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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1116/4/8/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 November 2009

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
ANN KELLY
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

SPORTS DIRECT INTERNATIONAL PLC

Applicant

- v -

THE COMPETITION COMMISSION

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Mark Brealey Q.C. and Ms Maya Lester (instructed by Berwin Leighton Paisner LLP) appeared for the Applicant.

Ms Elisa Holmes and Mr. Paul Stuart (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Daniel Beard (instructed by the General Counsel, Office of Fair Trading) appeared for the proposed Intervener, the Office of Fair Trading.

1 THE CHAIRMAN: Good morning, Mr. Brealey.

2 MR. BREALEY: Do I have to introduce everybody? Mr. Beard is for the OFT, Miss Elissa
3 Holmes for the Competition Commission and I appear on behalf of Sports Direct with Miss
4 Lester.

5 THE CHAIRMAN: Well, welcome.

6 MR. BREALEY: Thank you very much. We have all agreed, subject to the Tribunal's direction,
7 that this should be a CMC not a formal application.

8 THE CHAIRMAN: So we are about to embark on a long piece of satellite litigation about
9 disclosure are we?

10 MR. BREALEY: A short piece of non-satellite, but perfectly fair and proper litigation.

11 THE CHAIRMAN: I did not say it was not fair and proper! Yes carry on, Mr. Brealey.

12 MR. BREALEY: I have in front of me the 19th November letter where the Tribunal has helpfully
13 set out the agenda. Item 1, I have already been asked by Mr. Beard for the OFT, and
14 certainly for our part we do not object to the OFT intervening, so it is subject to the
15 Tribunal ----

16 THE CHAIRMAN: I think if you did object you might lose that argument.

17 MR. BREALEY: Well I wondered whether he was intervening on our behalf, but he is not, he is
18 intervening on behalf of the Competition Commission.

19 THE CHAIRMAN: And I gather we have the Competition Commission represented, have we got
20 JJB represented as well?

21 MISS ROBERTS: Yes.

22 THE CHAIRMAN: Could you come nearer the front you are a very long way away? Come into
23 the penalty area and then you can handle the ball if you want to. (Laughter)

24 MISS ROBERTS: My name is Veronica Roberts from Herbert Smith, and we represent JJB.

25 THE CHAIRMAN: It is very kind of you to come, forgive my discourtesy, Miss Roberts. And
26 you are for JJB?

27 MISS ROBERTS: Yes.

28 THE CHAIRMAN: Do JJB want to intervene?

29 MISS ROBERTS: We have not had the time, given the documents went on the website
30 yesterday, and given that we do not have sufficient information to make a decision by 9.30
31 this morning to be absolutely sure that we wish to intervene. We wanted to attend this
32 hearing .

33 THE CHAIRMAN: So you might want to intervene?

34 MISS ROBERTS: We may wish to.

1 THE CHAIRMAN: That is helpful, thank you.

2 MR. BREALEY: If they do, I am sure it can be done on paper.

3 THE CHAIRMAN: Absolutely. I do not know if you heard Mr. Brealey, but if you want to it
4 can be done on paper, that sounds very sensible.

5 MISS ROBERTS: Thank you.

6 THE CHAIRMAN: At least to begin with. I saw Mr. Beard looking startled at the front. It can
7 start on paper.

8 MR. BREALEY: So that was the agenda item 1. Item 2 is that in the event that request for
9 permission to intervene is granted to consider issues relating to confidentiality.
10 Certainly, there are issues in our application which, to a certain extent are confidential
11 because they are the working papers, obviously the Competition Commission can see those,
12 but we are a bit sensitive on that, but broadly we do not have any confidentiality issues at
13 all.

14 THE CHAIRMAN: It connects, does it not, Mr. Brealey with question no.4 in the letter?

15 MR. BREALEY: Yes.

16 THE CHAIRMAN: Which I would put in a slightly more direct way: Does the Tribunal need to
17 see the documents that are being withheld?

18 MR. BREALEY: Can I answer that “probably yes”, but give my reasons as to why “probably”.
19 There are essentially two issues to be addressed on the main hearing. One is whether this
20 information is confidential at all. For example, the financial information relating to the
21 stores – Sports Direct has been operating those stores for one or two years now and it is
22 very difficult to see why that should be withheld – that is the first issue, whether this
23 information is confidential at all. The second issue is, even if it is, and this is the thrust of
24 our main point, even if it is you have put it in the working papers, you cannot redact it. So
25 when I say “probably yes”, this application could go on the basis that you assume that it is
26 confidential, but to take our second point it should be disclosed, because it is being used in a
27 working paper and we must have an opportunity ----

28 THE CHAIRMAN: Your fair trial point.

29 MR. BREALEY: It is our fair trial point. We are given reasons that it is confidential, and we are
30 in an intolerable position as much as the Tribunal is on the first issue. So “probably yes”,
31 imbues the Tribunal does need to see it.

32 THE CHAIRMAN: How do we achieve that if that is the conclusion?

1 MR. BREALEY: It may well be that the information has to be given to the Tribunal and a very
2 limited number of representatives on the Sports Direct side, for example, myself. We can
3 make submissions on it and maybe the Company Secretary from Sports Direct, Miss Lester.

4 THE CHAIRMAN: PII?

5 MR. BREALEY: Why not.

6 THE CHAIRMAN: The thought that had gone through my mind was that a PII application could
7 be made by the Commission, documents would then be seen by the Tribunal which would
8 give the Tribunal, and I am not making any decisions at the moment, I am just offering
9 thoughts, the Tribunal would then have the opportunity to consider all the relevant
10 documentation. When a PII application is made the Tribunal of law has to keep the PII
11 under review at all times. Were we to be of the view that material in that PII should be
12 disclosed to Sports Direct we would say so. It would then be a matter for the Competition
13 Commission to decide what to do about it.

