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

Case No. 1160-65/1/1/10

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

3 November 2011

Before:

VIVIEN ROSE  
(Chairman)  
DR ADAM SCOTT OBE TD  
DAVID SUMMERS OBE

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 SUPERMARKET 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

**(1) SHELL UK LIMITED  
(2) SHELL UK OIL PRODUCTS LIMITED  
(3) SHELL HOLDINGS (UK) LIMITED**

Appellants

– v –

**OFFICE OF FAIR TRADING**

Respondent

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*Transcribed using LiveNote by Opus 2 International  
1 Bell Yard, London, WC2A 2JR  
Tel: +44 (0)20 3008 5900  
[info@opus2international.com](mailto:info@opus2international.com)*

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## **HEARING (DAY 26)**

Note: Excisions in this transcript marked “[...][C]” relate to passages excluded.

## APPEARANCES

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

Mr Rhodri Thompson QC and Mr Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of the Appellant Co-operative Group Ltd.

Mr Pushpinder Saini QC and Mr Tristan Jones (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellants WM Morrison Supermarkets Plc and Safeway Stores Ltd and Safeway Ltd.

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

Ms Dinah Rose QC and Mr Brian Kennelly (instructed by Baker & McKenzie LLP) appeared on behalf of the Appellants Shell U.K. Ltd, Shell U.K. Oil Products Ltd and Shell Holdings (U.K.) Ltd.

Mr Paul Lasok QC, Ms Elisa Holmes, Mr Rob Williams, Ms Anneliese Blackwood and Ms Ligia Osepciu (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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1 Thursday, 3 November 2011  
 2 (10.30 am)  
 3 Discussion re future course of proceedings  
 4 Submissions by MR LASOK  
 5 **THE CHAIRMAN:** Mr Lasok.  
 6 **MR LASOK:** Madam, the Tribunal has asked the OFT to specify  
 7 which constraints apply in relation to each of the  
 8 infringing agreements. The OFT considers that each of  
 9 the infringing agreements operated on the basis that,  
 10 when the rival manufacturer's brand went up in price,  
 11 the price of the linked competing brand of the  
 12 manufacturer which had the P&D agreement was to be  
 13 raised by the retailer to suit.  
 14 In the case of downward movements, they operated  
 15 through the opportunity to respond mechanism, either  
 16 formally where that mechanism was provided for in  
 17 a trading agreement or as a matter of practicality.  
 18 However, the OFT has considered the evidence as it  
 19 has emerged in the course of the proceedings, and it  
 20 appears to the OFT in the light of the evidence that  
 21 each and every one of the specific circumstances relied  
 22 on in the decision in support of the finding of  
 23 an object infringement may or may not be established to  
 24 the appropriate legal standard.  
 25 For example, if the price moves take place through

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1 manipulation of the wholesale price, that may reflect  
 2 a restraint that is not referred to in paragraph 40 of  
 3 the OFT's skeleton argument.  
 4 If the Tribunal were to find in relation to any one  
 5 of the infringing agreements that are the subject of  
 6 these appeals that none of the constraints in  
 7 paragraph 40 of the OFT's skeleton argument were  
 8 present, it does not follow that there was no object  
 9 infringement. In other words, putting matters in the  
 10 statutory language, for reasons that the Tribunal will  
 11 well understand in a minute or two, there are reasonable  
 12 grounds for suspecting an object infringement that  
 13 worked in the absence of the four constraints as they  
 14 are described in paragraph 40 of the OFT's skeleton  
 15 argument.  
 16 Now, that is a departure from the decision as  
 17 currently formulated, although the suspected  
 18 infringement that appears on the face of the evidence is  
 19 the same in nature as that found in the decision. The  
 20 procedural question that then arises is whether these  
 21 appeals can and should be dealt with by the Tribunal in  
 22 exercise of its powers under schedule 8,  
 23 paragraph 3(2)(d) and (e) of the Act, expanding the case  
 24 in the decision to the alternatives that arise from the  
 25 evidence.

