of these companies relating to the supply of metal packaging coatings products in the UK (and correspondence between these companies and their customers) but, in our view, neither the identity of the contracting entity nor the corporate structure reflected how in

substance strategic and operational decisions were made within the Akzo Nobel Group. We noted that Akzo Nobel's business activities, such as its activities in the metal packaging coatings industry are organised by Business Areas (BAs), Business Units (BUs) and Sub-Business Units (SBUs). For example, Akzo Nobel's metal packaging coatings business activities were organised by the SBU ANPG, which Akzo Nobel told us did not have separate corporate identity as a legal entity (Akzo Nobel also told us that the relevant BU did not have separate legal identity). The subsidiaries within the Group sit within these Business Units…

11.91 Akzo Nobel told us that depending on the specific activities and customers served, the organisation of the SBUs and BUs is either by market or by geography.... We therefore recognised that there was a distinction between the corporate structure of Akzo Nobel and the operational structure of the Group. In our view these arrangements, which are common among large corporate groups, reflected a structure in which the decision-making is centralised within the Group.

11.93 These contractual arrangements (*set out in a confidential paragraph*) reflected the situation which we considered was not unusual for a Group structure of a multi-national company. While certain aspects of the contractual arrangements are at subsidiary level, we noted that the purchasing arrangements had significant aspects which were centralised.

11.95 We considered the organisation of the Group and the involvement of Akzo Nobel NV to assess the decision-making arrangements within the Group. Akzo Nobel told us that Akzo Nobel NV has only a peripheral involvement in directing strategy for the UK… The four members of Akzo Nobel NV's Board of Management and the four leaders with functional expertise have responsibility for day-to-day management of the company, the Executive Committee (ExCo). ExCo manages the company's day-to-day operations.

11.97 In our view these arrangements (*a reference to a confidential section*) show that the participation of Akzo Nobel NV through ExCo was extensive and includes the approval of operational decisions. We therefore did not accept that Akzo Nobel NV had

only a peripheral involvement in directing strategy for the UK.

11.98 The arrangements described by Akzo Nobel in its submission to us and in the Authority Schedule (*another confidential document*) are complex. The Group carries out operations in the UK and business operations are part of a SBU, BU and BA. We have observed that Akzo Nobel NV has structures in place such that the operations of the Group's various business activities are ultimately controlled by it. While appreciating that there are several steps of upward referral before the functional member of ExCo or Akzo Nobel NV takes a decision, the structure in place, in our view, is one in which the operations within the Group are centrally monitored and directed which limits autonomy within the BUs and SBUs in practice. In our view, the organisational structure and arrangements we have described above, including the relevant business units, is the means through which Akzo Nobel NV carries on business, including in the UK."

15. Save perhaps for the last sentence, the quoted passages from the Commission's Report consist entirely of findings of fact. They are not, and indeed could not be, the subject matter of challenge in this court, otherwise than on *Edwards v Bairstow* rationality grounds. There has been no such challenge.

16. The Commission's Report made no specific findings about the legal ownership of the businesses within the Akzo Nobel Group or, in particular, of the Group's businesses within the UK. I shall assume in favour of the Appellant that those businesses were, for the most part, owned by the Group's wholly-owned UK subsidiaries, rather than owned by, or held on trust for, their ultimate parent Akzo Nobel.

17. Whereas the Articles of Association of a typical UK incorporated company provide that its business is to be managed by its board of directors, it is clear from the Commission's findings that responsibility for the management of the businesses of all the Group's UK subsidiaries, both in strategic and operational (i.e. day-to-day) terms, rested with ExCo, an organ of the Akzo Nobel parent company.

18. For present purposes it matters not whether this wholesale transfer of responsibility for management from subsidiaries to ultimate parent was achieved by delegation by individual subsidiary boards of directors, alteration to their Articles of Association, or simply by the decision-making of 100% of the subsidiary's shareholders, as permitted by English law in relation to solvent companies: see *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Limited* [1983] Ch 258. However achieved, the result that Akzo Nobel itself (through its organ ExCo) managed the businesses of all its UK subsidiaries is a cardinal fact which, incidentally, distinguishes the operations of the Akzo Nobel Group from the traditional basis upon which shareholders may influence the management of the businesses of their companies, namely by voting at general meetings and securing the

appointment of directors of their choice, who are themselves charged with the management of the company's business. Although a departure from tradition, there is nothing at all unusual about the centralised group management structure which I have described. As the Commission noted, it is how most modern international corporate groups are managed.