14 MR. BREALEY: That is one route obviously, but that cuts across our application which is that it
15 is being used in these documents against us, and we do not actually know whether it is in
16 the public interest at all. It raises very dense points whether the OFT can drip the
17 Competition Commission information which is on the face of it used in its investigation to
18 the detriment of Sports Direct. The OFT can keep information to itself if it wants to
19 conduct its investigation but to go around drip feeding it to another body and then saying,
20 "Well, don't disclose it to the main person in the investigation" we say is wholly unfair.
21 The Tribunal of course can look at it, but we would need to make submissions as to why it
22 should be disclosed to us. That is the purpose of our application.
23 So, we have no objection to the Tribunal seeing it. As I say, if the Tribunal did see it, it can
24 make a decision as to whether, on the face of it, it is confidential. But, it does not actually
25 affect the second issue, which is whether it should be disclosed, and whether it is a proper,
26 fair process that the OFT should be just drip-feeding this information and then saying,
27 "Well, you can use it".

28 THE CHAIRMAN: This is the sort of classic PII situation which arises, certainly in the criminal
29 courts, every day of the week. Material is disclosed to the judge on the basis that it is
30 contrary to the public interest for it to be disclosed to anyone else. But, if, for a fair trial, it
31 is necessary for it to be disclosed to the defendant in a criminal trial, then the judge so
32 orders and the prosecution decide to go on whether to go on with the case, or not. I mean,
33 my extensive knowledge of what happens in the Northern Ireland courts is that it goes on all
34 the time and has for the last thirty years, or more. That is one way of looking at it.

1 MR. BREALEY: It is one way of looking at it. I think one has to remember that this is
2 information which has come from JJB, as we understand it. That is one party to the merger
3 investigation. It goes to the very essence of the transaction that is being referred. One of
4 the reasons that we are here is that the merger transaction is being referred and we are being
5 denied access to the information relation to that transaction. We cannot comment on that in
6 a hearing. So, I take the PII point, but it is kind of like Plan C rather than Plan A.

7 THE CHAIRMAN: I understand that.

8 MR. BREALEY: So, the answer to your question at Point 4 is: Yes, we have absolutely no
9 objection to the Tribunal seeing it whatsoever because it is relevant to the first issue I have
10 mentioned - as to whether it is confidential in the first place. How is it really impacting on
11 the OFT's investigation? Sir, they are very kind of wide words, and they are easy words to
12 use, which would affect our investigation. How on earth can we judge whether that is true,
13 or not?

14 THE CHAIRMAN: We have not dealt with Point 3. I jumped you to Point 4. I am sorry.

15 MR. BREALEY: I think we have kind of tentatively suggested a timetable.

16 THE CHAIRMAN: Yes. I have been told about it. Can I add that this tribunal, this constitution
17 could make Friday, 4th December available all day.

18 MR. BREALEY: We could work back from that.

19 THE CHAIRMAN: I think that fits with the indicative timetable that was discussed certainly
20 with the Registry yesterday. I do not have the details of that timetable before me, but I
21 know you gave them to the referendur who is sitting with us today.

22 MR. BREALEY: I think what the Competition Commission were suggesting was that they would
23 submit their papers by Wednesday, 25th. We were suggesting that the OFT should do the
24 same. That would include the OFT and any other interveners - JJB if it wants to intervene.
25 Then we would maybe have an opportunity to respond either by 27th, the Friday, or maybe
26 the Monday, 30th. That would give essentially that week to lodge skeletons and give the
27 Tribunal maybe two days in which to read the papers.

28 THE CHAIRMAN: It is a tight timetable, but given the nature of this matter I hope everyone
29 would agree that we have to keep to this tight timetable. It is achievable.

30 MR. BREALEY: Sir, if the hearing is on Friday, 4th I throw it open to the Tribunal -- Would you
31 prefer the skeletons on Wednesday, 2nd? Is that enough time?

32 THE CHAIRMAN: Yes - as long as those who are drafting the skeletons bear in mind the word
33 'skeleton'. Certainly I notice leading counsel turning plaintively to Miss Lester and
34 stretching out a hand. I know some of the counsel here. I know that you are all inclined to

1 put only what is required in skeletons. It is not a complaint. But, when we are abridging
2 time it is important, of course, that we should stick to the essentials. The point here is
3 essentially a very straightforward one.

4 MR. BREALEY: It is. So, skeletons by 4.00 p.m. on Wednesday. Then, 4.00 p.m. on Monday
5 30th - we will have time to respond.

6 THE CHAIRMAN: It would be helpful to me - and I suspect to my two colleagues - if everything
7 could be sent in electronically as well as in hard copy form. Then it can be winged to our e-
8 mails.

9 MR. BREALEY: Sure.

10 MR. BEARD: I think there may be difficulties with that. I will have to take instructions from
11 those behind me, but if there is material that is closed -- I do not know whether or not
12 arrangements at the CAT are currently such that restricted material can be conveyed
13 electronically. I think this was something raised previously in relation to the user group.

14 THE CHAIRMAN: Is there a problem, Mr. Bailey? (After a pause): That is well raised, Mr.
15 Beard. We will sort that out somehow.

16 MR. BREALEY: Sir, I think they are broadly the directions that we were seeking - to get a
17 hearing quickly. It is a tight timetable, but, as I think you know, sir, and the Tribunal, it is
18 very important to Sports Direct that this does get ----

19 THE CHAIRMAN: Bear with me, Mr. Brealey. I have a list of my own. I just want to see if
20 there is anything we have not covered. (After a pause): Thank you.

21 MISS HOLMES: Sir, if I can start with perhaps the most difficult issue first - the issue of the
22 redacted material. With respect to my learned friend, the manner in which he has portrayed
23 the central issues to be determined are, with respect, somewhat misleading. This is not a
24 disclosure exercise. This is quite a different situation. This is a situation in which the
25 starting point is that the Competition Commission, in the conduct of investigation, is not to
26 disclose information. The Enterprise Act makes that quite clear. It is entitled to disclose
27 information. Of course, we accept - not to stray too far into the substantive argument, sir
28 that it has obligations of fairness, and so forth. To that extent we are in agreement. But, I
29 think that is as far as the agreement goes. So again with respect to my learned friend, it is
30 simply wrong to describe or to conceive this as some sort of disclosive situation because it
31 is just not, in the ordinary CPR sense -- There is no obligation on the Competition
32 Commission to disclose any document.

