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

Case Nos. 1160-4/1/1/10

Victoria House  
Bloomsbury Place  
London WC1A 2EB

26th May 2011

Before:

VIVIEN ROSE

(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) IMPERIAL TOBACCO GROUP PLC**  
**(2) IMPERIAL TOBACCO LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

**CO-OPERATIVE GROUP LIMITED**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

**WM MORRISON SUPERMARKETS PLC**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

**(1) SAFEWAY STORES LIMITED**  
**(2) SAFEWAY LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

(1) ASDA STORES LIMITED  
(2) ASDA GROUP LIMITED  
(3) WAL-MART STORES (UK) LIMITED  
(4) BROADSTREET GREAT WILSON EUROPE LIMITED Appellants

- v -

OFFICE OF FAIR TRADING Respondent

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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

Mr. Mark Howard QC and Mr. Tony Singla (instructed by Ashurst LLP) appeared on behalf of the Appellants, Imperial Tobacco Group PLC and Imperial Tobacco Limited.

Mr. Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of the Appellant, Co-operative Group Limited.

Mr. Pushpinder Saini QC (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellants, WM Morrison Supermarkets PLC and Safeway Stores Limited and Safeway Limited.

Mr. Robert O'Donoghue (instructed by Norton Rose LLP) appeared on behalf of the Appellants, Asda Stores Limited, Asda Group Limited, Wal-Mart stores (UK) Limited and Broadstreet Great Wilson Europe Limited.

Mr. Paul Lasok (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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1 THE CHAIRMAN: Good morning ladies and gentlemen. Thank you to everybody for coming at  
2 such short notice to try and make progress with this issue. I have some preliminary remarks  
3 which I hope will be helpful but if, from these remarks it appears to you that I have the  
4 wrong end of any particular stick then I am sure you will let me know.

5 What we received from the parties yesterday were two draft documents setting out rival lists  
6 of issues. For convenience I will refer to one of them as the “Shaffer list of issues”, a draft  
7 list that is said to have been circulated by Professor Shaffer to the appellants’ experts on  
8 Tuesday evening, and I understand that this has been populated – by which I mean the space  
9 provided by comments has been filled in by Professor Shaffer, by Mr. Ridyard and it may  
10 also have been completed to some extent by the other experts. I understand that this  
11 document also corresponds to what has been described in the OFT’s skeleton argument as  
12 the Part 1 issues.

13 The second document which I will call “the Ridyard list of issues” is a list of issues put  
14 together by Mr. Ridyard of RBB (Mr. Ridyard being ITL’s expert) comprising all the issues  
15 that the various experts want to include in the joint statement. Again I understand that this  
16 has been populated by all the appellants’ experts but not yet by Professor Shaffer. I further  
17 understand that these issues correspond to what have been called the “Part 2 issues”. It has  
18 been very helpful to see the rival draft list of issues and, let me say at the outset, that having  
19 seen them for the moment I agree with the points made by some of the parties that it does  
20 not make sense and would be unfair to treat the Ridyard list as being somehow subsidiary or  
21 of lesser importance than the Shaffer list.

22 It seems to me that the two lists approach the task in different ways. The Shaffer list is very  
23 much derived from the structure and content of Professor Shaffer’s report of 15<sup>th</sup> December  
24 2010. It starts by seeking to clarify the different interpretations of the nature of the  
25 agreements: are they price parity agreements as Professor Shaffer says, or are they about  
26 relative mark-ups as the appellants’ experts say.

27 The remaining questions then explore what part of the experts’ analysis holds goods if the  
28 Tribunal ultimately decides the question of interpretation in a different way from the one  
29 favoured by the particular expert. So, for example, issue 2A(1) effectively asks the  
30 appellants’ experts whether if, contrary to their primary view Professor Shaffer turns out to  
31 be right in his price parity interpretation of the P&Ds, do they accept that manufacturers and  
32 retailers have incentives to offer P&Ds?

33 Conversely, under issue 2B, Professor Shaffer will presumably give his views as to  
34 whether, if he turns out to be wrong in his interpretation and the Tribunal ultimately finds

1 that the agreements are relative mark-up and relative maxima type agreements, he agrees or  
2 disagrees that manufacturers and retailers still have incentives to offer P&Ds.