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1 An alternative is that the OFT should amend the  
 2 decision by removing the infringing agreements currently  
 3 before the Tribunal and, if it considers it appropriate  
 4 to do so on further consideration, issue a new statement  
 5 of objections that is more broadly based but seeks to  
 6 capture all the alternatives that the evidence has  
 7 thrown up.  
 8 If the Tribunal considers that the schedule 8  
 9 solution is a possible option in the present case,  
 10 the Tribunal would need to hear submissions from the  
 11 parties before these appeals go further. Going down the  
 12 schedule 8 route requires serious consideration of the  
 13 practicalities and the procedural consequences. One  
 14 option is for the Tribunal to complete the factual part  
 15 of the case, make findings of fact and, depending upon  
 16 what those findings were, engage in a further stage at  
 17 which expert evidence and legal argument come into play.  
 18 On the other hand, it might be that a different solution  
 19 would be envisaged and more appropriate.  
 20 Now, for its part, the OFT recognises that there are  
 21 issues with the schedule 8 solution in the circumstances  
 22 of these appeals. But if the Tribunal decides that that  
 23 solution is not appropriate, the OFT's current view is  
 24 that it would amend its decision as I've indicated and  
 25 consider the issue of a new statement of objections in

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1 the light of any submissions made to it by the  
 2 appellants and, if a new statement of objections were  
 3 issued, the administrative procedure would then follow  
 4 as normal, and the OFT would obviously consider any  
 5 submissions of the parties in response to the new  
 6 statement of objections with an entirely open mind.  
 7 **THE CHAIRMAN:** Two matters arising from that, if I may seek  
 8 some clarification: could you explain again what it is  
 9 you say is the position in relation to the constraints  
 10 set out in the decision as a --  
 11 **MR LASOK:** There is one upward movement constraint, and if  
 12 you look at it in terms of, let's say, an ITL parity and  
 13 differential agreement, the upward movement is when  
 14 Gallaher moves upwards then the retailer is to move up  
 15 the ITL brand price.  
 16 So far as the downward movements are concerned, it's  
 17 operated through the opportunity to respond mechanism,  
 18 as I've said, either because the opportunity to respond  
 19 mechanism was expressly stated in the trading agreement,  
 20 or it operated as a result of the practicalities  
 21 associated with downward movements.  
 22 **THE CHAIRMAN:** Yes. What I wasn't sure was whether you were  
 23 saying that that is a constraint that you say was  
 24 an element in each of the 15 bilateral arrangements --  
 25 **MR LASOK:** Yes.

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1 **THE CHAIRMAN:** -- in each of those. Do you say that some of  
 2 the other constraints were also accepted in respect of  
 3 one or more of those 15 bilateral arrangements?  
 4 **MR LASOK:** No. Again looking at an ITL parity and  
 5 differential agreement, if ITL moved the price up, on  
 6 the evidence that has emerged it doesn't seem to us that  
 7 the retailer was expected to move the Gallaher price.  
 8 The difficulty here is in interpreting the instruction  
 9 from ITL, because if the ITL instruction is interpreted  
 10 as a widening of the differentials, then you wouldn't  
 11 expect an upward movement in the Gallaher price to  
 12 follow. But in many of the instances that we have got,  
 13 it looks as though the ITL instruction, when an ITL  
 14 price moved up, was -- either was or was construed as  
 15 being -- an instruction that, made by ITL, altered the  
 16 differentials and therefore didn't give rise to the need  
 17 automatically to move the Gallaher price.  
 18 **THE CHAIRMAN:** So that is what you say is the nature of each  
 19 of these arrangements?  
 20 **MR LASOK:** And I should emphasise the point that I made  
 21 about the ITL move upward not being followed necessarily  
 22 by the Gallaher move. That position is our assessment  
 23 of the evidence, and the difficulty about this is that,  
 24 on the face of it, we would have said that the intention  
 25 was that this should have happened, but you can't have

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1 a unilateral intention, you have to have a common  
 2 understanding. For that you need to look at the  
 3 evidence, and when you look at the evidence there are  
 4 clearly evidential difficulties in the way of the OFT's  
 5 case, and it's problematic from the perspective of the  
 6 appropriate legal standard that one applies.  
 7 It's effectively a pragmatic conclusion that the OFT  
 8 has come to after evaluating the evidence. It doesn't  
 9 mean that we accept that, in principle, this constraint  
 10 didn't exist. Our difficulty is that if you look at the  
 11 evidence from the perspective of the appropriate legal  
 12 standard, we think that there are serious difficulties  
 13 in us establishing that. That doesn't apply in relation  
 14 to the other constraints that I've mentioned, in our  
 15 submission at any rate.  
 16 **THE CHAIRMAN:** The other constraint?  
 17 **MR LASOK:** Yes.  
 18 **THE CHAIRMAN:** The other point was when you refer to  
 19 amending the decision, were you talking -- just  
 20 a moment. (Pause). I didn't quite understand the point  
 21 about amending the decision, and then issuing  
 22 a statement of objections.  
 23 **MR LASOK:** Because we think, having looked at the evidence  
 24 in the round as it has come out, that the decision has,  
 25 to put it loosely, been cast too narrowly. If you like,