33 THE CHAIRMAN: It is much more fundamental, is it not, than a disclosure situation? It is a fair
34 trial situation.

1 MISS HOLMES: It is a fair investigation and a fair procedure. Yes, absolutely, sir. On that
2 point, the central focus of our submissions in relation to the substantive issue is that at this
3 point in the investigation - that is, before any conclusions on anything have been reached -
4 my learned friend's application is simply premature. There is absolutely now way, with
5 respect, that this Tribunal at this stage in the proceedings can determine whether or not my
6 learned friend's clients have benefited from a fair investigation or not.

7 THE CHAIRMAN: Can I just be clear of what you are submitting? You are not submitting - and
8 forgive the double negative - that we have no jurisdiction?

9 MISS HOLMES: Part of our submission, sir, is that s.120 - and it might be worth, now that the
10 point is raised ----

11 THE CHAIRMAN: I read it about twenty minutes ago.

12 MISS HOLMES: Section 120 is, on its terms ---

13 THE CHAIRMAN: A decision.

14 MISS HOLMES: Yes, a decision.

15 THE CHAIRMAN: Your authority for an argument that we are not dealing with a decision is?

16 MISS HOLMES: The point, sir, is not that we are not dealing with a decision - it is that we are
17 not dealing with a decision under Part 3. We can see that s.120 is headed 'Review of
18 Decisions under Part 3' and so forth. If we go to the definition in sub-section (2),

19 "For this purpose decision does not include a decision to impose a penalty ..."

20 But, it is quite clear from the terms of s.120 that it relates to decisions under Part 3. In fact
21 it says 'under this part'. I should add, just to make it clear, sir, that to the extent that my
22 learned friend is challenging a decision, it appears to be a decision taken under s.244 of the
23 Enterprise Act which does not fall in Part 3. Section 244 arises "in the event the
24 Commission decides that it should provide information to parties" and it requires in that
25 event the Commission to take into account certain considerations, one of which is the public
26 interest; another of which is commercial sensitivity, to put it shortly.

27 We say, sir, that there is a very good reason why s.120 (a) appears where it does in the
28 legislative scheme, but (b) is confined to decisions under Part 3. That is because it is the
29 decisions under Part 3 which stand a chance, even, sir, of affecting the rights, the interests
30 of parties.

31 THE CHAIRMAN: Why can s.244 not refer to a decision under Part 3? Section 244 provides
32 statutory guidance only, does it not? It does not limit the considerations of disclosure. It
33 does not trump the fair trial requirement.

1 MISS HOLMES: With respect, sir, my learned friend certainly has not identified any decision
2 within Part 3 he seeks to review. But, further to that, as for s.244, it does require a decision.
3 It requires - as my learned friend puts it, but it is not the way we would put it - the
4 Commission in certain circumstances to undertake some sort of assessment, the conclusion
5 of which is inevitably some sort of decision or some sort of action, and is therefore self-
6 contained. One can see the context of s.244 if one has a look at s.241. Section 241 is
7 important - that also falls outside of Part 3 -- because it says at sub-paragraph (1),

8 "A public authority which holds information to which s.237 applies **may** disclose
9 that information for the purpose of facilitating the exercise by the authority of any
10 function that is undertaking its investigation".

11 So, there is the power, sir, to disclose the information. That power is, to some extent,
12 fettered by s.244.

13 So, in our submission, sir, there can be no dispute that to the extent my learned friend is
14 seeking to have a decision judicially reviewed, it is a decision under s.244 (or perhaps in
15 combination with s.241) and simply not a decision in Part 3 of the Act.

16 Sir, there is a very good reason, as I said, why the statutory scheme would be such. That is
17 because, as I say, it is impossible to tell at this stage of the investigation whether my learned
18 friend's clients are going to suffer any unfairness. There are several reasons for that. One
19 is, as I say, that the Commission has yet to reach even provisional stage. The Commission
20 itself does not know, as my learned friend puts it, what the central facts which might lead to
21 the key decisions, the key conclusions are. Indeed, the Commission at this stage does not
22 know what its conclusions are going to be. So, it is simply impossible to know in this
23 statutory context of disclosure what documents or information are required in order to
24 accord fairness to my learned friend's clients.

25 As I have already emphasised, there is no statutory obligation at all to provide particular
26 documents. In fact, the statutory obligations are quite limited in this respect. Not
27 surprisingly, they are to consult on the key decisions and to provide information as to the
28 reasons for the decisions, but the decision, sir, is the statutory decision which ultimately the
29 Commission is required to make under s.35 of the Act.

30 On top of that, sir, we are at a particular stage of the investigation now. There is still a
31 period of the investigation to go. To the extent that the Commission seeks to rely on certain
32 documents or information in its findings and the Commission in the exercise of its judgment
33 determines that in order to ensure fairness it needs to put certain matters to my learned
34 friend's clients, it can still do so at a later date. It can do that in a different form. It does not

1 have to give my learned friend's clients the opportunity to respond to a particular document
2 so long as the salient facts upon which the Commission relies are put to my learned friend's
3 clients. That must be my learned friend's submission.

4 For those reasons, sir, our position is that my learned friend's application, to put it at its
5 best, is premature. Whether one looks at it in terms of s.120 and the jurisdiction afforded to
6 the Tribunal under s.120, or whether one looks at it just from a simple judicial review point
7 perspective - and, indeed, there is very strong judicial review case law in the Administrative
8 Court to this effect - it is simply premature to bring judicial review actions, as the case law
9 states, at interlocutory stages. The reason for that is that one does not know at this stage
10 whether any unfairness has occurred. It might be that my learned friend's clients are quite
11 happy with the outcome of the investigation. It might well be cleared - in which case it
12 cannot possibly be the case that my learned friend's clients have suffered any prejudice or
13 unfairness.

14 I think that this was a very long answer to your question, sir, as to whether or not we take
15 any jurisdiction point.

