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IN THE COMPETITION
APPEAL TRIBUNAL

Cases: 1114-1115/1/1/09
1117-1139/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 January 2010

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
VIVIEN ROSE
LORD CARLILE OF BERRIEW

Sitting as a Tribunal in England and Wales

—————
(1) KIER GROUP PLC
(2) KIER REGIONAL LIMITED
-v-
OFFICE OF FAIR TRADING

CREST NICHOLSON PLC
-v-
OFFICE OF FAIR TRADING

(1) GF TOMLINSON GROUP LIMITED
(2) GF TOMLINSON BUILDING LIMITED
-v-
OFFICE OF FAIR TRADING

(1) GMI CONSTRUCTION HOLDINGS PLC
(2) GMI CONSTRUCTION GROUP PLC
-v-
OFFICE OF FAIR TRADING

BALLAST NEDAM NV
-v-
OFFICE OF FAIR TRADING

(1) QUARMBY CONSTRUCTION COMPANY LIMITED
(2) ST JAMES SECURITIES HOLDINGS LIMITED
-v-
OFFICE OF FAIR TRADING

(1) DURKAN HOLDINGS LIMITED
(2) DURKAN LIMITED
(3) CONCENTRA LIMITED
-v-
OFFICE OF FAIR TRADING

AH WILLIS AND SONS LIMITED

-v-

OFFICE OF FAIR TRADING

- (1) SOL CONSTRUCTION LIMITED**
- (2) BARKBURY CONSTRUCTION LIMITED**

-v-

OFFICE OF FAIR TRADING

NORTH MIDLAND CONSTRUCTION PLC

-v-

OFFICE OF FAIR TRADING

- (1) BARRETT ESTATE SERVICES LIMITED**
- (2) FRANCIS CONSTRUCTION LIMITED**

-v-

OFFICE OF FAIR TRADING

ISG PEARCE LIMITED

-v-

OFFICE OF FAIR TRADING

- (1) BOWMER AND KIRKLAND LIMITED**
- (2) B&K PROPERTY SERVICES LIMITED**

-v-

OFFICE OF FAIR TRADING

- (1) GAJ CONSTRUCTION LIMITED**
- (2) GAJ (HOLDINGS) LIMITED**

-v-

OFFICE OF FAIR TRADING

CORRINGWAY CONCLUSIONS PLC

-v-

OFFICE OF FAIR TRADING

- (1) RENEW HOLDINGS PLC**
- (2) ALLENBUILD LIMITED**

-v-

OFFICE OF FAIR TRADING

- (1) ROBERT WOODHEAD (HOLDINGS) LIMITED**
- (2) ROBERT WOODHEAD LIMITED**

-v-

OFFICE OF FAIR TRADING

- (1) THOMAS VALE HOLDINGS LIMITED**
- (2) THOMAS VALE CONSTRUCTION PLC**

-v-

OFFICE OF FAIR TRADING

- (1) SICON LIMITED**
- (2) JOHN SISK & SON LIMITED**

-v-

OFFICE OF FAIR TRADING

- (1) G&J SEDDON LIMITED**
- (2) SEDDON GROUP LIMITED**

-v-

OFFICE OF FAIR TRADING

**(1) INTERCLASS HOLDINGS LIMITED
(2) INTERCLASS PLC**

-v-

OFFICE OF FAIR TRADING

**(1) JH HALLAM (R&J) LIMITED
(2) JH HALLAM (CONTRACTS) LIMITED**

-v-

OFFICE OF FAIR TRADING

HOBSON AND PORTER LIMITED

-v-

OFFICE OF FAIR TRADING

APOLLO PROPERTY GROUP SERVICES LIMITED

-v-

OFFICE OF FAIR TRADING

GALLIFORD TRY PLC

-v-

OFFICE OF FAIR TRADING

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CASE MANAGEMENT CONFERENCE

APPEARANCES

- Mr. Aidan Robertson Q.C. (instructed by McCormicks) appeared on behalf of GMI and Construction Holdings plc and GMI Construction Group plc.
- (instructed by Boyes Turner) appeared on behalf of Barrett Estate Services Limited and Francis Construction Limited.
- (instructed by Watson Burton) appeared on behalf of GAJ Construction Limited, GAJ (Holdings) Limited, G&J Seddon Limited, Seddon Group Limited, Interclass Holdings Limited, Interclass plc, JH Hallam (R&J) Limited, JH Hallam (Contracts) Limited and Hobson and Porter Limited.
- Mr. Aidan Robertson Q.C. (instructed by JH Powell & Co) appeared on behalf of GF Tomlinson Group Ltd and GF Tomlinson Building Limited
and Ms Sarah Abram
- Ms Bernadine Adkins (instructed by Wragge & Co) appeared on behalf of Thomas Vale Holdings Limited and Thomas Vale Construction Plc.
- Mr. Christopher Vajda Q.C. (instructed by CMS Cameron Mckenna) appeared on behalf of Ballast Nedam NV.
and Ronit Kreisberger
- Mr. George Peretz (instructed by DLA Piper UK) appeared on behalf of Renew Holdings Plc, Allenbuild Limited, Robert Woodhead (Holdings) Limited and Robert Woodhead Limited.
- Ms Kassie Smith (instructed by Pinsent Masons) appeared on behalf of Galliford Try Plc.
- Ms Marie Demetriou (instructed by Ashurst) appeared on behalf of Crest Nicholson Plc.
- Mr. Mark Brealey Q.C. (instructed by Simmons & Simmons) appeared on behalf of Kier Group plc and Kier Regional Limited.
- Mr. Mark Clough Q.C. (instructed by Addleshaw Goddard LLP) appeared on behalf of Quarmby Construction Company Limited and St. James Securities Holdings Limited.
and Adam Aldred
- Mr. Mark Hoskins Q.C. (instructed by Jones Day) appeared on behalf of Durkan Holdings Limited, Durkan Limited and Concentra

Limited.

Mr. Paul Harris (instructed by Nabarro) appeared on behalf of Corringway Conclusions plc.

Mr. Josh Holmes (instructed by DLA Piper UK) appeared on behalf of ISG Pearce Limited.

Mr. Rhodri Thompson Q.C. (instructed by Browne Jacobsen LLP) appeared on behalf of Sol Construction Limited, Barkbury Construction Limited and North Midland Construction Plc.

Mr. Thomas de la Mare (instructed by Pinsent Masons LLP) appeared on behalf of Apollo Property Group Services Limited.

Mr. Thomas Sharpe Q.C. (instructed by Shepherd and Wedderburn) appeared on behalf of Bowmer and Kirkland Limited and B&K Property Services Limited.

(instructed by Mayer Brown International) appeared on behalf of Sicon Limited and John Sisk and Son Limited.

Mr. Matthew Cook (instructed by Field Seymour Parkes) appeared on behalf of AH Willis.