19. In his excellent and concise submissions on this appeal, Mr. Tim Ward QC sought to characterise the management structure found to have existed by the Commission as limited to "monitoring and directing" activities and decisions carried out by other entities in the Akzo Nobel Group, leaving the substance of management to other entities in the Group, including the UK subsidiaries. While it is true that the Commission used the phrase "centrally monitored and directed" (in paragraph 11.98 of its Report), a reading of the Report as a whole and in particular the passages which I have quoted from it, make it clear that responsibility for management of the group's business together with actual strategic and operational management were all vested in and carried out by ExCo, and that the residual responsibility of individual subsidiaries consisted of such relatively low-level matters as ExCo permitted, by way of delegation, together with each subsidiary's audit and accounts. This is particularly apparent from the confidential Authority Schedule issued by ExCo, available both to the Commission, the Tribunal and to this court during the hearing of the appeal, but from which it would be inappropriate for me to quote. It is also apparent from the Commission's specific rejection of Akzo Nobel's submission that its involvement in directing strategy for the UK businesses was only peripheral: see paragraphs 11.95 and 11.97 quoted above.

Section 86 in its Context

20. The innocent-sounding phrase "carrying on business in the United Kingdom" has been much used in UK legislation and, indeed, by the English courts as an analytical tool. The industry of Mr. Ward and his team suggested that it appeared no less than 135 times in UK legislation going back as far as 1854. It has been in use within competition legislation since the 1940s, having originally appeared in the Monopolies and Restrictive Practices Act 1948. Like any phrase in a statute or other legal document, it must be read in context, having regard both to the general purposes of the legislation in question, and to the specific purpose for its inclusion, so far as that can be ascertained. A phrase may have a natural or ordinary meaning which admits of no ambiguity. Sometimes, as in the present case, ambiguity only appears when an apparently simple phrase has to be applied to particular facts.

21. The phrase "carrying on business in the UK" is not specifically defined in the Act, but some assistance is obtainable from the definitions in section 129. In section 129(1):

> ""Business" includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge;"

Section 129(3):

> "References in this Part to a person carrying on business include references to a person carrying on business in partnership with one or more other persons."

22. More generally, there was a sharp debate between counsel as to the consequences of the requirement to construe legislation purposively. Mr. Daniel Beard QC for the Commission, supported by Mr. Romano Subiotto QC for Metlac (intervening to oppose Akzo Nobel's appeal) submitted that the phrase "carrying on business" in the United Kingdom should be liberally construed, so as to bring within its boundary all those targets of appropriate enforcement action necessary to ensure that the Commission could fashion and impose effective remedies for SLCs falling within its investigatory purview. It would, they submitted, be a negation of Chapter 4 of the Act headed "Enforcement" for Section 86 to be narrowly construed, in particular because of the Commission's duty, enshrined in Section 36(3), to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.

23. For his part Mr. Ward submitted that Section 86 was designed to implement, in the regulatory context, the common law requirement that English jurisdiction is confined to persons and activities within the UK, rather than extended in breach of comity to persons and conduct in other jurisdictions. Section 86(1) was, he submitted, a deliberate limiting provision plainly designed to confine the reach of the regulatory jurisdiction of the Commission within bounds which respected international comity, and should therefore be construed with that purpose in mind. In particular, he submitted that it should not be construed so as to bring within the class of targets of an enforcement order persons (whether individual or corporate) with no presence or place of business in the UK, whose participation in UK business was confined entirely to conduct outside the UK.

24. It is in my judgment appropriate to have regard both to the wider general purposes of the Act in providing an effective regulatory regime to deal with anticipated or actual anti-competitive outcomes (see Section 36(2)), and to the specific purpose of Section 86(1), which is plainly to set boundaries to the class of persons who may, in relation to their behaviour outside the UK, be targets for enforcement orders. But neither of those purposes leads to a conclusion that Section 86(1) should either be broadly or narrowly construed. It must be interpreted with the fulfilment of both those purposes in mind so that, in particular, an interpretation which was destructive of either of them should be rejected, and an interpretation which gives best effect to both of them adopted if possible.