16 THE CHAIRMAN: I am not complaining about the length of the answer, but I think I could
17 reduce it to 'Yes'.

18 MISS HOLMES: Yes. Thank you, sir. I am grateful for the conciseness of your summary.
19 That leads on to the question with which I started, which is the disclosure of this
20 information -- or the redacted information. We are extremely concerned, needless to say, at
21 my learned friend's suggestion that members of Sports Direct - directors or other members
22 of Sports Direct - see any information. That defeats the whole purpose of the redaction in
23 the first place. That clearly is not a satisfactory resolution of this matter. But, we say, sir -
24 and you might have read the Treasury Solicitor's letter on behalf of the Competition
25 Commission yesterday - that one way of dealing with this would be to consider - and, of
26 course, this is subject to the Tribunal's availability - that the preliminary issue, or, if you
27 like, the theoretical issue of whether it is even possible for my learned friend's application
28 to succeed, whether we call it on the basis of this jurisdiction point, or whether we refer to it
29 as a prematurity point, but for the reasons that I have summarised a few moments ago, that
30 would avoid potentially ----

31 THE CHAIRMAN: I am sorry. I do not understand what you are suggesting. Try again.

32 MISS HOLMES: To put it quite simply, sir, one way of dealing with this would be to split the
33 issues to be heard into two separate hearings.

34 THE CHAIRMAN: So, you want an ex parte hearing ----

1 MISS HOLMES: No, sir. Almost a preliminary issue hearing.

2 THE CHAIRMAN: What about the Tribunal seeing the documents? How are we supposed to
3 determine this issue without seeing the redacted documents?

4 MISS HOLMES: The issue of whether or not there is any chance at all that my learned friend's
5 application can succeed. We say there is none at all for the points that I have just said,
6 which is that s.120 does not apply to decisions under the Part - so, if you like a kind of
7 jurisdictional point But, also, even if my learned friend is right and at some point in the
8 investigation one would normally expect to see these documents, it simply cannot be
9 determined at this stage by the Tribunal whether or not there has been any unfairness in the
10 course of the investigation.,

11 THE CHAIRMAN: If there is a jurisdiction point, we can take that as the first part of the hearing.

12 MISS HOLMES: Yes, sir. That is right, with respect. The reason for this proposal on the
13 Commission's part is to avoid, if you like, potentially the need to deal with how to deal with
14 the redacted information. If we are right on that first point - on the
15 prematurity/jurisdictional issue - then there is, I think, on anyone's argument no need for the
16 Tribunal, or for anyone, to see the information. If we are wrong on that, if the Tribunal does
17 have jurisdiction and my learned friend's application is not misconceived for the reasons I
18 have said, it is only then that my learned friend says, I think in his ground 2, that we
19 exercised our discretion, as he puts it, or our decision under a non-Part 3, under s.244
20 incorrectly, and it is only at that stage that there can be an argument that the Tribunal at
21 least should see the information.

22 THE CHAIRMAN: Well given the abridgement of time, given the short time available I fear we
23 may have to take it as it comes.

24 MISS HOLMES: I can see that problem, sir, particularly if the Tribunal is not available at an
25 earlier date in that week, as I understand now to be the position. That still does leave us in
26 the position whereby perhaps part way through the day, if we do deal with that issue first
27 and the Tribunal was minded to decide in our favour that still does leave the chance in any
28 event that we will not have the issue with the documents, but I suppose that does not
29 alleviate the need at this stage to have a contingency plan, if you will, sir.

30 THE CHAIRMAN: No.

31 MISS HOLMES: As to the directions, the particular directions, the Commission is certainly quite
32 content generally with that timetable. The directions that we were minded to propose is that
33 nay further applications to intervene be filed and served by 4 pm. on Monday, 23rd.

1 THE CHAIRMAN: If you are content with the proposed timetable we do not need to start
2 varying it unless Mr. Beard wants to.

3 MISS HOLMES: I was not clear, sir, whether my learned friend was saying that we should have
4 until 4 pm on Wednesday, 25th or – I do not think he gave a time – until Thursday, 26th.

5 THE CHAIRMAN: I think he said 4 pm on Wednesday, 25th.

6 MISS HOLMES: We would ask, sir, until Thursday, 26th particularly if my learned friend then
7 wants until Monday to put his reply in and obviously those documents would deal with the
8 interveners.

9 THE CHAIRMAN: Mr. Brealey is shaking his head in a resigned sort of way, so we will go for
10 Thursday, 26th ----

11 MISS HOLMES: I am grateful, sir.

12 THE CHAIRMAN: -- to be helpful to you.

13 MISS HOLMES: And we are content with the remaining directions, Sir, which I think
14 constituted skeletons I think in electronic form.

15 THE CHAIRMAN: I say “Thursday, 26th”, unless Mr. Beard wants to say anything – which he
16 will do in a moment – on that matter.

17 MISS HOLMES: We are very grateful to the Tribunal for being able to fix a date for a hearing so
18 quickly. On that point, I do note on behalf of the Commission, the Commission is also very
19 concerned to get this matter rolling, and it is probably important that I say something about
20 the Commission’s timetable on this.

21 THE CHAIRMAN: Yes, I was interested in your timetable too.

22 MISS HOLMES: The Commission’s investigation is ongoing. As the Tribunal anticipated, in its
23 recent letter, it has an internal administrative timetable which involves, for what it is worth,
24 the publication of provisional findings in early to mid-December, which is followed in the
25 usual way by remedies’ hearings which will take place in January, and the statutory
26 deadline for its report is 24th February, but the Commission ----

27 THE CHAIRMAN: Can you stop the clock. Behind you, I think those instructing you are
28 shaking their heads vigorously.

29 MISS HOLMES: We cannot stop the clock, Sir, is the answer. We can extend in circumstances,
30 the deadline but there is statutory provision for that. Our position is that we do not propose
31 to stop the investigation pending the outcome of this hearing, as I have already submitted,
32 although the Competition Commission’s internal procedures for investigating are a matter
33 for it. of course subject to legal constraints such as affording fairness and so forth, but the
34 Commission does not intend to stop so it will still progress and, if possible, according to its

1 timetable and take decisions. Of course, it is aware of these proceedings and it is aware of
2 the fact that it will not get a judgment until at the very earliest until Friday, 4th, I think.

