

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1144/4/8/09

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

4<sup>th</sup> December 2009

Before:

THE HON SIR GERALD BARLING  
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

**WM MORRISON SUPERMARKETS PLC**

Applicant

- v -

**THE COMPETITION COMMISSION**

Respondent

---

*Transcribed by Beverley F. Nunnery & Co.  
Official Shorthand Writers and Tape Transcribers  
Quality House, Quality Court, Chancery Lane, London WC2A 1HP  
Tel: 020 7831 5627 Fax: 020 7831 7737  
[Info@beverleynunnery.com](mailto:Info@beverleynunnery.com)*

---

**PROCEEDINGS**

## APPEARANCES

Mr. Michael Fordham QC and Mr. Meredith Pickford (instructed by Gordons LLP) appeared for the Applicant.

Mr. Ewan West (instructed by the Treasury Solicitor) appeared for the Respondent.

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Linklaters LLP) appeared for Sainsbury's Plc.

Mr. Mark Hoskins QC and Mr. Julian Gregory (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Tesco.

---

1 THE PRESIDENT: Mr. Fordham?

2 MR. FORDHAM: Just before you start can I make sure that a material development has come to  
3 your attention. That is a letter that has been sent ----

4 THE PRESIDENT: I saw a letter, yes. Is that the letter beginning ----

5 MR. FORDHAM: “We write to confirm ...”

6 THE PRESIDENT: Yes, I have read that.

7 MR. FORDHAM: The reason for mentioning it is that it is an openly offered undertaking. You  
8 will see from the second paragraph it is relevant to the so-called “one horse race” point.

9 THE PRESIDENT: Yes, thank you.

10 MISS ROSE: Also on a similar theme it is also our position that we would be prepared to  
11 undertake not to serve a notice to complete pending these proceedings.

12 MR. WEST: Can I just say, for the record, we actually have not seen the letter concerned.

13 THE PRESIDENT: I am afraid it is not a very satisfactory way of proceeding, frankly, to tell one  
14 those things now, but as it happens I do not think they make any difference.

15 (For Judgment see separate transcript)

16 MISS ROSE: Sir, in the light of the refusal of interim relief as you know Sainsbury’s is left in a  
17 difficult situation since we are now required to complete on Monday ----

18 THE PRESIDENT: So is Tesco, yes.

19 MISS ROSE: Yes, but it is we who have to hand over the money.

20 THE PRESIDENT: Yes, well you get the site.

21 MISS ROSE: Yes, but the difficulty that we are in is that we cannot commence investment in the  
22 site while these proceedings are hanging over because we do not ----

23 THE PRESIDENT: Well there are no proceedings yet.

24 MISS ROSE: That is true, and it may be best to invite Morrisons first to indicate they are  
25 intending to proceed before I make the submission I was going to make, which was that if  
26 they are going to proceed it will need to be very, very promptly because our uncertainty will  
27 need to be dealt with very quickly.

28 THE PRESIDENT: Well I expect you have probably now made that point on the record.

29 MISS ROSE: Yes. Well, my point is more fundamental because if they are intending to proceed  
30 we will need to fix a timetable now.

31 THE PRESIDENT: Well without hearing Mr. Fordham – Mr. Fordham might want to consider  
32 with his clients the position.

1 MISS ROSE: Well, Sir, that will be very, very difficult for Sainsbury's because our position at  
2 the moment is that we are completely paralysed in being able to invest in the site until the  
3 matter is determined certainly.

4 THE PRESIDENT: Well on any view his time for bringing the proceedings will expire ----

5 MISS ROSE: He has up to two months.

6 THE PRESIDENT: No, four weeks in these cases.

7 MISS ROSE: Well the parties have been canvassing a timetable which would have involved the  
8 resolution of the complete proceedings either before or very shortly after Christmas.

9 THE PRESIDENT: Well you are perfectly entitled to canvass that but I think we will have to  
10 wait and see what happens before we make any directions about it.

11 MISS ROSE: Well, Sir, can I just make clear that if there is not certainty by the beginning of  
12 February there is going to be serious commercial prejudice to my clients.

13 THE PRESIDENT: Well you have made that point, but I am not actually completely sure that the  
14 Tribunal can do anything about this. There are no proceedings now. We have not given  
15 interim relief so there is no undertaking in that sense. I am not sure we can give directions  
16 about proceedings that do not exist.

17 MISS ROSE: Very well.

18 THE PRESIDENT: I am willing to be persuaded otherwise, but it does sound a bit odd. If you  
19 think I can be then go ahead.

20 MR. FORDHAM: Well we have heard and understood Miss Rose's concern that if the  
21 application is to proceed it must do so promptly. We have also heard and understood the  
22 observations that you have made in your Judgment as to the position that we will be in on  
23 our judicial review application in the circumstances of no interim relief; we will have to  
24 consider our position.

25 THE PRESIDENT: You have to start by whatever it is – the 17<sup>th</sup> or something like that, have you  
26 not? The proceedings have to begin fairly soon.

27 MR. FORDHAM: We went through all of this yesterday.

28 THE PRESIDENT: Once they have begun we will be in a position then to listen to what people  
29 want to say about directions, but I do not think we can start giving them – you might change  
30 your mind and not bother.

31 MR. FORDHAM: That is our position.

32 THE PRESIDENT: Well thank you very much. Is there anything else?

33 MISS ROSE: (After a pause): Our concern is that we are, at the moment, subject to an order  
34 from the Competition Commission to build on the site within 12 months. Now, in those

1 circumstances we may have no alternative other than to make an application now for  
2 interim relief for the suspension of that order.

3 THE PRESIDENT: Of that order – you want to apply for interim relief?

4 MISS ROSE: Sir, we are in an impossible position ----

5 THE PRESIDENT: Are you?

6 MISS ROSE: -- because at the moment we are committed ----

7 THE PRESIDENT: But you always were.

8 MISS ROSE: Yes, Sir, but that was on the basis we were going to own the site and enjoy it.

9 THE PRESIDENT: Who says you are not?

10 MISS ROSE: Morrisons, Sir.

11 THE PRESIDENT: Well they have not even started proceedings yet.

12 MISS ROSE: Absolutely, Sir, but at the moment ----

13 THE PRESIDENT: Honestly, I think when they start proceedings you will no doubt come on  
14 very quickly and say there must be a very, very short timetable to ensure that you are kept  
15 in suspension, if indeed you would be in suspension.

16 MR. WEST: I am sorry, maybe I can help because the undertakings that are given at 3.4 do  
17 indeed say that the redevelopment option approved purchaser will commence operating a  
18 grocery retail store within 12 months. In terms of planning permission or otherwise such  
19 longer periods as the Competition Commission should at its absolute discretion determine.  
20 There may well be some provision whereby the timetable can be extended, but I need to  
21 look. That is obviously one alternative.

22 THE PRESIDENT: All right. Well anyway, I do not really think that is a matter for me at the  
23 moment. Thank you all very much. Mr. Fordham, do you want to say something?

24 MR. FORDHAM: I think I ought to, yes. Just so Miss Rose is clear, if she makes an application  
25 in the context of a judicial review by us for an order that protects her, she will have our full  
26 support. That is the first point.  
27 The second point is just to repeat something we have said all along, which is that the  
28 Competition Commission, under the terms of its order, has the power to issue directions and  
29 there must be compliance with such written directions as the Competition Commission may  
30 give to it. If it decides to give a direction which is relevant to what would otherwise happen  
31 on Monday in the context of an expedited judicial review, that is entirely open to it, it is in  
32 the bundle, it is p.6 of the order. But these are all matters that need to be considered in the  
33 light of what you have decided about your power.