25. In that context I accept Mr. Ward's submission that international comity forms part of the reason why Parliament may be supposed to have thought it necessary to limit the class of targets of an enforcement order, in relation to conduct outside the United Kingdom. But it cannot be supposed that Parliament intended to apply a purely common law notion of comity, such as that set out in the note to Section 128 in *Bennion* on Statutory Interpretation (5th Edition):

> "*The principle of comity* An Act is taken to be for the governance of the territory to which it extends, that is the territory throughout which it is law. Other territories are governed by their own law. The principle of comity between

> nations requires that each sovereign state should be exclusively allowed to govern its own territory. So an Act does not usually apply to acts or omissions taking place outside its territory, whether they involve foreigners or Britons."

It is obvious that this cannot have been the intention behind Section 86(1) since it is in terms intended to permit three classes of persons to be subjected to regulatory control in respect of their conduct outside the UK.

26. Rather, it seems to me that Section 86(1) performs in relation to this regulatory jurisdiction a function often to be found in statutory provisions which give the English courts jurisdiction over the affairs of foreign individuals or companies, namely to set out connecting factors between targets of regulatory action and the UK which make it appropriate, rather than exorbitant, for the particular jurisdiction in question to be exercised over them in relation to conduct outside the UK. The connecting factors in the present case are UK nationality, incorporation under UK law and carrying on business in the UK. If any one or more of those connecting factors is shown to exist in relation to a person, then Parliament must be taken to have decided, notwithstanding the dictates of international comity, that it is appropriate to confer upon the Commission jurisdiction to make enforcement orders regulating that person's conduct outside the UK.

27. Mr. Ward laboured long and hard to persuade us that the phrase "carrying on business in the UK" had been habitually treated as synonymous with, or as a proxy for, the common law requirement that jurisdiction over a corporate body depended upon it having some 'presence' within the territory of the court exercising jurisdiction. He relied mainly on the well-known asbestosis case of *Adams v Cape Industries PLC* [1990] Ch 433, and in particular its analysis of what was described as "the *Okura* line of cases" of which the leading example was the Court of Appeal's decision in *Okura & Co Limited v Forsbacka Jernverks Aktiebolag* [1914] 1KB 715. The *Adams* case was itself about the question whether Cape Industries PLC and an associate company Capasco had established a sufficient presence in the USA to enable default judgments against them obtained in the USA to be enforced in England. The *Okura* line of cases relied upon by way of analogy were concerned with the question whether a foreign corporation had established a sufficient presence in England to render it susceptible to the English court's jurisdiction. Giving the judgment of the Court of Appeal, Slade LJ identified as the "most helpful guidance" in determining whether a foreign corporation is "here" so as to be amenable to the jurisdiction of our courts the following passage from the judgment of Buckley LJ in the *Okura* case itself, at pages 718-9:

> "The point to be considered is, do the facts show that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third

> essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression 'doing business?'"

Slade LJ continued:

> "It is clear that (special statutory provision apart) a minimum requirement which must be satisfied if a foreign trading corporation is to be amenable at common law to service within the jurisdiction is that it must carry on business at a place within the jurisdiction: see *The Theodohos* [1977] 2 Lloyd's Rep. 428, 430, *per* Brandon J."

28. Mr. Ward submitted that, by parity of reasoning, the use of a 'carry on business in the UK' test for the Commission's jurisdiction should at least require it to be shown that the target company was itself present within the UK and carrying out some business activity here. That could not, he said, be achieved simply by attributing to a foreign parent the business activities of its UK subsidiaries. That much was also established in *Adams v Cape Industries*, accepted by the Tribunal and is common ground in this court. Nor could it be established if the only participation of the parent company in the English business consisted of acts of supervision and management carried out abroad.

29. Mr. Ward sought to bolster his submission by reference first to *The San Paulo (Brazilian) Railway Company Limited v Carter (Surveyor of Taxes)* [1896] AC 31, a case about the statutory test for corporate liability to income tax, and secondly to *SSL International PLC v TTK LIG Limited* [2012] 1WLR 1842, a case about whether a company had established a sufficient presence within England to enable service to be effected on one of its directors while temporarily within the jurisdiction. It fell squarely within the *Okura* line of cases. He submitted that, in both of them, the concept of carrying on business within the jurisdiction was treated as synonymous with presence here.