3 THE CHAIRMAN: Yes.

4 MISS HOLMES: But the Commission, just to make it clear ----

5 THE CHAIRMAN: I think you will get at least a decision on Friday, 4th.

6 MISS HOLMES: I am very grateful for that indication, Sir.

7 THE CHAIRMAN: Whether you get the text on Friday, 4th may depend on whether we want to
8 give an extemporary judgment or not, because it would obviously have to be extemporary,
9 but you will probably get conclusions on 4th.

10 MISS HOLMES: I am very grateful for that indication and I think those behind me will be
11 extremely grateful to hear that, it will help them in deciding how to proceed over the next
12 few weeks with their investigation.

13 Sir, I think that addresses each of the items in the Tribunal's agenda.

14 THE CHAIRMAN: Yes, I think so.

15 MISS HOLMES: Unless there is anything else? Thank you, Sir.

16 THE CHAIRMAN: Mr. Beard?

17 MR. BEARD: I am grateful to Mr. Brealey for the indication that there is no opposition to the
18 intervention of the OFT, on that basis I will proceed – on the basis that we are permitted, in
19 anticipation of any such order.

20 The challenge that has been brought before this Tribunal has been couched in terms of
21 fairness and fair procedure, but there are going to be a number of points that are going to
22 need to be covered. My learned friend, Miss Holmes, has already adverted to some of them.
23 Is the decision to redact working papers, which is challenged, a decision which falls for
24 review pursuant to s.120 of the Enterprise Act. Is it a valid application pursuant to Rule 10
25 of the Rules – I am not sure if that is a matter that is going to arise. Even if the challenge is
26 within the CAT's jurisdiction and is a valid application, is it nonetheless premature? That is
27 given the fact that no final or even provisional has been made, and obviously without going
28 to the case law and discussing the substance of this case, fairness is a matter that has to be
29 taken in the round, and it is the fairness of the final decision which is, of course, the matter
30 that falls for consideration by this court, and to anticipate what the claimants are going to
31 have to do in this case is show that it is necessarily rendering that final decision unfair to
32 have these redactions in the working papers.

33 In passing, I also note that the characterisations made by the appellants in this case of the
34 procedure of the CC and the role of the hearing, and the comparators that are readily trying

1 to be drawn between the procedure before the CC and any criminal procedure, for example,
2 are misconceived. The OFT are concerned about this particularly because it was a matter
3 that arose during the course of the OFT's consideration of whether or not to refer this
4 matter, that certain of the submissions mischaracterised the role of the CC and the OFT at
5 that time.

6 The fourth issue that arises is the issue that then concerns potentially closed confidential
7 material: Did the Competition Commission in deciding not to provide certain material to
8 SDI lawfully exercise its discretion under Part 9 of the Enterprise Act? I put the point that
9 way advisedly, because it is not good enough for the appellant simply to skip around in
10 public law terminology without actually directing itself properly to the terms of Part 9. That
11 means that one then has to ask oneself: "Was the disclosure in question contrary to the
12 public interest? Did the Commission consider that the disclosure of any commercial
13 information in question might significantly harm the legitimate business interest of the
14 undertaking to which it related? Did the Commission consider that the disclosure of any of
15 the information relating to the private affairs of an individual might significantly harm the
16 individual's interest? Was the disclosure necessary for the purpose for which the
17 Commission was permitted to make the disclosure. I use that terminology advisedly
18 because if the Tribunal would take up again the almost biblical Purple Book, Miss Holmes
19 took the Tribunal to some provisions of Part 9 – internal 230. It is just important to note
20 that the way in which this procedure may unfold, 237: "General Restrictions".

21 "(1) This section applies to specified information which relates to:

- 22 (a) the affairs of an individual;
23 (b) or any business of an undertaking

24 (2) Such information must not be disclosed –

- 25 (a) during the lifetime of the individual, or
26 (b) while the undertaking continues in existence, unless the disclosure is
27 permitted under this Part."

28 In other words, there is a blanket prohibition on disclosure subject to gateways, and there
29 are various gateways, there is a gateway at 239, which is consent, and then I think the key
30 gateway here is going to be 241 – "Statutory functions" and that is the provision to which
31 Miss Holmes has already adverted:

32 "A public authority which holds information to which section 237 applies may
33 disclose that information for the purpose of facilitating the exercise by the

1 authority of any function it has under or by virtue of this act or any other
2 enactment.”

3 Then one turns on to 244 which, Sir, you correctly characterised as setting out a set of
4 considerations, but the reason it only specifies considerations is because it is those
5 considerations that must be taken into account when deciding whether or not the disclosure
6 passes through any gateway. The only reason I fleshed this out is because Miss Holmes has
7 spelt out why it is that under s.120, if we might turn back to that, you might get the situation
8 where this Tribunal does not have review powers. It is therefore important to read the
9 whole of s.120(1) together: “Any person aggrieved by a decision of the OFT ...” well it
10 does not stop there, “... Secretary of State or the Commission under this Part in connection
11 with a reference ...” the decision we are talking about here is a decision plainly made under
12 Part 9, because it is a decision to say that the disclosure of information is or is not to be
13 permitted through one of the Part 9 gateways. The appellant has put forward no good
14 argument why it is you should consider a Part 9 decision to be considered as made under
15 Part 3, and that, as I understand, is the point that Miss Holmes is raising.

16 I go through those provisions because it is right to say, and right to emphasise and the OFT
17 is concerned to emphasise that it is subject to a statutory scheme of disclosure control, and
18 so is the Competition Commission. So the idea that these issues can be relatively quickly
19 skated over may be just frankly wrong, and it may be in the appellant’s interest to do so, but
20 that has broader ramifications.