Mr. David Unterhalter, S.C. and Mr. Daniel Beard and Ms. Kelyn Bacon (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Office of Fair Trading.

1 THE PRESIDENT: Good morning. Welcome, everybody. When it comes to people saying
2 things, please do not feel you need to stand as normal - especially if you are in a row further
3 back. You will find it easier, probably, to use the microphone if you remain seated. But, it
4 is entirely a matter for you. We will not take offence if you do.

5 Can I thank everybody for the very helpful written submissions which have been put in, and
6 which we have read and considered very carefully.

7 So far as this morning is concerned - and I very much hope that it will only be this morning,
8 and I see people nodding too - the issues are really the big picture issues, and mainly the
9 question first of all of how we conduct the proceedings and, in particular, whether, as we set
10 out in our letter of 11th January, one possibility would have been to try and identify some
11 points of principle which apply to some or all of the penalty cases and have those
12 determined first in the hope that that would then reduce the time and expense in relation to
13 the other cases. Alternatively, of course, we can try the cases in the ordinary way. That is
14 probably the main issue.

15 The second main issue is, as always, the exciting and difficult point about timetabling and
16 other incidental directions.

17 The aim, as always, is to dispose of all these appeals in an expeditious, economic, and of
18 course a just way.

19 As I said in our letter of 12th January we set out some provisional thoughts about how the
20 appeals might be disposed of. The thoughts that we expressed a provisional view about
21 were shared by the Office of Fair Trading and also by some of the appellants. Having
22 looked very carefully, as I have said, at the written submissions our current thinking is
23 rather different. Our current thinking is really based upon the apprehension reflected in
24 some of your observations that if we were to try and isolate some points of principle there
25 would be a risk that rather than expediting the ultimate disposal, it might increase the cost
26 and, indeed, delay the ultimate disposal of the appeals. That is the view that we are
27 currently of. So, our current inclination - and it is quite a firm one, and we will provide an
28 opportunity for any dissenting views in a few minutes is to proceed in the ordinary way.

29 That leads me on to the question of timetabling. I think it is only fair that we tell you about
30 where we are at the moment on this so that you can give it your consideration in a moment.

31 We do have, for your convenience I hope - rather than speaking it - a draft timetable, taking
32 us right down to the final hearings of these appeals. (Same handed) There are two visual
33 aids. The coloured one relates to the three weeks in which we are proposing to have the

1 oral hearings, spread over three weeks in the way in which we have indicated. The other one
2 deals with the actual timetable leading up to that point.

3 Can I ask you first to look at the written document, headed 'Draft Procedural Timetable'?

4 You see there that we are proposing that the Office of Fair Trading file defences in all the
5 cases, including the liability appeals, by 31st March. That would be about eighteen and a
6 half weeks from the latest Notice of Appeal received at the back end of November.

7 I will run through these just very quickly and then come back. This proposes about one
8 month for the appellants to file their skeleton arguments. It seemed to us that there was
9 probably no real reason to have replies separate from skeleton arguments. You could simply
10 incorporate your reply points in your skeleton arguments rather than have two separate
11 documents. 11th June is probably one of the dates here that is more or less immovable.
12 That is a date on which we are proposing the OFT file skeleton arguments. On the current
13 timetable, as the column at the end says, that would allow the OFT six weeks to do quite a
14 lot of skeleton arguments. That is, I accept, quite a tight job for the Office of Fair Trading.
15 If that were to be expanded slightly it would have to be expanded by altering the earlier
16 dates - 31st March and 30th April dates. We will come back to that. As I say, 11th June is
17 really a more or less immovable date because if the hearings are to start on 28th June - and
18 that is more or less immovable, then that seems to be the minimum period that the Tribunal
19 panels would require in order to do the work that they have to do as well. We anticipate
20 there being quite a lot of reading.

21 The hearings, as the colour chart shows, we envisage beginning on 28th June. We would
22 like to hear all the appeals over three weeks - the three weeks which we have indicated
23 there, which are consecutive. There will be three panels hearing these appeals. They will
24 each hear approximately six penalty-only appeals and approximately two liability appeals of
25 which, as you know, there are six. There may be some fine-tuning in that because there is a
26 request by Crest Nicholson and ISG Pearce to have their cases heard together, which means
27 that there is some conflation there.

28 Each panel would hear two penalty appeals per sitting day. So, we are allowing, on this
29 chart, a half-day for each of the penalty-only appeals. We have allowed a notional period of
30 two days per liability appeal. That is how one reads the coloured chart.

31 When it comes to populating this chart with actual cases there are various ways in which it
32 could be done, but I think what we are currently minded to do is to permit the parties - the
33 appellant and the OFT - to have, say, by a week on Friday to reach as much agreement as
34 you can on which cases would fill which slots in the chart. Perhaps it is better to do it that

1 way round, rather than we decide initially and then you, as it were, shoot it down. So, we
2 are proposing to let you have the opportunity of populating this. After that, we will decide.
3 We will have your proposals. We would obviously not want to have separate proposals
4 from you. We would want to have an agreed -- or as far as you can reach agreement by a
5 week on Friday. So, that is the proposal in relation to this.

6 Going back to the draft procedural sheet, you see that the last entry is 10th September - that
7 is just the notional time which seems to us about right - for parties who have had a chance
8 to look at the transcripts of the other hearings that they are interested in to make very short
9 written submissions about any points that were made in the other hearings. That will avoid
10 the need for any formal interventions which we think probably is better in this case, which
11 we would rather not have.

12 That is the proposal. What this does not include are provisions about bundles. We do need
13 to have some thoughts about when the Tribunal would be provided with the bundles. We
14 are very keen - as I am sure you are - that we should have as little duplication as possible
15 between the cases. What we would propose there - and maybe you could think about this in
16 a moment as well when we give you time to look at all this - is that there be an agreed
17 bundle, at least in the penalty-only appeals, although they are being heard separately, a lot
18 of the materials will be actually the same - the matters that people want to refer to - and it
19 may be that one team, as it were, could co-ordinate suggestions so that we can come up with
20 one main core bundle of authorities for the penalty-only appeals. It might be different - I do
21 not know for the liability appeals. I am not volunteering anybody to do it, but it may be that
22 those who are involved in most cases, as it were, could co-ordinate suggestions. I am not
23 looking at anyone in particular at the moment - (Laughter). As far as the other bundles are
24 concerned, again, we need some thought to be given to how you can keep down the size of
25 them. So, suggestions for that would be welcome.

26 That represents our current thinking. It seems to us that that current timetable is essential if
27 these appeals are going to be resolved in the course of this year. Obviously, we have taken
28 you by surprise to some extent by this. There may be thoughts from the OFT, or, indeed,
29 some of the other appellants who also felt that they preferred the other route. You may
30 want to consider it. We have reached a fairly firm view, but we have still, just about, got an
31 open mind on it.