3 Similarly, issue 4A(2) requires Professor Shaffer to say whether, if the appellants' experts  
4 turned out to be right in their interpretation of the P&Ds, does he accept that one would  
5 expect retail prices to be lower with P&Ds than without P&Ds, or does he maintain that  
6 even if the agreements are actually about relative mark-ups they could still be expected to  
7 raise retail prices. Conversely the appellants' experts are expected to say whether they  
8 agree that if Professor Shaffer is right that these are price parity agreements then prices  
9 could be expected to be higher with the P&Ds than without them, or do they instead  
10 maintain that even if Professor Shaffer is right in his characterisation of the agreement, the  
11 agreements would still not be expected to cause retail prices to rise.

12 Now this approach is quite useful potentially because it may be helpful for the Tribunal to  
13 know how much of a particular expert's report is based on the assumption or conclusion that  
14 the agreements are about relative mark-ups and not about price parity, and so how much of  
15 their evidence would still be useful if the Tribunal decides the initial characterisation issue  
16 against them.

17 The Ridyard list proceeds in a different way. First, it covers a range of issues that the  
18 appellants' experts want to raise which are not raised by Professor Shaffer in his 2010  
19 report, and do not arise directly from their critique of his report. Thus, the questions cover  
20 the 2007 Shaffer report and certain factual issues such as issue 4.8, that issue asks whether  
21 Professor Shaffer accepts that during the relevant period the relative prices of paired brands  
22 did not remain fixed in the face of a unilateral wholesale price change for one of the brands,  
23 and similarly issue 4.10 asked Professor Shaffer to say whether or not he agrees with the  
24 statement that ITL and Gallaghers P&Ds were not parallel or symmetric.

25 Some of the issues on the Ridyard list seem designed to close off possible lines of inquiry.  
26 For example, issue 7.1 as I read it, asked Professor Shaffer to confirm that his dynamic  
27 theory of harm is not based on a standard economic theory of tacit collusion, and it also asks  
28 some very practical questions such as issue 2.2: whether all the experts accept that there are  
29 no flaws in any of their mathematical derivations and this very last question (issue 2.2) may  
30 be very useful to the Tribunal because if everybody agrees that that is the case we can then  
31 proceed on that basis. Conversely, if there are arithmetical or such like mistakes it is best to  
32 get that cleared up now rather than ambush an expert with it in the witness box.

33 So a number of matters to me appear to be clear. First, the skeleton arguments have already  
34 explained the background to this matter, and I do not think it is going to be useful for us to

1 try and explore why we have reached this impasse – I am sure everyone was doing their best  
2 to progress matters.

3 Secondly, it seems to me likely that there is very little scope for a further meeting of minds,  
4 or resolution of disagreement by the experts between now and the date on which these  
5 reports must be finalised in order to keep the timetable on track. As I understand it the  
6 experts have met separately and the appellants' experts have met together, and the task now  
7 is not to try and reach further agreement, but just to record the current state of agreement or  
8 disagreement in a comprehensive and comprehensible document to assist the Tribunal.

9 Thirdly, it would not be right or helpful for me to choose one of these rival draft documents  
10 over the other, either we need to have both lists or the lists need to be merged in a sensible  
11 and coherent way.

12 Fourthly, it does seem necessary that all the experts need to engage with all the issues raised  
13 in both lists; it is not enough just to answer the questions that the expert thinks are relevant.  
14 The expert must answer the questions that the other experts think are relevant too even if it  
15 is only to say that that issue is immaterial or should carry no weight, etc.

16 Fifthly, at first sight some of the questions in the Ridyard list may be worded in a slightly  
17 contentious manner, but at this late stage everyone will have to put up with that, I do not  
18 think that there is time enough to have much further tinkering with the drafting of the  
19 questions, anyone can make whatever points they want about the particular wording in their  
20 answers if they so wish.

21 What is not clear to me at the moment is, first, how easy it would be to interweave the  
22 issues raised into the Shaffer list in to the Ridyard list or vice versa, and who would be best  
23 placed to do this. Secondly, whether that interweaving is a worthwhile exercise or whether  
24 it would be better for everyone now to get on and complete the two separate lists as soon as  
25 possible with the result that they can either be left separate or perhaps merged together at  
26 some later stage to produce a consolidated document, albeit with some overlaps.