21 The second point to bear in mind, and this again amplifies – and I hope I do not repeat what
22 Miss Holmes has already said, 120(4), in determining such an application, so let us assume
23 that this application can properly be brought under s.120:

24 “(4) In determining such an application the Competition Appeal Tribunal shall
25 apply the same principles as would be applied by a court on an application for
26 judicial review.”

27 And here an anomaly arises because, of course, in judicial review in the Administrative
28 Court what you have is a two stage process, you have permission first off, and then you
29 have a full hearing if, and only if, permission is granted, first considered on the papers, can
30 renew to an oral hearing, so you are familiar with the process – I perhaps just emphasise it.
31 You do not have any permission scheme here. You do not have ways of weeding out cases
32 that would be weeded out at the permission stage on the face of that provision, but of
33 course, at the permission stage in judicial review proceedings it is precisely issues such as
34 alternative remedy, prematurity, delay, that are the sort of matters that are dealt with as a

1 preliminary issue and knocked on he head. It is therefore understandable why the
2 Commission says: “Look, there is a sensible demarcation to be drawn here between the
3 issues. On the one hand s.120, jurisdiction matters, and on the other hand alongside that
4 prematurity permission-type matters; and on the other side the substance of this case.
5 One can understand if the Tribunal only has availability to deal with this in the round, on a
6 particular date it is necessary to put in place directions in order to deal with the matters in
7 the round, but starting without that constraint one can see the absolute sense in dealing with
8 the jurisdictional and pseudo-permission issues as a preliminary matter under this
9 Tribunal’s case management powers, because one of the concerns that this Tribunal must,
10 of course, be alive to is that when one uses the term “decision” in its broadest sense
11 regulatory bodies are constantly making decisions in the course of their investigations, but
12 not all of those decisions are right for judicial review. In order for this Tribunal to have the
13 power to weed out those unripe challenges the Tribunal needs to think about the structure
14 by which it deals with these matters. I make those observations because in this case the
15 confidential matters only arise in relation to those second order substantive matters.
16 Therefore there is a further logic to the Competition Commission’s position. In those
17 circumstances there is great sense in what the Competition Commission says, and if this
18 Tribunal could accommodate hearings - one urgently dealing with the jurisdiction and
19 prematurity issues; one, postponed, to deal with the substantive questions - there is a great
20 logic to that because in those circumstances this Tribunal will not then have to grapple with
21 whether there are any difficulties in relation to the dealing with confidential material.
22 Furthermore, it is perhaps worth stressing that the OFT’S concerns which have led the
23 Competition Commission to carry out the Part 9 balancing exercise and reach the
24 conclusion on redactions are about the integrity of the investigation that the OFT and the
25 Serious Fraud Office are carrying out into SDI and those associated with it.

26 THE CHAIRMAN: The Serious Fraud Office have been asked whether they want to intervene
27 and have indicated that they do not.

28 MR. BEARD: That is right. We have had contact with them. They have similar concerns to those
29 of the OFT, but given that the OFT are intervening in these proceedings they indicated to us
30 that they did not consider it necessary to intervene in these matters.

31 THE CHAIRMAN: That is a matter for them.

32 MR. BEARD: It is of course a matter for them, but we have had contact with them. I can put it
33 no higher than that. That is the communication we have had with them at this stage. But,

1 they do have a continuing investigation and they do have similar concerns to those of the
2 Office.

3 THE CHAIRMAN: Do we know how continuing the investigation by the SFO is, as a matter of
4 interest?

5 MR. BREALEY: I have just been informed that the SFO have got absolutely nothing to do with
6 any cartel offence or competition-related aspect. It is the OFT who is looking at this from
7 any cartel offence and from any breach of the Competition Act. The SFO, as I understand
8 it, have no role to play in it whatsoever.

9 MR. BEARD: I am not sure that is an accurate and proper summary of the position.

10 THE CHAIRMAN: If the SFO want to intervene, the SFO can intervene. If they do not
11 intervene, they have nothing to say. What I do know about the SFO - and I was involved, as
12 it happens, in the case which was focused on in a recent report on the SFO - is that they can
13 take a very long time to reach a conclusion on almost anything.

14 MR. BEARD: To be clear, Mr. Brealey's summary is correct to the extent that there are fraud
15 concerns that are being investigated by the SFO, but they pertain to the matters that are also
16 at issue in the cartel investigation proceedings. The reason it is worth noting this fact is
17 because, of course, the investigation is continuing. Interviews are being carried out, and
18 have been carried out this week, last week, and will be carried out next week, and so on.
19 Evidence is being gathered. Of course, that means that the sensitivity of any material will
20 actually change over time. Therefore, this is not going to be a static analysis. At one point
21 information might be highly sensitive. Over time its sensitivity may decline. Again, it is a
22 matter for the Tribunal to consider in setting out how it wishes to deal with these matters.
23 The factors involved may alter over time. In those circumstances, bifurcating the
24 consideration of matters may again be a matter that the Tribunal ----

25 THE CHAIRMAN: I repeat, Mr. Beard, that it is a matter for the SFO if they want to intervene. I
26 do not think the Competition Appeals Tribunal can speculate on what may be happening
27 somewhere deep in the recess ----

28 MR. BEARD: I am sorry. I was not there talking about the SFO. I am talking about the Office
29 of Fair Trading.

30 THE CHAIRMAN: I see. I am sorry.

31 MR. BEARD: It is carrying out a cartel investigation which could relate to both civil or, indeed,
32 criminal, depending on the outcome of the SFO's position and matters pertaining to the
33 cartel investigation and the interviews being carried out. I was not making any submission,

1 to be clear, about the position of the SFO. I do not know what the SFO are doing. I am
2 talking about hat the OFT are doing. The comments are made only in relation to OFT.

3 THE CHAIRMAN: Is it the view of the OFT that the Tribunal should see the redacted material in
4 order to be able to make a decision, and, if so, how do we achieve that?