30. In my judgment, none of those cases lead to or even support the conclusion for which Mr. Ward contends. I agree with the Tribunal that the starting point is that Parliament could have, but did not, specify a 'presence' test in Section 86(1)(c) of the Act. It could have used one or more of the principles relating to 'presence' set out by Slade LJ at page 530-1 in the *Adams* case, which are firmly focussed upon the requirement that the foreign company has established and maintained a fixed place of business of its own within the jurisdiction, and carried on its own business from such premises. Instead, Section 86(1)(c) imposes a simple carrying on business requirement which, neither expressly nor by necessary implication, requires it to be shown that the target company's participation in the carrying on of that business is itself carried out within the UK.

31. Secondly, the attempt to show by reference to the *Okura* line of cases that presence here is a necessary characteristic of carrying on business here strikes me as an

illegitimate form of reverse engineering. While it may be that carrying on business here is a characteristic of corporate presence here, the opposite does not follow. Presence requires the additional element of a permanent place of business here from which the business is carried on.

32. Thirdly, Lord Davey's analysis of the facts in the *San Paulo Railway* case illustrates that a corporation may carry on a business in one country even though its management of it takes place entirely from another. The railway company was registered in England and its central management and control was exercised entirely from England, but its trading activities consisted of the running of a railway in Brazil. He said:

> "It is clear to my mind that the direction and supreme control of the appellant company's business is vested in the board of directors in London, who appoint the agents and officials abroad, and either by general orders or by particular directions control or may control their duties, remuneration, and conduct, and to whom any question of policy or any contract or other matter may, and if deemed of sufficient importance I suppose would, be referred for their decision. The business is therefore in very truth carried on, in, and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country." (*my underlining*)

33. Applying that analogy to Akzo Nobel, its central management activity is carried on in the Netherlands, but a substantial part of the managed business is transacted in the UK. It may fairly be described as carrying on business both in the Netherlands and in the UK.

34. For present purposes, the critical question is whether the exercise of the strategic and operational management and control of a manufacturing and sales business, a substantial part of which is unmistakably carried on within the UK, amounts to carrying on business in the UK, where that management and control itself takes place elsewhere. I have in that context found Section 129(1) and (3) of the Act to be of significant assistance. Section 129(1) defines business as including a money making undertaking, rather than merely an activity other than pleasure. The effect of section 129(3) is that every partner is to be treated as carrying on a partnership business. Suppose that the business of an unincorporated partnership is or includes manufacturing and trading in the UK, and that responsibility for strategic and operational management of the business lies with a partner who (or which) carries out those activities entirely abroad. In my judgment that managing partner would be carrying on business within the UK even if he, she or it never entered the UK or established a presence here. Taken together, those definitions show that it is legitimate to approach Section 86(1)(c) by asking (i) is there a business being carried on in (or partly in) the UK? (ii) is the target person sufficiently involved in that business that it can be said to be carrying it on, whether alone or with others? If the answers to those two questions are affirmative, then the target falls within Section 86(1)(c). I agree again with the Tribunal that it would cast the net too wide to say that any involvement in such a business, such as the supply of goods to it from abroad,

amounts to carrying it on. What does or does not amount to carrying it on in any particular case will be a fact-intensive question.

35. That approach seems to me to give proper effect to the purposes both of the Act as a whole and of Section 86(1) in particular. In enables the Commission to regulate the behaviour abroad of a person engaged in the carrying on a business here. I consider that conducting strategic and operational management of a business carried on here clearly amounts to carrying it on, because it supplies an appropriate connecting factor between the manager and the UK to justify the exercise of jurisdiction over it, even if that manager performs its role offshore. Were that not so, modern methods of communication would permit effortless evasion of the Commission's regulatory jurisdiction, which Parliament is unlikely to have intended.

36. In the present case, the substantial UK manufacturing and trading business of the Akzo Nobel group may well be carried on in premises owned or leased by one or more UK-incorporated subsidiaries, and the manufacturing and trading processes may be undertaken by employees of one or more of those subsidiaries. The profits of the UK business may be accounted for as profits of one or more of those subsidiaries. In all those respects the UK subsidiaries are themselves engaged in the carrying on of that business. But the business is nonetheless managed both strategically and operationally by Akzo Nobel, so that, like the offshore managing partner, it is also carrying on business in the UK.

