JUDGMENT OF THE COURT (Sixth Chamber)
6 April 1995 *

In Case C-310/93 P,

BPB Industries Plc, a company governed by English law, established in Slough, United Kingdom,

and

British Gypsum Ltd, a company governed by English law, established in Nottingham, United Kingdom,

represented by Michel Waelbroeck and Denis Waelbroeck, of the Brussels Bar, and by Gordon Boyd Buchanan Jeffrey, Solicitor, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 1 April 1993 in Case T-65/89 between, on the

* Language of the case: English.

one hand, *BPB Industries Plc* and *British Gypsum Ltd* and, on the other hand, the *Commission of the European Communities*, [1993] ECR II-389, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

supported by

Iberian UK Ltd, formerly **Iberian Trading (UK) Ltd,** a company governed by English law, established in London, represented by John E. Pheasant and Simon W. Polito, Solicitors, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

intervener,

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, P. J. G. Kapteyn (Rapporteur), G. F. Mancini, C. N. Kakouris and J. L. Murray, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 13 December 1994,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 8 June 1993, BPB Industries Plc and British Gypsum Ltd (hereinafter 'BPB' and 'BG'), brought an appeal pursuant to Article 49 of the Statute of the Court of Justice of the EEC against the judgment of 1 April 1993 in Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389 ('the judgment under appeal'), in which the Court of First Instance dismissed their application for annulment of Commission Decision 89/22/EEC of 5 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.900, BPB Industries Plc, OJ 1989 L 10, p. 50, hereinafter 'the Decision') and ordered them to pay the costs.

2 In the judgment under appeal (paragraphs 2 to 10), the Court of First Instance found that:

— BPB is the United Kingdom holding company of a group which controls about half the production capacity for plasterboard in the Community, having a net

consolidated turnover of ECU 1 116 000 000 in the financial year to 31 March 1987. In Great Britain, BPB operates in the building plaster and plasterboard sectors essentially through a wholly-owned subsidiary, BG. In Ireland, gypsum products, in particular building plasters and plasterboard, are produced by BPB's Irish subsidiary Gypsum Industries Plc, which supplies the market in Ireland and, through BG, Northern Ireland.

— In Great Britain, BG produces plasterboard at eight plants situated in the Midlands, the South-East and the North of England. BPB normally supplies the British plasterboard market from mills in Great Britain, whereas the mills in Ireland supply the market in Ireland and Northern Ireland.

— Plasterboard used in the United Kingdom and Ireland is almost all supplied through builders' merchants. Merchants provide an effective chain of distribution to builders. They also have the function of assuming the credit risk of builders. Over the relevant period, there was an ongoing trend of concentration in the builders' merchanting sector.

— Before 1982, there were no regular imports of plasterboard into Great Britain. In that year, Lafarge UK Ltd ('Lafarge'), a company in the French Lafarge Coppée group, started importing plasterboard manufactured in France. Lafarge has gradually expanded its imports. However, because of supply difficulties linked with its dependence on its manufacturing plant in France, Lafarge was not able to provide normal deliveries to a large number of customers.

— In May 1984, Iberian Trading (UK) Ltd ('Iberian') started importing plasterboard manufactured in Spain by Española de Placas de Yeso. Its prices were lower than those of BG, the difference generally being in a range of 5 to 7%,

although certain larger price discrepancies have been noted. The range of products supplied by Iberian was restricted to a limited range of standard plasterboard sizes from among those most in demand. Iberian also encountered supply difficulties on a number of occasions.

— In 1985 and 1986, BG supplied about 96% of the plasterboard sold in the United Kingdom, the remainder of the market being shared between Lafarge and Iberian.

— On 17 June 1986, Iberian sent the Commission an application requesting that it find, pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), that there were infringements of Article 86 of the EEC Treaty on the part of BPB. On 3 December 1987, the Commission decided to initiate a proceeding under Article 3(1) of Regulation No 17.

— After giving the undertakings an opportunity to reply to the objections raised by it, pursuant to Article 19(1) of Regulation No 17 and Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) and after consulting the Advisory Committee on Restrictive Practices and Dominant Positions, on 5 December 1988 the Commission adopted the contested Decision.

3 The operative part of the Decision is as follows:

'*Article 1*

Between July 1985 and August 1986 British Gypsum Ltd infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in

Great Britain through a scheme of payments to builders' merchants who agreed to purchase plasterboard exclusively from British Gypsum Ltd.

Article 2

In July and August 1985 British Gypsum Ltd infringed Article 86 of the EEC Treaty by implementing a policy of favouring customers who were not trading in imported plasterboard in the provision of priority orders for the supply of building plasters at a time of extended delivery for that product which constituted an abuse of its dominant position in the supply of plasterboard in Great Britain.