32 I think half an hour is probably about the minimum time that you need now just to have a
33 think about this. The other courtroom is available as a spill-over area for you. So, please
34 feel free to use the other courtroom, as well as the conference rooms, and anywhere else.

1 Unless there is any burning question that people want to flag up now, we will come back at
2 quarter past eleven unless we receive a message to say that people would generally like to
3 have a bit longer just to think about this. You do not need to worry about populating this at
4 this stage because you have the best part of two weeks to agree that. It is really just about
5 the bigger points of principle I think which we would appreciate comments on.

6 (Short break)

7 THE PRESIDENT: I hope that proved useful. It may be by natural selection that someone will
8 “bob” up first; I will leave it to you to decide. Will it be Mr. Unterhalter?

9 MR. UNTERHALTER: Thank you very much. We had, as you will have seen from our
10 observations, thought that there were legal principles and that they should be distilled for
11 the purposes of the hearing and alternatively a test case approach might be adopted. We
12 accept, however, that there is a different approach that commends itself to the Tribunal and
13 we have now been seeking to see how we can accommodate our preparation for the case in
14 line with the indications that you have given us.

15 What we would, however, draw to your attention is this, that unlike the appellants there is
16 but one case team that manages this work for the OFT and they are few in number. It would
17 not be possible just practically from the OFT’s point of view to have simultaneous sittings
18 of both liability and penalty matters going on at the same time because members of the case
19 team would conceivably have to be in two places at the same time, which they could not be
20 and that difficulty also arises for the purposes of preparing. There are a very large number
21 of issues for us to deal with and although we have been engaged very fully in tackling what
22 we understood to be the common principles that arose, particularly in the penalty sphere of
23 the case, on our calculations there would be two days per appeal left for us to prepare to file
24 our defences in respect of what is a very limited case team.

25 We would submit that the proposal that would combine in a single time period both liability
26 and penalty cases would prove to be undoable for the OFT on the time table that is
27 proposed. What we would ask you to consider is really to split out the penalty appeals from
28 the liability appeals and have a sitting in June/July exactly on the timetable you have
29 proposed in respect of the penalty appeals. We would also submit that as far as that is
30 concerned, because we still maintain the position that there are numbers of key arguments
31 around central propositions in the penalty appeals that we would want to address generally
32 for the purposes of all the appeals that arose in respect of penalty that if one had one Panel
33 that heard all of the appeals concerning penalty then what might be possible would be for
34 the OFT to address all of those appeals in one go, and that might be either at the

1 commencement of the sitting in respect of the penalty appeals or it may be at a point once
2 the appellant has addressed their cases to you. We do not think it would be advantageous,
3 given that the decision has been structured around general propositions that have been
4 adopted for the purposes of considering penalty and then applications of those general
5 principles to the particular cases, for us to make repetitive submissions to separate Panels
6 for the purpose of addressing the penalty issues in the appeal. Therefore, our proposal
7 would therefore be, first, for practical reasons – by reason of our case team constraints
8 which cannot be supplemented at this stage in any way, although the counsel team could be
9 – to separate out these streams and then secondly in respect of how the hearings are
10 addressed to separate the penalty from the liability sitting for this purpose. What that would
11 mean practically is that we could adhere entirely to the timetable that is now proposed in
12 respect of a separate stream that would be dedicated to the penalty appeals, but what we
13 would ask you to give consideration to is that there would then be a second sitting in
14 September in respect of the liability cases and that would obviously involve separating out
15 liability from penalty and not as the current proposal suggests, which is to wrap up the
16 liability and penalty cases where liability points are taken as well. That would then permit
17 us to file our defences in respect of liability at the end of May and that would then allow us
18 to both utilise our resources which are modest in respect of the case team and counsel, in
19 order to make it possible to have both of these streams of appeals determined according to a
20 timetable that would not unduly string this out and would permit, we think, of a reasonably
21 economical approach to the matter.

22 We can give you our specific submissions in respect of how a second timetable by way of
23 proposal would work for a separate stream that would deal with liability but we are simply
24 not in a position as matters stand to meet this timetable, as it is currently framed if there is
25 going to be both liability and penalty determined simultaneously in the way now suggested.

26 THE PRESIDENT: Just explain to me a bit more, Mr. Unterhalter, why it is not possible. You
27 are instructing counsel to the submissions, is it because of the mix of penalty and liability
28 that causes the problem?

29 MR. UNTERHALTER: There are a couple of practical points.

30 THE PRESIDENT: Who is your case team?

31 MR. UNTERHALTER: There are two key people in the case team, and they could not be in two
32 places at once as the present proposal suggests.

33 THE PRESIDENT: One could be in one place and one could be in the other.

1 MR. UNTERHALTER: The difficulty may be that on the key issue it is one person who needs to
2 be in two places at the same time, so if that person was responsible for two cases involving
3 an issue of liability and involving an issue of penalty and they are being heard by separate
4 Panels on the same day then they are not in a position to be there, hear the arguments and
5 consider what instruction should be given in respect of those matters. We do emphasise,
6 and it is particularly true in respect of the penalty part of the case that there is simply one
7 person in the case team who was largely responsible for the penalty determinations that
8 were made and, again, if one is going to split this across different Panels then for our
9 purposes that is going to be enormously difficult to deal with, indeed, we would submit
10 practically impossible.

11 The other submission we would make on this score is simply that in drawing up the
12 submissions equally one has a limited case team which is going to be stretched between
13 these two streams that have to be determined in respect of liability and penalty, and there
14 too it is enormously difficult given the time that is available to have them do what they have
15 to do over both parts of the appeal.

16 THE PRESIDENT: Just so I have it plain what you say, if there were not a mix between liability
17 and penalty this particular issue you are talking about would not arise?

18 MR. UNTERHALTER: What one has, for example, in week one on the proposed timetable is
19 penalty issues being determined before one Panel in court 1, and before another Panel in
20 court 2. Only one person in the case team would have been responsible for dealing with the
21 penalty issues in those two cases and so the cases would be argued.

22 THE PRESIDENT: So are you saying you cannot even have a mix of two penalty cases?

23 MR. UNTERHALTER: No, indeed, our submission is that what should happen is that one Panel
24 should be allocated to deal with all the penalty cases.

25 THE PRESIDENT: That is not going to be feasible for us, I am afraid, almost certainly not.

26 MR. UNTERHALTER: Well if it could not then be one Panel at least they should have hearings
27 sequentially so this problem of double hearings on a single day does not arise.