27 Thirdly, I am not clear how much time is needed and how this affects the timetable. I hope  
28 very much that we would still be able to get the joint statements completed by the end of  
29 next Monday at the latest. I currently envisage that this would entail a short extension to the  
30 deadline for ITL's skeleton, but I do not see at the moment that this necessarily has a knock-  
31 on effect on the rest of the timetable that was set out in our order of 8<sup>th</sup> April.

32 Ideally, the result of today's hearing would enable me to make an order to which it might be  
33 helpful to attach the form or forms which the parties' experts would then fill in; that would  
34 remove the scope for any further argument about the wording of the questions, and focus

1 everyone's mind on the provision of the answers and, if necessary I am prepared to work  
2 through the issues in either list now to iron out any burning points that people have that  
3 they really feel they cannot live with on the wording of the lists as they currently stand.  
4 I hope that is helpful in setting out what I have concluded from my admittedly rather hasty  
5 reading of the papers that have been provided. Mr. Howard, do you want to go first?

6 MR. HOWARD: Yes, indeed. If I can say that is extremely helpful. I would suggest in response  
7 to your views that it is not going to be helpful trying to interweave the issues at this stage.  
8 We would agree with you the essential thing is that all the experts comment on the issues,  
9 and the issues in what are being described as "Part 1" and "Part 2" we have not come along  
10 to argue it should be the "Part 2" issues. We recognised last week in the light of the  
11 position the parties had got to, the only fair and sensible way to proceed was for each side to  
12 comment on the issues, as drafted by the experts and as seen by the experts, which is  
13 important. So we would suggest that it would not be sensible to try and interweave them, it  
14 is just going to give rise to more argument. Nor do we actually think it would be a good use  
15 of everybody's time today to try and go through them, not least because on each side the  
16 drafting has been done by the respective experts, the respective experts are not here and I  
17 think it is invidious for us to seek to redefine whether it is Professor Shaffer's or Mr.  
18 Ridyard's and the other experts' approach. They are all, one hopes, and I am sure they are,  
19 trying to assist the Tribunal, and I suspect it is better to tell them to get on with it.  
20 The simple answer is, as you said, we are actually a long way down the road in the sense  
21 that the Ridyard list has, I believe, been populated as you say by Mr. Ridyard and the other  
22 experts and it is simply awaiting Professor Shaffer. Professor Shaffer's list has been  
23 populated by him and certainly a number of the experts. What I think is important is before  
24 the document is finalised all the experts should be entitled to see Professor Shaffer's views  
25 on the Part 2 issues, and the other views on Part 1, because the issues are interrelated and  
26 your overall view is going to be coloured, or you may need to see the way you answer a  
27 point on Part 2 by reference to what somebody else has said on Part 1. In other words, in  
28 order to avoid confusion that one goes some way to merging things by ensuring that the  
29 answers are merged and you can cross-refer and so on, and that is why what we had  
30 suggested is that there is a process whereby each side will have answered the Part 1 and Part  
31 2, and then there is a process of a two day gap to finalise things.  
32 That may be slightly more difficult if you believe we ought to do everything by Monday but  
33 in a way it rather depends on when Professor Shaffer provides his views on Part 2. If he  
34 were to provide his views by, say, tomorrow on Part 2 I cannot see any reason why then we

1 could not get this process finalised over the weekend. 31<sup>st</sup> is Monday, which is a bank  
2 holiday, I imagine we probably can impose on people then we could stick to that and we  
3 would request the consequential knock on to our written opening or skeleton in order that  
4 we can take account of what is going to be in the joint statement

5 THE CHAIRMAN: So let me just be clear, the process that you see is that the order would set a  
6 date for everyone to have populated both lists by, say, close of play tomorrow, then there is  
7 the two day gap, and there is a day or may be two days for everybody then to make  
8 whatever changes they want to their answers.