5 MR. BEARD: It is a little surprising that this application is being made with no concrete
6 proposals as to how these matters are to be dealt with, and a 'Probably, yes' is all that is
7 said in relation to whether or not this Tribunal should consider this material. The Office's
8 position is that when it comes to considering the Part 9 assessment we can see that the
9 Tribunal will want to have an understanding of reasons why particular pieces of material
10 were kept confidential. At this stage it would be presumptuous to assume that the Tribunal
11 would necessarily want to see the details of that information, or simply outline reasoning in
12 relation to it. However, that reasoning would undoubtedly involve setting out matters
13 which were themselves confidential. So, to that extent we cannot see how this Tribunal
14 could properly assess the way in which the Commission was carrying out its exercise
15 without having some consideration of some confidential material. We do not presume to
16 delineate precisely what that might be at this stage, but since we think that must be the case,
17 some sort of procedure has to be put in place to deal with it.

18 Sir, you adverted to the PII-type procedure - just as a model, I quite take it. We would wish
19 to stress the vast gulf between PII and this, because we do here have this statutory
20 procedure and PII is a very different procedure. Carrying out the wily balancing exercise to
21 either entirely exclude material or entirely make it open is something that applies in relation
22 to particular public interest which are not subject to other statutory schemes. If there are
23 statutory schemes in place, those will usurp the PII process as, sir, you are very conscious in
24 the context of, for instance, SIAC control order case, POAC and so forth. So there, where
25 you have a closed material procedure in particular circumstances PII can be usurped.

26 THE CHAIRMAN: There is a special procedure there, is there not ----

27 MR. BEARD: Exactly.

28 THE CHAIRMAN: -- which we do not have here, so far as I am aware.

29 MR. BEARD: The point I make is simply this: yes, there is a special procedure which goes on to
30 deal with how one treats closed material. The point I would stress here is that there is a
31 special statutory scheme dealing with whether or not material should be disclosed.

32 Therefore, one should not immediately consider this analogous to, or akin to, a public
33 interest immunity proceeding because actually the way in which the Tribunal will consider
34 closed material and what it needs to see might be rather more step-by-step and rather more

1 limited than one might see in a PII analysis, because what the Tribunal is asking itself is:
2 Was the decision that was taken by the Competition Commission reasonable, rational, and
3 lawful in all the circumstances, given what it was told, given the basis of those reasons for
4 the information that it was told about. In those circumstances, simply to pick up documents
5 and go through the sort of black pen redaction exercise that is required in PII would not be
6 an appropriate analogy. But, to this extent there is a relevant comparator. Yes, this
7 Tribunal could look at the closed material and consider the extent to which any closed
8 material - it may just be gists; it may be summaries of reasons - needs to be provided in the
9 context of the allegations of fair procedure that need to be dealt with in these proceedings.
10 So, yes, to your suggestion, Mr. Chairman, that this Tribunal, in the first instance, would
11 look at that sort of closed material, but it may be an incremental process. The Tribunal
12 may look at some initial closed reasoning or gist and then decide that actually it needs to see
13 more, and then decide whether or not anything needs to come out in the context of the
14 analysis of fairness.

15 THE CHAIRMAN: I had obviously thought about the SIAC/POAC process, but I had excluded it
16 because it is a special statutory procedure.

17 MR. BEARD: Yes, of course.

18 THE CHAIRMAN: In judicial review in the control orders cases - and those go by way of
19 judicial review to the High Court - there is a procedure which involves - and heaven
20 preserve us from it here, I think - the introduction of special advocates, because we would
21 be here next March dealing with this ----

22 MR. BEARD: We are certainly not suggesting that.

23 THE CHAIRMAN: No. Quite. We would need some persuading. But, then we are left with the
24 situation where - if we do not use PII - in which the Tribunal is being shown documents
25 which the other side cannot see. Now, how can we do that? That is just a rhetorical
26 question. Do not answer it now if you do not want to. It needs to be considered.

27 MR. BEARD: The Tribunal will have to ask itself - and obviously these are matters for
28 consideration and one does not want to stray on to the substance - in order to deal with the
29 procedural matters, whether or not there should be PII. If you decided that all the material
30 should be excluded, then the outcome of this would be that all of the material should be
31 excluded from working papers. If all the material should be excluded from working papers,
32 the Commission's procedure would roll on without reference to it, and no-one seeing it.
33 That exercise would have to be qualified by considering whether or not the Competition
34 Commission had carried out its exercise of its discretion. So, what would have to be done

1 under consideration of s.241 and s.244 was whether or not it was appropriate for the
2 Commission to withhold that material and, if so, no-one would see it.

3 THE CHAIRMAN: Let us just change the phraseology slightly. A PII-type procedure envisages
4 anything ranging from wholesale concealment (to use it as a neutral term) of the
5 material ----

6 MR. BEARD: Removal from the process.

7 THE CHAIRMAN: Yes, removal of the material -- anything from wholesale removal to
8 wholesale disclosure, depending upon the issues that are raised with a continuing review at
9 all times of whether there should be wholesale removal or merely part removal, or no
10 removal. In other words, typically in a PII situation - and I have seen it done on a few
11 occasions - the court will say, "Ah, well, I think that the other side should actually see
12 documents P, Q, and R, but not the other documents between A and Z".

13 MR. BEARD: Yes. That sort of process must be the sort of process that will have to be engaged
14 in here. If the Commission or the Office said, "In those circumstances, the Tribunal is
15 approaching this in the wrong way. These materials should not be made available",
16 assuming that you made such an inclusion, then it would have to be an appealable point.

17 THE CHAIRMAN: Yes.

18 MR. BEARD: There can be no way round that.

19 THE CHAIRMAN: In general terms, without prescribing what is done, I agree.

20 MR. BEARD: I am just extraordinarily concerned not to turn this into just a *de facto* PII exercise
21 because there is a statutory scheme in place and in circumstances where the appellant has
22 not put forward any proposals as to how this is going to be dealt with. We are obviously
23 picking this up a little late in the day.

24 THE CHAIRMAN: What you have said is, as always, Mr. Beard, if I may say so, very helpful. It
25 enables us all to concentrate our minds on the range of issues that is going to arise.