28 THE PRESIDENT: What we are talking about, so you have it plain, we envisage very short oral
29 submissions. As far as penalty is concerned we are envisaging that half an hour each party,
30 with a reply, is what we imagine is going to be appropriate, and that most of the
31 submissions are going to be in writing with the opportunity, as we have indicated, for the
32 parties to make short further submissions if anything arises from the other cases. In those
33 circumstances, for my part and speaking only for myself, find it difficult to see how there
34 would be any extreme difficulty, even if someone was for a second out of court and in the

1 other court – which is only across the way – why there could not be appropriate
2 accommodation made; I am talking about the penalty cases, we will come on to the other
3 problem.

4 MR. UNTERHALTER: I think our submissions on that score are twofold. First, we do not
5 envisage that half an hour would be sufficient to address all of the issues.

6 THE PRESIDENT: In one penalty case?

7 MR. UNTERHALTER: As I say, at least in our conception of how the case is going to be
8 presented, there is an array of often common issues which raise large issues of principle that
9 we say would need to be addressed, because of the many overlaps in our conception, in each
10 of the penalty cases.

11 THE PRESIDENT: Well because of the overlaps there may come a point where you do not need
12 to deal with them at great length if it is the same Panel, it will short circuit it.

13 MR. UNTERHALTER: It is precisely for that reason we had thought that it might be
14 advantageous if at least conceptually there was one stream that dealt with penalties, that we
15 could address all the common themes that we say arise in the penalty appeals in one go, and
16 that would give rise to considerable economy, but that is not going to be possible if there are
17 two Panels that are hearing these matters because then one cannot address a single set of
18 issues before one Panel in a consolidated form which would then allow for the economies
19 that we have indicated. So that would be our first point.

20 THE PRESIDENT: But you would have addressed all these points in your written submissions,
21 and we envisage the oral argument is going to be really just to highlight certain points and
22 possibly to deal with things that have not been dealt with up to now.

23 MR. UNTERHALTER: But even in respect of the highlighting there are going to be many cross-
24 overs as we conceive of the matter and that too would permit of the economies that we
25 suggest.

26 The other point is that as to the instructions, naturally by the stage one comes to argument
27 there would be perhaps fewer instructions to receive, but nevertheless we are entitled to
28 have the OFT present and take stock of what is being said, and give us any instructions that
29 they think flow from the submissions that are being made in the oral phase of the process,
30 and with this simultaneous hearing that is not practically going to be possible given that
31 penalties really falls to one person in the OFT case team, and it is for that reason that we ask
32 for the single stream.

33 THE PRESIDENT: You are saying all the penalties are decided by the one person?

34 MR. UNTERHALTER: Not so much decided, but there is a key person who is involved.

1 THE PRESIDENT: Who needs to be on tap.

2 MR. UNTERHALTER: He needs to be there, yes.

3 THE PRESIDENT: Of course.

4 MR. UNTERHALTER: And it is for that reason that we would ask that there should be a
5 splitting out of penalty and liability.

6 THE PRESIDENT: Explain to me a bit more the problem with the liability. You explained the
7 overlap of the penalties, but what was the problem again between the overlap of penalty and
8 liability?

9 MR. UNTERHALTER: Is the issue around whether to wrap them into ----

10 THE PRESIDENT: The issue is, for example, as on 2nd July proposal, there will be penalty cases
11 going on in one courtroom and there will be a liability case starting in the other.

12 MR. UNTERHALTER: It is a very similar problem because the person who is principally
13 responsible for penalties is also one of two key people who are responsible for the liability
14 part of the case, and so again it is one person potentially having to be in two places at the
15 same time which we would submit is not possible.

16 THE PRESIDENT: Are you saying that there are only two people who have done all this work?
17 (Laughter)

18 MR. UNTERHALTER: They are enormously energetic! (Laughter) The other submission that
19 we would make is simply around preparing our defences where again they are enormously
20 stretched across the very large number of issues both factual and legal.

21 THE PRESIDENT: On the written defences?

22 MR. UNTERHALTER: Yes, indeed, and so there are, as we have calculated it, in the days that
23 remain until 31st March there would be two days per appeal left for us to compile our
24 defences.

25 THE PRESIDENT: Yes, but you would have had, as you see in the column, you would have had
26 over 18 weeks, and the defences – I am not suggesting that anything is straightforward in
27 life, not in this area, but you would know what you were saying, and the notices of appeal
28 are relatively short. The points are, as you say, repetitive in some areas, all be it applied to
29 the individual cases, so I think it is a bit artificial to just look at the time that is left. When
30 we did extend time we said that we would expect work to continue in the ordinary way.

31 MR. UNTERHALTER: Yes, and indeed, that work has been done but it has been largely framed
32 by our suggestions as to the common principles which we say have arisen and which at least
33 at a point appeared to have some responsiveness on the part of the Tribunal.

1 THE PRESIDENT: Certainly since we reacted on 12th January that is true. Before we invite
2 comments from others are there any other points on the timetabling as it stands that you
3 want to make?

4 MR. UNTERHALTER: No, those are our submissions essentially. We are entirely content and
5 able to meet the timetable but only on the penalty appeals.

6 THE PRESIDENT: I am so sorry, I did not catch that.

7 MR. UNTERHALTER: The timetable for us is entirely workable, but only in so far as it applies
8 to the penalty appeals. What we would then propose, as we have indicated, is a separate
9 stream. It would become applicable to the liability appeals in which our defences at the end
10 of May and then a staggered timetable thereafter.

11 MISS ROSE: Could you just clarify, with the liability cases I was not sure whether I heard you
12 say that you would split out liability from penalty within those six cases and deal with
13 penalty at the same time as the penalty only cases, so those would be dealt with first on your
14 idea, and then just the liability issues would be dealt with in September.

15 MR. UNTERHALTER: That was our suggestion, and we that there were some economies in
16 approaching it that way because of the commonality of issues that arise where there are
17 liability appeals which have penalty components to them as well. The penalty components
18 would be extracted and put into the first sitting, as it were, and then we would address them
19 because of them involve these common issues of the kind that we have already indicated.
20 That might also permit the liability appeals being rather shorter than the time now provided
21 under the timetable.

22 THE PRESIDENT: Are those your points?

23 MR. UNTERHALTER: Thank you, those are our submissions.

24 THE PRESIDENT: Thank you very much. Are there any comments on that? I think we
25 indicated informally that you might want to put your name plate up, so I think you might
26 have to put hands up. Mr. Brealey, you got yours up first?

27 MR. BREALEY: Just very short on the practicalities. With the greatest respect, we would say
28 they are exaggerated. They have two key personnel apparently. They can easily split the
29 two key personnel. One can be in this court room and the other can be next door in the
30 other court room. As you say, sir, there will be detailed written submissions. The oral
31 hearings will be fairly short, and if there is a problem that arises and they need to take
32 instructions, hopefully one key personnel can sort it out here. If not, they can just call into
33 court 2 and bring that person in. The chances of it happening in a half an hour, 45 minute

1 oral hearing are extremely remote. So we do not see why one should split penalty and
2 penalty, or split liability and penalty, when they could easily split their case team.