37. This is not to attribute the activities of Akzo Nobel's UK incorporated subsidiaries as its activities. That would be, as the Tribunal held, and as is common ground, an inappropriate departure from principles of separate corporate identity, flowing from *Salomon v Salomon* [1897] AC 22, and applied in this context in *Adams v Cape Industries*. It is simply the consequence of the Commission's careful focus on the nature and extent of the Akzo Nobel parent company's involvement in the conduct of the UK business, through its organ ExCo, as set out in the passages from the Report which I have summarised and from which I have quoted. By contrast, if all that the parent company of a subsidiary carrying on business in the UK did was to exercise its rights as shareholder in the traditional fashion, leaving the entire management of the business to the subsidiary's directors, the parent would not solely on that account be carrying on the business at all.

38. It follows that neither the Commission nor the Tribunal made any error of law in its analysis of the question whether Akzo Nobel NV carried on business in the UK, so that the first limb of Akzo Nobel's grounds of appeal must be rejected.

Did the Tribunal depart from the Commission's findings of fact?

39. I can take this second limb of the grounds of appeal shortly, and it did not occupy much time during argument. Mr. Ward's submission that the Tribunal had departed from the Commission's findings of fact was focussed on paragraphs 113 and 114 of the Tribunal's judgment, from which I have extracted the passages criticised:

> "113. …The Commission's central conclusion was that the organisational and decision-making structure of the AN

> Group is based upon its functional units rather than its operating subsidiaries. Strategic decisions are made within the functional units, as evidenced by the absence of a strategic plan for subsidiaries. Contracting decisions are likewise made within the functional units:… Similarly, other operational decisions are made within the functional units. Taken together, we are satisfied that the Commission was entitled, as a matter of law, to conclude that these activities constitute the carrying on of business within the functional units and that that activity extends to the UK.
>
> 114. An important aspect of the Commission's unchallenged decision is that, based on the Authority Schedule, decision-making within the AN Group is centralised through ExCo, which is an organ of Akzo Nobel itself. It might be said that that decision is at variance with the distribution of decision-making authority between ExCo and the functional units. That issue is not, however, open to Akzo Nobel in a challenge based solely on an error of law. In that context, it is important to appreciate that the language of section 86(1)(c) cannot be applied to a group of companies; it necessitates that the business activities are attributed to a legal person, or persons, within the group. The activities of Akzo Nobel's functional units must be attributed to a legal person. Neither the ANPG SBU, nor the Industrial Coatings BU have separate legal personality so that the activities of those units cannot be attributed, for the purpose of section 86(1)(c), to them. They must, be attributed either to Akzo Nobel itself or to the subsidiaries that are located within the units. In determining which of those attributions is correct, the Commission is in our judgment entitled, as a matter of law (consistently with section 86(1)(c) and without violating the *Salomon* principles), to consider, on the basis of the evidence available to it, whether the decisions made within the functional units are properly to be regarded as decisions made by the organs of the subsidiaries or decisions made by the functional units that are implemented through the subsidiaries. If the latter, then it may be the case – and this will be a matter for factual assessment – that the decisions of the functional units are in reality those of the ultimate holding company."

40. Mr. Ward submitted that it was wrong for the Tribunal to treat the Commission as having decided, as a matter of fact, that the strategic and operational decision-making in relation to the activities of the Group's functional units was to be attributed, via ExCo, to Akzo Nobel. In my judgment that is precisely what the Commission decided, as can readily be seen by comparing those extracted parts of the Tribunal's

judgment with the parts of the Report which I have summarised, and from which I have quoted at the beginning of this judgment.

41. My only slight criticism, which is immaterial for present purposes, is about what appears to have been an implicit assumption by the Tribunal that those decision-making activities had to be attributed, by a binary decision, either to the parent Akzo Nobel or to its subsidiaries. Even if they had been shared between them, Akzo Nobel's share of that activity would still have justified the conclusion that it was carrying on business in the UK. But the Commission did indeed find that the decision-making rested with ExCo, an organ of Akzo Nobel, even if no such simple all-or-nothing choice had to be made. That finding is, as I have said, not challenged on the grounds of irrationality.

42. For those reasons I would dismiss this appeal.

Lord Justice Beatson :

43. I agree.

Lord Justice Richards :

44. I also agree.

45.