26 MR. BEARD: If I might just trespass on the Tribunal's goodwill for a moment longer -- One
27 other issue to note is that in the draft relief that was sought a mandatory order directed
28 towards the Commission was sought. As I understand it, given the undertakings given by
29 the Commission about matters to do with what the appellants talk about as this vital oral
30 hearing and which the Commission see as part of the continuing process of investigation,
31 that application for a mandatory order falls away. But, it is worth highlighting at this stage
32 that that sort of application for a mandatory order is one that does raise a range of issues.
33 This Tribunal is no doubt aware of a different composition, having made mandatory orders
34 in relation a telecoms remittal which then went up to the Court of Appeal to be dealt with.

1 Certain observations were made about the scope and power of this Tribunal to direct
2 regulators in the way in which they carry out their functions. I simply place that as a flag
3 because, again, from the perspective of a regulator intervening, that is a matter of some
4 importance.

5 THE CHAIRMAN: Thank you.

6 MR. BEARD: Unless I can assist the Tribunal further ----

7 THE CHAIRMAN: No. Thank you very much, Mr. Beard.

8 MR. BREALEY: Sir, I am not sure whether I need to reply on anything.

9 THE CHAIRMAN: I am not sure that you do either. But, you can if you want.

10 MR. BREALEY: Really we are just talking about the directions, but on the roll-up point on the
11 hearings, you have heard at length about how the Tribunal does not really have any
12 jurisdiction. Can I just emphasise two points? One is that in my submission it is
13 nonsensical to say that there is a Part 9 and a Part 3 decision and that only Part 9 decisions
14 can be reviewed.

15 THE CHAIRMAN: I understand the point, Mr. Brealey.

16 MR. BREALEY: What has got to be emphasised is that in s.241 it refers to the exercise of any
17 function, and therefore you cross-read when the Competition Commission is exercising its
18 function under Part 3 it sucks in its powers under Part 9, so that is the first point.
19 The second point is that if the OFT and the CC are correct you would never ever have any
20 ability to challenge the unfairness during the process of the investigation, you would have to
21 wait until right at the end, because they could always say: "It is work-in-progress, it is our
22 provisional decision, we can always change our mind."

23 THE CHAIRMAN: Thank you. In that case, we have the timetable, Mr. Bailey do you have a
24 reasonable note of the directions? If counsel could just ensure that the referendaires have
25 the directions in order in the usual way. Mr. Brealey is just getting some instructions

26 MR. BREALEY: I am sorry, if I may ----

27 THE CHAIRMAN: Yes, of course, Mr. Brealey, we are in no hurry. (After a pause): It is a two-
28 line note but it is obviously very complicated.

29 MR. BREALEY: I will be candid about it, basically the point is in response to Miss Holmes's
30 suggestion that they are proceeding with the investigation, and we cannot ask for a freeze,
31 but we are concerned that the timetable, the provisional findings almost after the judgment
32 that may come on the 4th, and we are just concerned that we are not going to be hampered in
33 our ability to make submissions.

1 THE CHAIRMAN: I understand the point. I think we are just going to have to take this in
2 stages. To make it absolutely clear, on the 4th we are going to have a hearing in which all
3 issues will be up for decision and we will take it in whatever order the parties can agree,
4 failing which we will decide, so it is going to be easier for everyone if you decide between
5 yourselves.

6 MR. BREALEY: I take the point.

7 THE CHAIRMAN: I understand the point completely, but we are just going to have to take it in
8 the logical order and if problems arise after the 4th well they will have to be sorted out with
9 the help of the Tribunal if necessary, and we are on a very short timetable.

10 MR. BREALEY: Yes.

11 THE CHAIRMAN: Mr. Beard, you want to say something

12 MR. BEARD: I am very sorry to intrude. I am just concerned in relation to the logistics of
13 confidential material coming to the Tribunal and the organisation of it. If it is the case that
14 this Tribunal is going to have, for example, a witness statement that sets out material that is
15 closed and is provided on that basis but does not set out – and I am not presuming at this
16 stage because it is early in the process, but does not actually set out the material in the
17 working papers, but this Tribunal on the 4th looks at the matters and thinks: “Actually, we
18 have come to the view that we want to see more material” I am concerned that the present
19 timetable does not necessarily accommodate that sort of consideration. It may be that this is
20 an intractable matter and it is one to be taken away, but it is nonetheless one that, given this
21 is a CMC, it is appropriate to highlight at this stage.

22 THE CHAIRMAN: Are we talking about a large amount of material in terms of paper.

23 MR. BEARD: No.

24 THE CHAIRMAN: No more than a lever arch file?

25 MR. BEARD: So much less than that.

26 THE CHAIRMAN: Well I would suggest that the material is brought in an appropriately sealed
27 envelope or something, and if we need to we can deal with that at the hearing.

28 MR. BEARD: I am grateful.

29 MR. BREALEY: Sorry, Sir, in response to that, do I take it then that Mr. Beard is going to give
30 the Tribunal some of the redacted material, or the gist of it?

31 THE CHAIRMAN: They have not made their minds up yet.

32 MR. BREALEY: Could I just put a marker down that obviously the Tribunal should see it, but
33 the Tribunal may be assisted at least by some representatives from this side as to the
34 relevance of it.

1 MR. BEARD: There is something of an issue, certainly for the OFT, in relation to these matters.

2 THE CHAIRMAN: I have images of Sir Chris Hoy in this case, cycling around a track at a very
3 high speed ----

4 MR. BEARD: Yes, it becomes a blur.

5 THE CHAIRMAN: I think we just have to take this as it comes frankly. We will have in mind at
6 all times, and I will speak to the referendaires who deal with the day to day management,
7 about the essential necessity of keeping our eye on the ball of a fair trial.

8 MR. BEARD: Just in relation to that one particular concern that arises, and this is not in any way
9 to suggest that those representing SDI would in any way act improperly in relation to any
10 material provided to them, but they are the same solicitors acting in both investigations.

11 THE CHAIRMAN: I am very mindful of that, Mr. Beard, and I am sure my colleagues are too.
12 We will keep a close eye on that. We will make sure that a fair procedure is followed I
13 hope. Shall we leave it at that? Thank you all very much indeed.

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