3 THE PRESIDENT: While you are notionally on your feet, have you any other points to make
4 about the timetabling?

5 MR. BREALEY: We are happy with the timetable. It accords broadly with what we suggested to
6 the Tribunal in our written observations. We take the hit over Easter, but we are broadly
7 happy with it.

8 THE PRESIDENT: Thank you. Miss Demetriou?

9 MISS DEMETRIOU: Thank you, we are happy with the Tribunal's approach, and we support the
10 way forward that the Tribunal suggests.

11 As far as the OFT's submissions are concerned, we endorse what Mr. Brealey just said; and
12 then on the second point raised by the OFT we are concerned by the suggestion that there
13 should be some sort of larger hearing at the outset on penalty dealing with so-called
14 common issues, because we think that raises all the problems which have been canvassed in
15 writing. We would all have to be there at that initial hearing it seems to me, and it would
16 just rack up costs. We are against that suggestion. We think that any common issues in so
17 far as they exist can be canvassed in writing and we can deal with it by having an exchange
18 amongst everybody of all written submissions and then leave it to the discretion of counsel
19 not to repeat points that have been made in writing unnecessarily. That is the additional
20 point I would like to make.

21 THE PRESIDENT: Thank you very much. Mr. Robertson?

22 MR. ROBERTSON: The eight appellants that I represent support the Tribunal's proposed
23 timetable. One of those appellants, GMI Construction, is a liability appeal. We are not in
24 favour of having split trials because that will inevitably lead to an increase in costs. All of
25 my appellants are particularly cost conscious, so we would prefer to do it the way the
26 Tribunal proposed.

27 As to the OFT's alleged problems in dealing with simultaneous hearings, I think the
28 Tribunal's suggestion that the parties be at liberty to file and serve further very brief written
29 submissions following hearing transcripts should enable the OFT to deal with any points
30 that they were not able to deal with on their feet, because the relevant person was in the
31 other court room at the relevant time. We think that caters for the problems they think they
32 have got.

33 THE PRESIDENT: Thank you. I am looking around for anyone else.

1 MR. COOK: Matthew Cook representing AH Willis. Just to make the point, my clients are a
2 relatively small player in this, and consequently not a terribly rich company. To have a split
3 hearing where we appeal on both liability and penalty, to be forced to come to two separate
4 hearings, which is what the OFT is suggesting, would obviously increase costs very
5 significantly – simply the cost of attendance, getting matters back up, makes a very
6 significant difference. So we would resist the suggestion that rather than there being a
7 single attendance on a single day for us we have to come twice. That would certainly
8 increase costs significantly.

9 The other point, while I am notionally on my feet, that I would make as a practical matter is
10 this: this is an appeal against a decision and the OFT is not entitled, therefore, to
11 supplement or add to its case. It is set out in the decision and whatever the process that
12 resulted in that decision, the decision is what is being appealed. It is therefore difficult to
13 see the extent to which there can materially be real instructions coming through the OFT
14 about particular points. It is either in the decision, in which case it is to be defended, or it is
15 not, in which case it is immaterial. So the practical likelihood of there being the need for
16 significant instructions we would say is very limited indeed.

17 THE PRESIDENT: Yes, Mr. de la Mare?

18 MR. DE LA MARE: Two points, sir. The first is in relation to this proposal that there be an early
19 hearing. We resist it for the same reason that everyone else does. It is, of course, entirely
20 open to the OFT, if it chooses to do so, to do some form of generic defence and then explain
21 its position in each appeal by reference to that generic defence. Each party will then have
22 the opportunity to address that in the course of their own hearing. That may or may not
23 deliver procedural economies, but that is effectively how they have structured their decision
24 in the first place.

25 The second point is a practical one. The directions at present provide for exchange of
26 transcripts after the various hearings. I wonder whether it may be possible, with some form
27 of protocol as to how one refers to confidential information, to get transcripts of hearings,
28 next day transcripts or the same day transcripts, available before the next hearing starts, so
29 that one does not find oneself in the position of covering ground in front of a non-receptive
30 Tribunal when that particular furrow has been ploughed the day before by some other
31 counsel, and one unnecessarily goes over the same ground. I am sure the parties can agree
32 with the OFT in some way to refer to any confidential material in a sensible fashion that
33 makes the provision of next day transcripts a practical reality.

1 THE PRESIDENT: I think, off the top of my head, the transcripts are normally available pretty
2 soon. There would not, in the ordinary event, be a great delay. They are normally available
3 the next day, are they not?

4 MR. DE LA MARE: Yes, it is confidential information that is a potential sticking point. As long
5 as parties avoid referring to it and do the usual, "If you look at the figure at column 2, p.3",
6 then there ----

7 THE PRESIDENT: I think we can control that. I think that probably would help.

8 MR. DE LA MARE: I am grateful.

9 THE PRESIDENT: I think we were envisaging that the parties would get something pretty
10 quickly on the transcript front.

11 MISS SMITH: Cassie Smith for Galliford Try. I am afraid I am not Mr. Swift, you have got me
12 today, but two very short points. We do not understand the full detail of the OFT's second
13 proposal about making general submissions, although it does seem to be resurrecting the
14 idea of some sort of preliminary issues hearing, which we would oppose for exactly the
15 same reasons as set out in our written submissions. We think it will simply increase costs
16 and delay.

17 In so far as the OFT wants to avoid repeating general points that it has made, I think this can
18 be dealt with in two ways: first of all, they can, of course, as I think the point has been
19 made in written submissions, structure their defence to include a common document on
20 general points, or common paragraphs that can be used in the various defences.

21 Secondly, I also agree with submissions with already made that this point can be dealt with
22 to some extent by the exchange of non-confidential versions of the defences in all the
23 appeals between the appellants, and of non-confidential versions of the skeletons, as well as
24 the provision of transcripts. I agree with my learned friend about the quick provision of
25 those transcripts would be the most desirable way forward.

26 So I think all those issues can be managed in the way that various people have proposed.

27 THE PRESIDENT: Thank you very much. Yes?

28 MR. THOMPSON: Just to echo what people have said, but also a modest practical proposal
29 which might address some of Mr. Unterhalter's problems would be simply to swap the
30 penalty and liability blocks so that there was not both a penalty appeal going on in court 1
31 and in court 2. An obvious example would be to simply swap the red block on the left with
32 the blue block on the right, and one would then not have penalty cases going on in two
33 courts, if that is a particular problem for the OFT. It does not seem like a practical issue
34 that could not be overcome if it is a real problem for the OFT.