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1 it has identified a particular mechanism or method of  
 2 implementation that gives rise to the anticompetitive  
 3 harm. But in some of the cases that are before  
 4 the Tribunal, it looks as though the same end result,  
 5 that's to say the same anticompetitive harm, results or  
 6 may result in a different way, which is not captured  
 7 sufficiently clearly in the decision. When I say  
 8 "sufficiently clearly", one can look at the decision and  
 9 seek to read it in different ways, but at the end of the  
 10 day, you know, a decision has a particular legal  
 11 meaning, the Tribunal decides what the legal meaning of  
 12 the decision is, and it is clearly open to the Tribunal  
 13 to conclude that on the legal meaning of the decision,  
 14 it's too narrow to capture some of the permutations that  
 15 we have seen in the evidence.  
 16 For that reason, it appeared to the OFT on  
 17 reflection that there were really two routes arriving at  
 18 the correct result. Because if there are infringements  
 19 then they need to be the subject of a decision, and the  
 20 two routes -- I emphasise the word "if" of course -- are  
 21 either through the Tribunal exercising its powers under  
 22 schedule 8 or it's through the OFT dealing with the  
 23 matter, but in order to deal with the matter properly  
 24 the correct thing, in our submission, to do would be for  
 25 the OFT to amend the decision so that the disputed

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1 infringing agreements are cleared out of that decision  
 2 and then you have a statement of objections that puts,  
 3 as it were, the entire case to the undertakings in  
 4 question so that they have a fair opportunity to answer  
 5 it, but answer it in its entirety, and in its broad  
 6 sense. Then you would arrive at a decision, if  
 7 a decision was necessary, in the light of the  
 8 submissions made by the undertakings that did properly  
 9 capture what had actually happened.  
 10 **THE CHAIRMAN:** As far as these appeals are concerned, do  
 11 I understand you rightly as saying that if we go down  
 12 what you have called the schedule 8 route, given the  
 13 breadth of the Tribunal's powers in disposing of  
 14 an appeal, you say it's open to the Tribunal, possibly,  
 15 after considering practical and procedural issues to  
 16 which you referred, to arrive at its own infringement  
 17 decision, effectively --  
 18 **MR LASOK:** That's correct.  
 19 **THE CHAIRMAN:** -- of something that is within the decision  
 20 but not the whole of the decision?  
 21 **MR LASOK:** That's our submission, in a nutshell.  
 22 **THE CHAIRMAN:** Yes. If we do not consider that that is the  
 23 appropriate route and then the appropriate route is the  
 24 amending of the decision and the going through the  
 25 statement of objections route, where does that leave

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1 these appeals?  
 2 **MR LASOK:** Well, the amendment of the decision would mean  
 3 that the present proceedings can be brought to an end.  
 4 There would obviously be a question of costs, but it's  
 5 one of these situations that in fact is commonly  
 6 encountered in administrative law in which the  
 7 decision-maker decides to alter its position and, in  
 8 those circumstances, it's quite common for the court to  
 9 acknowledge the fact that the decision-maker has taken  
 10 that stance, and then, you know, the proceedings come to  
 11 an end.  
 12 **DR SCOTT:** As we did in ABI, where we were in fact, I think,  
 13 asked to quash a decision.  
 14 **THE CHAIRMAN:** That was where I was getting to, but that may  
 15 be a detail which one can look at.  
 16 Can we just have a look at both --  
 17 **MR LASOK:** The other possibility I think I ought to mention  
 18 for the sake of completeness is that the appeals could  
 19 be stayed.  
 20 (Pause)  
 21 Due to one of these accidents of efficiency that  
 22 plague one's existence, I don't think anybody in my team  
 23 has -- ah, I am saved. But fortunately it's even better  
 24 than that, because it's the 2009 edition. I don't know  
 25 whether there is a later one. With a bit of luck it's