9 MR. HOWARD: Exactly, and so the document gets signed off by everybody on Monday.

10 Basically the documents will be without prejudice tomorrow and then they become open on  
11 Monday with a chance to basically make such amendments as you think appropriate over  
12 the weekend is what it amounts to

13 THE CHAIRMAN: Yes.

14 MR. HOWARD: And that of course is the way one would normally work. What one would  
15 normally have with an expert statement is you would normally expect a travelling draft,  
16 which is without prejudice, with the experts having a chance to finalise their comments in  
17 the light of the comments of their colleague but getting to a stage at which you can then say:  
18 “This is final, now we have to bring the guillotine down.

19 THE CHAIRMAN: Yes, and whatever changes they want to make to their answers is still within  
20 the same box that they have originally answered, yes?

21 MR. HOWARD: Yes, absolutely. It is just an amendment to whatever they have written in their  
22 box. What is absolutely fundamental in this process, and this is partly where things are  
23 going wrong is one expert should not seek to define what he says the other expert is saying,  
24 because that is just what gives rise to argument. It is not for Professor Shaffer to say: “I  
25 hold the pen and therefore I will say what Mr. Ridyard’s view is on this”, he may or may  
26 not be right, but it is almost certain that however he expresses it will not be how Mr.  
27 Ridyard would express it.

28 THE CHAIRMAN: But given there does need to be a person who is charged with collating all  
29 this, and keeping control of the draft, presumably Mr. Ridyard would be happy to undertake  
30 that role if he was asked to do so?

31 MR. HOWARD: Yes, he has already effectively assumed that obligation. What he is doing is  
32 acting as the post box for the other appellants so that they feed their comments into him, and  
33 all he does is literally cut and paste. He is not in any way altering anything, the issue does  
34 not really arise. So that, we would suggest, is the pragmatic through



1 THE CHAIRMAN: Yes, Mr. Lasok?

2 MR. LASOK: Well we agree that it is not helpful to interweave the Shaffer list and the Ridyard  
3 list, or Part 1 and Part 2. As we pointed out in our skeleton argument more progress has  
4 been made on the Shaffer list or the Part 1 list than has been made on the Ridyard list and,  
5 in fact, the Part 1 list could have been completed, as I understand it, yesterday had things not  
6 been derailed by this debate. We are in a situation in which there is no difficulty with the  
7 Shaffer list or the Part 1 list in terms of the practicality of getting that sorted out. The only  
8 issue concerns are in dealing with the Ridyard list.

9 I will make a point about my learned friend's suggestion that the experts should see what  
10 each says on Part 1 and Part 2, and then revert back to Part 1 because yesterday evening I  
11 actually went through the correspondence between Professor Shaffer and the experts, and I  
12 cannot see in that any desire from any of the experts for that course to be taken. They seem  
13 to be approaching the Shaffer list and the Ridyard list as being two separate things, but that  
14 is simply not right, and I am looking at an email which makes exactly that point

15 THE CHAIRMAN: Well if they do not want to make any amendments then they do not need to;  
16 nobody is forcing them to re-visit the matter on the Monday if they do not want to, if they  
17 are happy with their answers after they have seen everything, then that is absolutely fine.  
18 But if they want to make any changes, or Professor Shaffer wants to make any changes then  
19 what is being proposed is that there is a day on Monday in effect for everyone to have that  
20 opportunity. But I think the key question for you is, is Professor Shaffer able, by close of  
21 play tomorrow, to put in his answers to the questions on the Ridyard list?

22 MR. LASOK: That is something that I asked Professor Shaffer and the reason for the proposal  
23 that we made in the draft order that was sent over with our skeleton argument is because the  
24 information received from Professor Shaffer was that that was the date by which he could  
25 do that task. This reflects a problem that may now disappear – put it this way – because we  
26 were not sure whether the Ridyard list or the Part 2 list had yet been finalised, because the  
27 letter that was received from Ashursts on I think the 24<sup>th</sup> ----

28 THE CHAIRMAN: What do you mean by “finalised” there? You mean the terms of the issues  
29 rather than the population of the ----

30 MR. LASOK: What happened is that the Ridyard list surfaced on Friday, and then was amended  
31 on more than one occasion and we were told by Ashursts on the 24<sup>th</sup> that late on Tuesday  
32 we had been provided with the current position, but we were not told that it was the final  
33 position. Now, I am inferring from what Mr. Howard is saying that the Tuesday email is  
34 the final position so we have now got the Ridyard list fixed, and we have the responses from