1 That was all I would suggest in the spirit of co-operation.

2 THE PRESIDENT: Thank you very much. Yes, Mr. Clough?

3 MR. CLOUGH: Thank you, Sir, just two quick points. Quarmby and St. James's would support
4 the Tribunal's approach in general. Second, the Tribunal had originally suggested having
5 the liability issues dealt with separately, and indeed decided before the penalty issues were
6 considered, and we would have no objection, if I can put it like that, to liability being dealt
7 with first. We are one of the six liability cases. Indeed, we would have no objection if the
8 Tribunal were to decide the liability issues before the penalty hearings began, but that might
9 be too extravagant a request.

10 THE PRESIDENT: I think the actual case management of the individual liability cases, what we
11 envisage is that will be left to the Panel that is dealing with the particular liability case,
12 because there are different issues arising in respect of them. If it was thought appropriate to
13 have a split trial for some reason between liability and penalty then no doubt the Panel in
14 question would order that. At this stage we are not so much looking at that.

15 MR. CLOUGH: To put it in concrete terms, if we were, for example, to have our first
16 infringement set aside on liability issues that would have an impact on our penalty
17 submissions which we have covered in our grounds of appeal.
18 Perhaps it is appropriate, since I have taken up so much of your time, to raise our
19 preliminary issue request, and this could save not only the Tribunal but also the Office of
20 Fair Trading a considerable amount of time, as well of course as the appellants, ourselves,
21 and that is ----

22 THE PRESIDENT: We have read that point. Can I just say this, Mr. Clough, because I do not
23 want to cut you off, as it were: we envisage that when these cases are allocated to one of
24 the three Panels, including Quarmby's case, that will be the moment to decide whether there
25 should be an issue tried. We hope that is not too far in the future. I think it is better if that
26 is dealt with as a matter of case management of your case, rather than in this plenary
27 session. The point is obviously noted, that you have raised that point. Mr. Unterhalter does
28 not have to meet anything on it now, but we have noted the point.

29 MR. CLOUGH: I am grateful, sir.

30 THE PRESIDENT: Mr. Hoskins?

31 MR. HOSKINS: Sir, can I just say on behalf of Durkan that we are happy with the Tribunal's
32 proposal. We do not like the OFT one. The notion that everyone in this room is going to be
33 gathered again to listen to the OFT's no doubt very profound submissions, it is not really a
34 very attractive suggestion by way of practicality.

1 I note what you said about individual liability appeals having individual case management.
2 I just raise it now because it seems to us, and you probably will not be surprised, two days is
3 probably way too short for Durkan. We have nine witnesses who we anticipate will be
4 cross-examined. In terms of whether that fits into this, I do not think it does. We can have
5 this conversation with someone else at a later date, but I thought it was important to flag
6 that up.

7 THE PRESIDENT: Mr. Hoskins, do you say four days, or something of that order?

8 MR. HOSKINS: That is right.

9 THE PRESIDENT: I do not know what the OFT say about that, but at the moment probably you
10 have a better idea than they do as to how long you need.

11 MR. HOSKINS: That may be for another day, but I thought it was worth flagging it up.

12 On a different issue, on the draft procedural timetable, there is the suggestion for
13 10th September for very brief written submissions. I must say, we are not very keen on that,
14 because it seems, having knocked everyone into shape, having heard ----

15 THE PRESIDENT: Are you going on holiday or something!

16 MR. HOSKINS: No, no, not that! You have heard my submissions too often, sir, obviously, not
17 this time! It is simply this: having herded all the cats into individual boxes, allowing
18 everyone to make submissions on everyone else's case, I am sure we are all responsible, but
19 one can see a prospect for it degenerating. I think also, if it is allowed and if someone does
20 take advantage of the possibility, I think you have to recognise that the OFT and the actual
21 appellants may themselves want to comment on what is said on their case. I think it is also
22 fair to say that the actual appellants should have the last word. So we can quite happily live
23 without the 10th September suggestion, but if it stays in I think you also have the possibility
24 of OFT comments, then appellants' comments.

25 THE PRESIDENT: Otherwise we are going to get into difficulties with interventions. I think we
26 have got to do something of that kind. The direction may need some fine tuning and it may
27 be that there will have to be a further commentary. It will not get out of hand because we
28 will put a limit on the length of submissions.

29 MR. HOSKINS: I think probably the OFT and appellants will need to have a chance to respond
30 in case in case something particularly exciting goes in. That is all I have to say, thank you.

31 THE PRESIDENT: Thank you very much. Mr. Harris?

32 MR. HARRIS: Sir, Corringway did not trouble the Tribunal with written submissions, but we
33 gratefully endorse the suggestion that have been made by Tribunal this morning in respect
34 of the timetable and the way in which these appeals should be managed. I only wish to

1 make one additional point. It partly echoes something Mr. Hoskins just said. The procedure
2 to be adopted here, quite understandably is going to be very heavily dependent upon written
3 submissions. It makes it vitally important on the current draft timetable that the OFT's
4 defences, for which it has such a long period to put them together, be very full documents.
5 We have heard from Mr. Unterhalter that apparently there are very large issues of difficult
6 and complex principle. All the appellants need to know in detail in the defence what the
7 OFT has to say about them. It will not be good enough for there to be a broad brush
8 approach. That leads me on to the second related point, which is that on the current
9 timetable the appellants then go next with their no doubt detailed skeleton arguments
10 incorporating reply points, but currently the last word in the written submissions - which, as
11 I say again, is going to be the most important aspect of this procedure is with the OFT.
12 That either makes it all the more important that the defences be full - which is the
13 suggestion that I advocate - and/or that the Tribunal should at least consider that the last
14 written word should be with the appellants prior to the hearings. I am just so concerned that
15 this is largely, 90/95 percent going to be written work, and, as I read it, in terms of the
16 written arguments before the hearing, the OFT is going to get the last word.

17 THE PRESIDENT: That is the normal way with skeletons. I think the order of the skeletons is
18 probably unavoidable. In terms of pleading you will have your right of reply. I think this
19 will come out in the wash, Mr. Harris, probably.

20 MR. HARRIS: Sir, I think it is just a marker down. These defences have to be very full and
21 complete documents for this procedure to work in the manner in which it is envisaged.
22 Thank you, sir.

23 MR. VAJDA: Sir, on behalf of Ballast, we would like to commend the Tribunal for its hard work
24 in producing a timetable which we entirely agree with. We also agree with what you have
25 said about the length of the oral hearing - about half an hour. We think that is eminently
26 sensible, couple with written submissions. For the moment we also agree with the liberty to
27 apply on 10th September. That is sensible. No doubt that can be reviewed. But, it would be
28 unfortunate to strike that out at this stage because it does obviate the need for other
29 measures which might be more costly.