Article 3

BPB Industries plc, through its subsidiary British Gypsum Ltd, infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Ireland and Northern Ireland:

— in June and July 1985 by successfully applying pressure on and thereby procuring the agreement of a consortium of importers to renounce importing plasterboard into Northern Ireland,

— by a series of rebates on BG products supplied to builders' merchants in Northern Ireland between June and December 1985 conditional on their not handling any imported plasterboard.

Article 4

The following fines are imposed:

— on British Gypsum Ltd, a fine of ECU 3 million in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 1,

— on BPB Industries plc, a fine of ECU 150 000 in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 3.

...'

4 The action brought by BPB and BG for the annulment of the Decision gave rise to the judgment under appeal, in which the Court of First Instance:

'1. Annuls Article 2 of Commission Decision 89/22/EEC ... in so far as it relates to July 1985;

2. Dismisses the remainder of the claims made in the application;

...'

In support of their appeal, the appellants put forward, primarily, four pleas in law and, in the alternative, one further plea.

The first plea alleges an infringement of Articles 86 and 190 of the EEC Treaty in that the Court of First Instance considered that it was superfluous to investigate the degree of influence of the parent company over its wholly-owned subsidiary, since control by the parent over the subsidiary could be assumed, and that sufficient reasons had been given for attributing to BPB the infringement found in Article 3 of the Decision.

The second plea alleges an infringement of Articles 85(3) and 86 of the EEC Treaty in that the Court of First Instance considered that the supply contracts and promotional payments came within Article 86 and that an exemption under Article 85(3), even if it could be established, would not prevent the application of Article 86.

The third plea alleges an infringement of Article 86 in that the Court of First Instance held that the priority deliveries of plaster constituted an abuse of a dominant position.

The fourth plea alleges an infringement of the rights of the defence in that the Court of First Instance considered that the Commission's refusal to disclose certain documents to the appellants on the ground of their confidential nature could not, in the present case, affect the legality of the Decision.

10 In the alternative, the appellants seek a reduction of the amount of the fines imposed upon them.

The first three pleas in law

11 For the reasons given in, respectively, points 20 to 31, points 42 to 69 and points 76 to 86 of the Advocate General's Opinion, the first, second and third pleas in law must be dismissed as unfounded.

The fourth plea in law

12 The complaint in the fourth plea concerns the finding by the Court of First Instance that the rights of the defence were observed during the course of the administrative procedure before the Commission.

13 The appellants maintained before the Court of First Instance (see paragraph 21 of the judgment under appeal) that the Decision should be annulled since the Commission had failed to disclose to them all the relevant documents which were in its possession, to their considerable detriment.

14 In reaching its conclusion that the rights of the defence were observed during the course of the administrative procedure, the Court of First Instance noted that the Commission had, in its Twelfth Report on Competition Policy (pp. 40 and 41),

imposed on itself a number of rules concerning access to the file in competition cases and that it had therefore been held, in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraphs 53 and 54, that the Commission 'has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved' (paragraph 29 of the judgment under appeal).

15 The Court of First Instance further pointed out that, in Joined Cases T-10/92, T-11/92 and T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 38, it had held that 'the procedure for access to the file in competition cases is intended to enable the addressees of a statement of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence' (paragraph 30 of the judgment under appeal).

16 The Court of First Instance went on to note that, in pursuance of the abovementioned commitments which the Commission had imposed upon itself, the statement of objections sent to the appellants was accompanied by an annex containing a list summarizing all the 2 095 documents which made up the Commission's file, specifying, for each document or group of documents, whether it was accessible to the appellants or not and identifying six categories of documents which were not made accessible to them: first, documents for purely internal Commission purposes; secondly, certain correspondence with third-party undertakings; thirdly, certain correspondence with the Member States; fourthly, certain published information and studies; fifthly, certain reports of verifications; and, sixthly, a reply to a request for information made under Article 11 of Regulation No 17 (paragraphs 31 and 32 of the judgment under appeal).

17 In paragraph 33, the Court of First Instance held:

'It is thus apparent that the applicants have no real grounds for complaining that the Commission did not make accessible to them certain purely internal documents, which the Court of First Instance has already decided did not have to be disclosed. The same applies necessarily to certain correspondence with the Member States and published documents and studies. The same applies again to the reports of verifications, the answer to a request for information made by the Commission and certain correspondence with third-party undertakings, to which the Commission was entitled to refuse access by reason of their confidential nature. An undertaking to which a statement of objections has been addressed, and which occupies a dominant position in the market, may, for that very reason, adopt retaliatory measures against a competing undertaking, a supplier or a customer, who has collaborated in the investigation carried out by the Commission. Finally, for the same reason, the applicants cannot maintain that the complaint submitted to the Commission under Article 3 of Regulation No 17 was wrongly made only partially available to them (documents 1 to 233). Accordingly, the Commission's refusal to disclose those documents to the applicants cannot, in this case, affect the legality of the Decision.'