1 the appellants' experts to the questions in the Ridyard list and if that is so then we do not  
2 need to have the stage that we had inserted in our draft order for finalisation of the Ridyard  
3 list, and that advanced things

4 THE CHAIRMAN: The version that I have is said to be circulated by Mr. Ridyard at 22.36 on  
5 Monday, 23<sup>rd</sup> May, and I assume that what I have got in my hands is that version, that that  
6 is the version that Mr. Howard is happy to proceed with and what propose to do is bring  
7 down the guillotine at least on the wording of the issues and say this, for better for worse, is  
8 the version that everyone has now got to answer, and there is to be no more tinkering with  
9 the wording of the issues.

10 MR. LASOK: We are perfectly content with that, and it would certainly mean that one stage that  
11 had been inserted in our draft order would disappear.

12 THE CHAIRMAN: How far is Professor Shaffer along with working out what his answers to  
13 these questions, or these issues, are?

14 MR. LASOK: I do not know, because he has been working on the Part 2 questions. Some of the  
15 Part 2 questions are not really matters for experts at all. With others, there are problems  
16 because of the way the questions have been put. Others again are new because they have  
17 not been raised in discussions previously between the experts. So it is not as if he was  
18 simply responding to things that have been put to him before and he had already thought  
19 about. I will have to go back to him to find out whether he could do this before Wednesday,  
20 1<sup>st</sup> June, given the fact that we are proceeding now on the basis of the late Tuesday text. It  
21 is perfectly possible that ----

22 THE CHAIRMAN: The late Monday text.

23 MR. LASOK: Well, whatever day of the week it was when the 10.36 document was circulated.

24 MR. SAINI: 23<sup>rd</sup> May.

25 MR. HOWARD: In fact the document was served on Friday. The only difference between  
26 Friday and Monday was that Monday was a populated document. In fact, the document  
27 served on Friday largely reflects what was served a week prior to that. It is quite important  
28 to bear that in mind.

29 THE CHAIRMAN: The question is, what I think is important is that if Professor Shaffer, who  
30 has done all the work for the Part 1 issues, thinks there are some issues which he cannot  
31 answer because they are not appropriate for an expert, then let him simply say that. If he is  
32 told as of now to crack on with putting in his answers to these issues, can he do that, at least  
33 on a without prejudice basis, as Mr. Howard has described it, by tomorrow close of play, so

1 that everyone can have a look at all that over the weekend and then finalise their own  
2 comments in response to everybody's else comments by close of play on the Monday.

3 MR. LASOK: Could I take instructions on that? (After a pause) At the moment, Professor  
4 Shaffer is not contactable. He is travelling. He is on his way to Norwich apparently, and he  
5 has got instructions to contact those instructing me as soon as he can.

6 It is perfectly possible that what we could do is pencil in something like 5 pm tomorrow, but  
7 it might be that we would have to revisit that. What I would have preferred to have done  
8 was to take instructions and get a clear idea from Professor Shaffer as to whether that is  
9 feasible or not.

10 Let me be absolutely clear about this, what we want to do is to get through this process as  
11 soon as possible. There is a difficulty because we can only do what is possible.

12 THE CHAIRMAN: As far as you are concerned, subject to it being possible for Professor Shaffer  
13 to give his answers to the Part 2 issues by tomorrow close of play, you have no other  
14 objection to the course which has been suggested of making an order attaching these two  
15 lists as being the statements that are going to be put in, everybody putting in their answers  
16 with Mr. Ridyard doing the cut and paste that is required by close of play Friday, everyone  
17 having a chance then to look at those answers of everybody else and then signing off,  
18 making any amendments they wish to make to their own answers by Monday, close of play?

19 MR. LASOK: I think our position is that the Part 1 thing can be sorted out very, very quickly.  
20 The Part 2 thing requires Professor Shaffer, and I cannot at the moment give a date other  
21 than the one indicated in the draft, which I appreciate that the Tribunal is not happy with.  
22 We are bound to be able to give an earlier date, but I cannot say what that one is at this  
23 stage. I would prefer to contact Professor Shaffer, but apart from that the process can be  
24 very, very simple, because the stage that remains for Part 1 is simply the remaining experts  
25 populating the Part 1 question, Professor Shaffer just having a look at what they have added  
26 and making any further clarificatory comments. That is Part 1 settled.