30 THE PRESIDENT: Thank you very much.

31 MR. HOLMES: Josh Holmes for ISG Pearce. We fully endorse the Tribunal's proposal today.
32 We resist the suggestion made by the OFT that there be several separate hearings in relation
33 to our appeal - first of all, the hearing of common issues at the start of the process on
34 penalty, then a hearing of our penalty issues unique to our case, and then a further hearing

1 on liability. That appears to us excessively cumbersome and only likely to lead to
2 unnecessary expense. So, we fully endorse the Tribunal's proposal and the timetable
3 suggested in the table.

4 As regards the procedure steps, we would endorse the suggestion that skeleton arguments
5 and defence be provided to all parties. That should avoid unnecessary duplication at the oral
6 stage. We can all see how the points are put across all of the appeals. That ought to assist
7 in ensuring that hearings are used in the most economical and expeditious fashion.

8 THE PRESIDENT: Thank you very much.

9 MR. PERETZ: I think I may be the last to speak and all I need to say is that we are not liability
10 appellants - that is, Renew and Robert Woodhead. So, we have no comments to make on
11 that. In relation to the penalty appeals, I endorse what has been said by all my various
12 learned friends. I add nothing of my own.

13 THE PRESIDENT: Thank you very much. I feel like an auctioneer, looking for further bids.
14 (Laughter) No further bids. Mr. Unterhalter, do you want to just come back?

15 MR. UNTERHALTER: Yes, if we may come back on a few points. First, we are not seeking to
16 resurrect the proposals that we have previously had at all. If there is a single penalty
17 stream, all that we were proposing is that insofar as we use the time allocated to us, we
18 might usefully do so by addressing the common issues as we see them, and other have said
19 at points that we should even present it in our written submissions as a consolidated
20 approach to different issues that arise across appeals. We think that that would probably a
21 sensible way of approaching the matter, but that is not seeking to, as it were, have a separate
22 hearing and bringing people here on a separate occasion that would give rise to additional
23 costs. I think that might simply be a misunderstanding as to what we are proposing. It is
24 simply how we will use the time allocated to us, if there were to be a single penalty hearing
25 of all the penalty cases.

26 The second is the suggestion that was made that even if the case team is small it is
27 possible for a single person to dart between courtrooms and come in at the appropriate point
28 in order to deal with an issue that has arisen - possibly questions put as to whether there is a
29 particular fact that is to be considered or found in the record, and the like. We submit that
30 that is a very impractical approach, and applies a very onerous burden upon the OFT
31 because at least as far as penalties are concerned, as I have indicated there is a single key
32 person who is involved. That person is surely entitled to sit through the oral hearings in
33 each of the appeals, and where something arises that warrants an instruction, then that
34 person must be available to consider the matter - not simply when counsel believes that that

1 person must be brought in for the purposes of taking an instruction. We do think, therefore,
2 there is a genuine question of fairness to the OFT as to both how fair would the oral
3 proceedings be if there were multiple sittings, both in respect of penalty issues and penalty
4 and liability issues in the way that is currently envisaged. We wish to make that submission
5 to you.

6 The third point that we wanted to raise is just as to the question of evidence. It has been
7 suggested by some that really most of this will be a matter of legal argument and there will
8 be little for us to put up by way of evidence, given that it is all in the decision anyway. We
9 would suggest that given the witness statements which have been filed in respect of
10 numbers of the appeals that are now brought, there will be a need on our part to put up
11 evidence and there too a limited case team is going to be used for that purpose. So, in terms
12 of the timetable that is envisaged both in respect of liability and penalty issues, there is
13 more time that we require in order adequately to use the resources that we have to properly
14 prepare for the matter.

15 I should indicate that even in respect of the penalty appeals, we do intend to put up a
16 witness statement that addresses the policy issues that have informed the issues of principle
17 that find their way into the decision so that those postulates that we have advanced in the
18 decision and which are the predicate upon which many of the individual applications of
19 principle are made to particular cases, are based on policy positions which were developed
20 by the OFT and which we would wish to sketch in a brief witness statement. Thereto, there
21 is an evidence foundation to what we want to put up, and that requires the use of the case
22 team in the manner that we have indicated.

23 THE PRESIDENT: That is something that is not in the decision.

24 MR. UNTERHALTER: No, it is not. It is a background to the decision which we would seek to
25 sketch as part of the context in which the decision is taken. Therefore there is an evidential
26 component, even in respect of penalty. But, the more pressing question is certainly that in
27 respect of the liability issues there are witness statements to be dealt with, and there is the
28 rather more modest resource that we have available for that purpose. So, we would ask that
29 to be taken into account.

30 Fourthly, there is the suggestion that is made that, well, ultimately one can always make
31 further written responses in the September allocation as some sort of salve to some of the
32 difficulties that we may encounter if we had to spread ourselves across different hearings at
33 different times. We would suggest that that too then simply creates a further burden at the
34 end of the process, whereas in fact we would submit the proper time for us to make our

1 showing is at the oral hearing, properly supported by the case team that is in a position to
2 instruct us. It is for that reason that we would not support a submission that suggests that
3 the written submissions ultimately in September are some kind of corrective to what might
4 otherwise be a failing in the course of the oral submissions.

5 THE PRESIDENT: The purpose of the September was to meet the perceived need in certain
6 cases for some interventions in other appellants' cases.

7 MR. UNTERHALTER: Indeed. We would support that. We have never taken the position that if
8 a party feels that there is some critical issue upon which they need to make a submission
9 that they should not have some opportunity to do so. So, we would simply indicate that that
10 is the case.

11 As to the fullness of the defences that my learned friend Mr. Harris has raised, well, of
12 course, part of our job is plainly to put up full defences. That is part of the burden that we
13 have to assume here in a compressed time period. It is for that reason that we have asked
14 that there should be these two streams. We do not see that it will lead to significant
15 additional cost because the sittings, as it were, in the two streams would become quite
16 economical, we would imagine, at least insofar as the OFT's presentation of the case is
17 concerned, in the penalty stream. Parties could then simply come at their allotted slot in the
18 penalty stream, and they may have just one more occasion on which they have to come for
19 the liability. But, it would certainly give rise to a consistency of approach across just one
20 panel hearing all the issues, many of which we say are overlapping. So, we would ask that
21 our proposal receive your favourable consideration.

22 THE PRESIDENT: Just remind me. Is it your proposal that in those liability cases which are
23 also appeals against penalty, the penalty bit is split out? Or, are you agnostic as to whether
24 they are split out or not?

25 MR. UNTERHALTER: I think our preference would certainly be for them to be split out because
26 that would give rise to some of the economy that we have suggested because there, too, the
27 common issues would be approached in the single stream that would be dedicated to the
28 penalty appeals. But, if it were thought from the point of view of organising panels that that
29 was very difficult, I suppose one could certainly proceed along the lines that you have
30 suggested with a combination of penalty and liability, but it is not our preferred outcome.
31 However, the key point from our perspective, is that there should not be simultaneous
32 hearings of liability and penalty because, as I think I indicated in my initial submissions, we
33 cannot have, from the point of view of the resources at our disposal, simultaneous hearings,

1 either in respect of penalty and liability, or in respect of two penalty cases going on at the
2 same time. That is our difficulty.