18 In support of their plea the appellants state, first, that the Court of First Instance wrongly held that the Commission complied with its obligation to make available all documents, whether in their favour or otherwise, in its files which were not of a confidential nature.

19 Secondly, the appellants argue that the Court of First Instance should itself have examined the documents in the file.

20 Thirdly, the appellants criticize the Court of First Instance for having upheld the Commission's non-disclosure of certain documents on the sole and inadequate ground that if they had been disclosed, retaliatory measures might have been taken against the supplier of the information. In their view, to deny flatly to the undertakings concerned any access to any of the information contained in a document which is not strictly confidential violates the principle of proportionality.

21 When considering whether this plea is well-founded, it must first be borne in mind that observance of the rights of the defence requires, *inter alia*, that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegation of an infringement (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7).

22 The appellants do not deny that the Court of First Instance could, without infringing the principle of observance of the rights of the defence, hold that the Commission is not obliged to disclose internal documents and other confidential information. They merely allege that the Court of First Instance misapplied that principle when it considered that the documents referred to in paragraph 33 of the judgment under appeal fell within the specified categories of documents not to be disclosed or, at the very least, failed to give sufficient reasons for that finding.

23 Finally, as the Advocate General has observed at point 125 of his Opinion, the appellants did not complain before the Court of First Instance that an incriminating document was not disclosed but rather that the documents which were not disclosed might have been helpful to their case. The criterion for non-disclosure, they claimed, should not be whether the Commission relies on a document but whether the document is truly confidential (see paragraph 22 of the judgment under appeal).

24 It must therefore be determined whether the Court of First Instance was entitled to find that the documents not disclosed fell within the categories of documents which the Commission may legitimately refuse to disclose by reason of their confidential nature.

25 As regards the refusal to disclose to the appellants the purely internal Commission documents, the correspondence with the Member States and the published documents and studies, it is enough to point out that the Court of First Instance was entitled to hold both that the first two categories of documents were of a confidential nature and that the third category concerned documents which were, by definition, accessible to the appellants.

26 With regard to the correspondence with third-party undertakings and the answer to a request for information, it must be recognized that an undertaking holding a dominant position on the market might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission. That being so, it is clear that third-party undertakings which submit documents to the Commission in the course of its investigations and consider that reprisals might be taken against them as a result can do so only if they know that account will be taken of their request for confidentiality.

27 The Court of First Instance was therefore right to consider that the Commission was entitled to refuse access to such documents on the ground that they were confidential.

28 Finally, the appellants have acknowledged in their appeal that the reports of verifications relate to inspections carried out in third-party undertakings. In that regard, suffice it to observe that documents capable of providing evidence of

infringements by third parties — unrelated, moreover, to the present case — are obviously not to be disclosed to the appellants.

29 As regards the appellants' complaint that the Court of First Instance did not give sufficient reasons for its decision concerning the Commission's refusal to make the abovementioned documents available to them, it is to be noted that their allegations concerning a supposed infringement of the rights of the defence were merely 'uncertain and hypothetical', as the Court of First Instance found in paragraph 35 of the judgment under appeal.

30 In view of that finding, the reasoning of the judgment under appeal, as summarized in paragraphs 14 to 17 above, clearly shows the grounds on which the Court of First Instance based its rejection of those allegations. Nor, in those circumstances, can the Court of First Instance be criticized, as it is by the appellants, for having looked in a general way at the type of documents in issue without of its own accord looking at each document not disclosed in order to verify the arguments relied on by the Commission for not having made them available.

31 Finally, the appellants complain that the Court of First Instance did not hold that the Commission should at the very least have made non-confidential summaries of certain documents available to them.

32 That complaint, too, must be dismissed, since it has not been established either that such summaries were requested by the appellants or that such a request would have been justified.

33 It follows from all the foregoing that the appellants cannot justifiably claim that the Court of First Instance infringed the principle of the observance of the rights of the defence and that their fourth plea in law must be dismissed as unfounded.

The alternative plea in law

34 With regard to the alternative plea, suffice it to point out that it is not for this Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law.

35 Since none of the appellants' pleas in law can be upheld, the appeal must be dismissed in its entirety.

Costs

36 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Since the appellants have been unsuccessful, they must be ordered to pay the costs of these proceedings, including those of the intervener.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellants to bear the costs, including those of the intervener.

Schockweiler Kapteyn Mancini

Kakouris Murray

Delivered in open court in Luxembourg on 6 April 1995.

R. Grass
Registrar

F. A. Schockweiler
President of the Sixth Chamber