27 So far as Part 2 is concerned, we have different iteration. If, at the end of that process, the  
28 experts want to revisit Part 1, that is just of administration and timing. The process in  
29 general is something that we do not have a difficulty with. We have no problem at all with  
30 the Tribunal making a direction that attaches to it the Shaffer lists and the Ridyard lists, and  
31 we have already acknowledged the fact, and the Tribunal has mentioned the fact, that there  
32 are difficulties with some matters in the Ridyard list but they can be dealt with by the  
33 experts as and when. In fact, that is what we were suggesting in the skeleton argument.

1 THE CHAIRMAN: Yes, thank you, Mr. Lasok. Does anybody else wish to be heard. Yes,  
2 Mr. Saini?

3 MR. SAINI: Can I respectfully say that we agree that both lists have to be attached to an order.  
4 Can I suggest that we banish the discussion on Part 1 and Part 2 henceforth. Those are  
5 going to be the two lists, and really Mr. Lasok should have obtained instructions as to when  
6 Part 2 can be completed, if that is what he calls the second list. I would ask the Tribunal to  
7 make an order today, rather than leaving it completely up in the air. If necessary, one could  
8 be even more generous to Professor Shaffer, the Tribunal, rather than ordering that there be  
9 an exchange by tomorrow, could order it by close of play on Monday, or even Tuesday  
10 morning. That can be a firm order.

11 One should also bear in mind that the material in the consolidated list is not new. It has not  
12 just been bounced on Professor Shaffer earlier this week. That list is the product of lengthy  
13 discussions, so one finds it hard to see why Professor Shaffer would have difficulty. If his  
14 answer is going to be to many of these issues, "I do not think it is appropriate", it would be  
15 very easy for him to say that. I would ask the Tribunal to make an order, if necessary  
16 extending the period until Monday, but not leaving it open for Mr. Lasok to come back and  
17 say, "Unfortunately, Professor Shaffer has not got time to do this until some time next  
18 week".

19 MR. LASOK: Can I just interrupt there, if the proposal is that Professor Shaffer produces his  
20 responses on the Part 2 questions by close of play Monday, that is no problem. My only  
21 concern is a proposal that he produces the responses to the Ridyard list by close of play  
22 Friday, because that is so short a period of time that I cannot say to the Tribunal that it is  
23 feasible.

24 THE CHAIRMAN: Right.

25 MR. LASOK: From my discussions with Professor Shaffer, Monday evening is not a problem.

26 MR. HOWARD: That is very helpful. Of course, it is interesting to hear that, because a moment  
27 ago Mr. Lasok said it was not possible for him to give any indication prior to 3<sup>rd</sup> June.  
28 Be that as it may, the timetable that I have suggested was to fit in with your idea of Monday,  
29 madam. I have not fixed on Monday. I am fixed on the idea that we do need to have an  
30 order.

31 THE CHAIRMAN: We will certainly have an order, and it will certainly include dates by which  
32 this done, and it appears that now it will certainly attach these two sets of issues as being the  
33 issues, and it will certainly also deal with them being answered and finalised at the same  
34 time and not in sequence. Really, the question as to what the deadline for any of these

1 things is, that relates to what the knock-on effect is on the timetable that we set for  
2 everybody's skeleton arguments.

3 How long do you need, Mr. Howard, after the finalisation of the statements before you are  
4 in a position to file your skeleton argument?

5 MR. HOWARD: I think we would like a week between the two.

6 THE CHAIRMAN: How much time was there ----

7 MR. HOWARD: It was actually envisaged that we would have slightly longer than that. It was  
8 originally the 23<sup>rd</sup> May until 3<sup>rd</sup> June.

9 THE CHAIRMAN: The original order was for the joint expert report by 23<sup>rd</sup> May, ITL skeleton  
10 by 3<sup>rd</sup> June, retailer appellants by 17<sup>th</sup> June, and OFT by 30<sup>th</sup> June.