3 THE PRESIDENT: You do not necessarily need to say now, but do you envisage individual
4 defences or, as I think was muted at one point, a sort of general, common defence?

5 MR. UNTERHALTER: We have debated it. We think that there may be some advantage to a
6 common defence in respect of what we take to be the common principles that we think
7 apply across cases. So, we are certainly exploring that. We think it may be an approach.
8 We have not adopted a final position though.

9 THE PRESIDENT: Is there anything else, Mr. Unterhalter?

10 MR. UNTERHALTER: No, thank you.

11 (Short break)

12 (For Ruling see separate transcript)

13 THE PRESIDENT: Mr. Unterhalter, I am sorry about that! (Laughter)

14 MR. UNTERHALTER: We accept the burden!

15 THE PRESIDENT: Going to the dates, we were, as I think I indicated, sympathetic to the need
16 for you to have as much time as possible in relation to the skeleton arguments, because, as
17 this stands, you will see the appellants' skeleton/come reply on 30th April, and then you will
18 have six weeks. There is the possibility, which I am floating over you, as it were, of finding
19 a bit more time than six weeks by adjusting the dates of 30th April and 31st March. In other
20 words, if you were able to put your defences in a bit earlier, for example, and then we were
21 able to move back to 30th April, or even if you were very forceful, there would be the
22 possibility of moving back the April date by a week or so anyway. Do you want to say
23 something about that?

24 MR. UNTERHALTER: I think we would be content to keep the timetable as it now stands.

25 THE PRESIDENT: Very well. In addition to that, what is listed there, we envisage that our order
26 will indicate that an agreed bundle of authorities for the penalty cases should be lodged by
27 11th June. It is a bit difficult to make any directions in other individual cases, but I think, as
28 far as the authorities are concerned, that will be very helpful. It may be that further
29 directions will have to be given in individual cases about the dates for the other bundles that
30 will be necessary in those cases, but I am hoping that that may emerge in the course of
31 correspondence. I am not envisaging any further general CMC of this kind.
32 We will also put in the order emerging from today that you try and agree as much as
33 possible by a week this Friday as to the listing of cases. Then thereafter we will deal with it

1 and determine exactly when cases will be listed. We would like to have your agreed
2 proposals so far as possible by then.

3 We also indicate that pleadings and skeleton arguments and witness statements, etc, should
4 be filed electronically as well in the usual way.

5 As far as intervention applications are concerned, probably the right approach for those is to
6 adjourn them generally. If anything proves a problem it can be raised with the specific
7 Panel.

8 I think those are the only specific points that we have got. Is there anything else at this
9 stage? Mr. Robertson?

10 MR. ROBERTSON: Sir, in relation to bundles of authorities, we have had a discussion with
11 junior counsel for the OFT and my junior, Miss Sarah Abram, will liaise with junior counsel
12 for the OFT. They are both at Brick Court Chambers. We will come up with a proposal to
13 put to the other parties for producing an agreed bundle of authorities.

14 In relation to other matters for today, I did have two applications for disclosure. Am I to
15 take it that those are to go to the individual Panels?

16 THE PRESIDENT: Yes.

17 MR. ROBERTSON: We will deal with them then.

18 THE PRESIDENT: I think they are slightly premature. Obviously the OFT have heard your
19 application and they have seen your written submissions. They have yet to put in a defence,
20 so I think that any disclosure application probably ought to be made after they have had an
21 opportunity to put in their defence.

22 MR. ROBERTSON: I think in relation to the Europe Economics Report that is correct; in
23 relation to the one disclosure application for GMI Construction, the Irwins Tender Register,
24 we did ask for that in correspondence with the OFT and they asked us to seek a direction
25 from the Tribunal at the first case management conference. This is a document that is in the
26 possession of Irwins, one of the addressees of the decision, not an appellant. They are a
27 leniency applicant. Therefore, they are subject to an ongoing duty of co-operation with the
28 OFT. We do not understand there to be a problem with the OFT requesting Irwins to
29 produce this document so that we can inspect it at the OFT's offices. I think that is a
30 request that we do properly make at this case management conference because we might as
31 well just get on with it. It is a document, copies of which are relied upon by the OFT in the
32 decision, but we want to see the original, the original being best evidence.

33 MR. UNTERHALTER: Our position on this is that we will certainly approach Irwins and ask
34 them to produce the originals and then make them available. We do not formally think it

1 correct that the duty of co-operation continues in the way suggested, but we are not certain
2 that that is something that needs to be determined in any way. We will approach them and
3 ask them for the original and make it available.

4 THE PRESIDENT: Do you think you need anything more than that at this stage?

5 MR. ROBERTSON: Not at this stage.

6 THE PRESIDENT: Thank you very much. Mr. Hoskins?

7 MR. HOSKINS: Sorry, sir, just a point that I raised that you did not deal with, which may be all
8 the answer that I need as to the view taken, in relation to 10th September, other submissions.
9 I just pointed out that it might be sensible to allow the OFT and actual appellants to respond
10 to those. I do not know if that was something that did not find favour.

11 THE PRESIDENT: No, it is not that it did not find favour; I think we just prefer to leave that at
12 the moment and see what emerges. It may well be perfectly appropriate that they should. It
13 may depend on the individual case as well, so I think that could be left.

14 MR. UNTERHALTER: Sir, I have an extremely uninteresting point just to clarify. You will
15 have noticed that all the parties indicated that they would like to communicate with each
16 other by email, and it may be that is in addition to what you have just said in terms of
17 pleadings and skeleton arguments. Is it possible for you to sanction that? Obviously it is
18 not going to stop the normal forms of communication with the Tribunal.

19 THE PRESIDENT: By “sanction it”, you mean require it?

20 MR. UNTERHALTER: I am trying to find the right word.

21 THE PRESIDENT: I am sure it is okay for you to do it.

22 MR. UNTERHALTER: That is probably quite sufficient, thank you, Sir.

23 THE PRESIDENT: I think the assumption is regarding further pleadings – I cannot remember
24 now whether we made an order about this – that all the non-confidential versions of the
25 notices of appeal were sent to almost everybody who wanted them. Nobody has asked for
26 anything further on that score. I think the maximum amount of co-operation in this case is
27 really within the spirit of what we are trying to achieve. I think one envisages that, if people
28 want it, non-confidential versions of people’s pleadings should go to whoever wants it. If
29 we have to make a direction about that we will, but I do not think the problem has arisen
30 yet.

31 Is there anything else at all? We will get an order out along those lines as soon as possible.
32 Thank you all very much indeed for your help, and I am sorry for the discomfort.

33 _____