11 If now we say that the without prejudice draft, if I can call it that, of both lists fully  
12 populated to be circulated by 30<sup>th</sup> May, and then we have two days for consideration, which  
13 would take us to 1<sup>st</sup> June, and then a day to finalise, that is 2<sup>nd</sup> June – I think that if I was  
14 going to do that, what I would do is then move the Imperial Tobacco to 9<sup>th</sup> June, but I do not  
15 see at the moment any reason to move the retail appellants. I know we left a big gap  
16 between the retail appellants and the ITL skeleton to try and reduce duplication, but that  
17 may be a luxury that we cannot now afford, because if we push the retail appellants'  
18 skeleton later then the OFT will want their date pushed later, and then we will have missed  
19 our target. I am afraid that pinch in the shoe may have to be borne by the retail appellants.

20 MR. O'DONOGHUE: Madam, if I may, this may not be a very popular in the light of your  
21 intimation, but the fact is that we have a separate appeal. There is a substantial fine. The  
22 idea is that we should be compressed in the middle and that the flies on either side will, in  
23 effect, have additional luxuries of at least not being any worse position seems to us quite  
24 unfair. This is a hearing that is some way off.

25 THE CHAIRMAN: Yes, but you will also have seen the experts' report on 2<sup>nd</sup> June. The only  
26 thing you will not have seen is ITL's skeleton, and the only reason why we did not order all  
27 the appellants to serve their skeletons on the same date, which is an order that one would  
28 expect to have been given that, as you say, you are all equal appellants, is the hope that by  
29 staggering them in that way you would be able to adopt some of what is said in the ITL  
30 skeleton as your own, and therefore not have to reproduce it in your own skeleton, but it is  
31 in no way suggesting that you are any less of an appellant than ITL, it was purely for that  
32 pragmatic reason, but you would still have a good week in which to see the ITL skeleton,  
33 and if that helps you to reduce the volume of your own skeleton then so be it, There is no

1 particular reason why you should have so much longer after the experts' report is finalised  
2 than ITL has. As I say, I do not want the OFT's date to move from 30<sup>th</sup> June.

3 MR. SAINI: Can I just say, we do not need any more time for our skeleton. We are content to  
4 stick to the 17<sup>th</sup>.

5 MR. BROWN: Madam, if I may just interject.

6 THE CHAIRMAN: Yes, Mr. Brown.

7 MR. BROWN: The primary concern for the Co-Op is to ensure that we do not duplicate ITL's  
8 material or submissions to the extent possible. Obviously we do not know quite how long  
9 the submissions from ITL will be, and we will just have to have time to take those into  
10 account. We were going to suggest the 20<sup>th</sup>, just to put it back by one working day to give  
11 us the weekend so that we do not have to incur the cost of materially starting work on the  
12 actual drafting of the skeleton until we have read and, as it were, consumed the ITL  
13 material.

14 THE CHAIRMAN: Let me just say this: there are lots of other meaty issues in this case other  
15 than the experts' reports. If counsel can liaise so that, for example, you get some idea about  
16 what ITL is going to say, for instance, on the authorities about object and effect, or on the  
17 application of the exemption order, or any of those things, then that may well help you. The  
18 only reason why this has been pushed off is because of the experts' report delay. Although  
19 that is, of course, a hugely important matter in the case, it is not the only matter in the case,  
20 and I would hope everyone could get on with all the other complicated issues that there are  
21 which are not going to be affected by the delay in the preparation of the experts' report.

22 MR. LASOK: Madam, could I possibly interject?

23 THE CHAIRMAN: Yes, Mr. Lasok.

24 MR. LASOK: I am well aware that you do not the date for submission of the OFT's skeleton to  
25 be moved, and I fully understand the reasons for that. I am afraid to say that I do have to  
26 record a slight concern, almost more than a slight concern, that if the ITL skeleton is moved  
27 to 9<sup>th</sup> June, then that effectively takes something like six working days out of the time that  
28 we have got to respond to everything. I would prefer not to make a submission asking for  
29 six more days for our part. I was wondering whether the better thing to do would be to  
30 move the OFT's date from 30<sup>th</sup> June to the following Monday, which is 4<sup>th</sup> July, because  
31 that, in our respectful submission, would be a reasonable step to take. It is only one  
32 working day, but it does give us a weekend. It is not as long as six days, but, in our  
33 respectful submission, it does actually reflect the fact that the OFT has got a lot of ground to  
34 consider when it reacts to the appellants' skeleton arguments. If that were done it is true

1 that it has an effect on things such as item 9 which is the joint bundle of authorities which  
2 has the date of 30<sup>th</sup> June and it would also have an effect on item 13. I do not think that it  
3 would have an effect on anything else and, in our respectful submission, making what is  
4 effectively a short alteration to those points in the order made at the last CMC is not  
5 outrageous or unacceptable, and it would be fully consistent with keeping the case on track.

6 THE CHAIRMAN: Right. Does anyone else have anything that they wish to add? Yes, Mr.  
7 Saini?

8 MR. SAINI: I am surprised that Mr. Lasok would make that submission. He was not at the last  
9 CMC but you may recall madam that the OFT wanted to exchange skeletons simultaneously  
10 on the basis that they knew what they were going to say, therefore it was rather surprising  
11 now for the OFT to take a position that, the Tribunal having ordered sequential exchange,  
12 contrary to the OFT's original position, now they want even more time. We would  
13 respectfully submit that the reasons that motivated the Tribunal in fixing the original date  
14 remain valid. There is a lot that the OFT can do, they are not going to simply rely upon  
15 what others say, so we respectfully ask you to stick to the original date.

16 MR. O'DONOGHUE: Madam, for our part the notion that the OFT on the one hand would have  
17 a short extension and ITL, as one of the appellants, on the other, but none of the other  
18 retailers it seems to us doubly wrong.

19 THE CHAIRMAN: (After a pause) Well I am going to rise briefly, and come back in a moment  
20 and tell you what I am going to do.

21 (Short break)

22 THE CHAIRMAN: The other matter we have to deal with, of course, is the extension of time for  
23 the statement that deals with the Dr. Walker issues – if I can call them that – but I  
24 understand that everyone is agreed that that can be filed by 5 p.m. on Friday, 27<sup>th</sup>.  
25 This is what I propose to say in the order: the other expert's report dealing with the theories  
26 of harm or whatever is lodged by 5 p.m. on 2<sup>nd</sup> June in the form of the two lists attached to  
27 the order following this process. First, all the experts to provide by email two – I do not  
28 know whether to name Mr. Ridyard, or is it RBB?

29 MR. LASOK: Probably Mr. Ridyard.

30 THE CHAIRMAN: By email to Mr. Ridyard, their answers to be included in all the boxes in both  
31 lists by noon on 30<sup>th</sup> May. Mr. Ridyard then to circulate the completed versions of both  
32 lists as soon as possible on 30<sup>th</sup> May. All experts then to provide Mr. Ridyard with final  
33 versions of their answers by 10 am on 2<sup>nd</sup> June, which will then enable Mr. Ridyard to lodge  
34 that by 5 p.m. on 2<sup>nd</sup> June. The knock-on effect of that is that the date for ITL to serve their

1 skeleton is extended until noon on 9<sup>th</sup> June. The retail appellants stay at 5 pm on 17<sup>th</sup> June,  
2 and the OFT's date is extended until noon on 4<sup>th</sup> July. The dates for the joint bundle of  
3 authorities and the e-versions of the pleadings, etc. is extended then to 5 p.m. on 4<sup>th</sup> July.  
4 We also need, as soon as possible please, from somebody electronic versions of the two lists  
5 to be attached to this order which are the versions that Ashursts provided to us yesterday.  
6 Does that make sense to everybody?

7 We will draw up that order as soon as possible, once we have the e-versions of the list and I  
8 hope then that everything will proceed smoothly.

9 MR. LASOK: Can I be irritating and say: Do we want to identify somebody who is going to  
10 provide the e-versions.

11 MR. HOWARD: Well we will, Ashursts ----

12 THE CHAIRMAN: Ashursts, yes.

13 MR. HOWARD: -- as soon as we get back to the office.

14 THE CHAIRMAN: Thank you very much everybody.

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