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1 an out of date one.  
 2 **THE CHAIRMAN:** We have the 2010 edition.  
 3 **MR LASOK:** That is wonderful, it confirms everything that  
 4 one believes about efficiency.  
 5 **THE CHAIRMAN:** So looking at page 85, "Decisions of  
 6 the Tribunal":  
 7 "The Tribunal must determine the appeal on the  
 8 merits by reference to the grounds of appeal set out in  
 9 the notice of appeal."  
 10 **MR HOWARD:** Sorry, what are you reading?  
 11 **THE CHAIRMAN:** It's schedule 8 of the Competition Act.  
 12 **MR HOWARD:** I am looking at a different version.  
 13 **DR SCOTT:** In the version at which you are looking, it is  
 14 page 85 on the top left-hand, towards the bottom of the  
 15 page.  
 16 **MR HOWARD:** I apologise, I had missed page 85. Sorry.  
 17 **THE CHAIRMAN:** So:  
 18 "The Tribunal may confirm or set aside the decision  
 19 which is the subject of the appeal, or any part of  
 20 it~..."  
 21 **MR LASOK:** Then you have (d) and (e).  
 22 **THE CHAIRMAN:** "... and may:  
 23 "(d) give such directions, or take such other steps,  
 24 as the OFT could itself have given or taken, or  
 25 "(e) make any other decision which the OFT could

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1 itself have made."  
 2 We know that the Court of Appeal has recently  
 3 considered the scope of those powers in the  
 4 Albion Water.  
 5 So is that what you have to say for the moment,  
 6 Mr Lasok?  
 7 **MR LASOK:** Unless there is anything further that you would  
 8 like me to add.  
 9 **THE CHAIRMAN:** No, thank you, very helpful.  
 10 Is there any initial reaction that you would like to  
 11 make to that, Mr Howard?  
 12 Submissions by MR HOWARD  
 13 **MR HOWARD:** I think I should resist the temptation to react  
 14 straightaway. I would suggest, though, that we ought to  
 15 just adjourn for a short time in order that I can  
 16 discuss things with my team. I have to say I am not  
 17 entirely clear what the OFT's position actually is. Let  
 18 me just say what I think has been said.  
 19 As I understand it, they appear to be acknowledging  
 20 that, of the restraints that are identified in the  
 21 paragraph 40 of the skeleton, the only one which, as  
 22 I understand it, they are still claiming to rely on is  
 23 a Gallaher price increase. So the central plank of the  
 24 case has gone -- that was an Imperial price increase --  
 25 and the downward movements by Imperial and Gallaher have

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1 gone. So that's the first thing I've understood we are  
 2 dealing with.  
 3 Secondly, any other constraints are not relied on,  
 4 so the retailer self-funded restraint which we said is  
 5 not in the decision, they are not seeking to say is or  
 6 there is any economic theory about that.  
 7 That's, as I understand it, where they are in  
 8 clarity of the case, and they say that restraint is  
 9 present in all of the agreements, namely --  
 10 **THE CHAIRMAN:** That is my understanding of the position.  
 11 **MR LASOK:** Yes. I should emphasise that what I said was  
 12 that I was focusing on the so-called paragraph 40  
 13 constraints.  
 14 If one thinks back to the decision, effectively the  
 15 decision proceeds on the basis that -- to put it rather  
 16 loosely again -- the work is done by the retailer under  
 17 the restraints imposed through the parity and  
 18 differential agreement, but there is a different  
 19 interpretation of the facts that is plausible as  
 20 an alternative scenario in relation to some of the  
 21 agreements at least that we have been looking at, which  
 22 is that you may have a restraint on the retailer, but  
 23 the restraint on the retailer doesn't translate through  
 24 into the type of behaviour that was identified in the  
 25 decision. What instead happens is something else.

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1 Instead, what you have is the same end result, but it  
 2 operates through a variation that wasn't properly  
 3 captured in the decision.  
 4 **THE CHAIRMAN:** I think I agree that it's a good idea for us  
 5 to adjourn. Can I just ask you one more question,  
 6 Mr Lasok: Is the OFT currently clear that they will  
 7 seek to argue that the Tribunal should go down the  
 8 schedule 8 route, or is that a decision that the OFT is  
 9 in the process of considering?  
 10 **MR LASOK:** It's a decision that -- the OFT has not finalised  
 11 its views on that, and one of the reasons why I stated  
 12 that the OFT recognised that there were issues about the  
 13 schedule 8 route is that we do recognise that, in case  
 14 of this sort, there are points that can be made against  
 15 going down the schedule 8 route.  
 16 At the moment -- and this is subject to further  
 17 consideration by the OFT -- the OFT's position is,  
 18 I would suspect, neutral in the sense that, given the  
 19 way events have developed, it took the view that it was  
 20 appropriate for it to draw this to the attention of  
 21 the Tribunal at the earliest opportunity, so that  
 22 the Tribunal and the parties were aware of how the OFT  
 23 was perceiving the case.  
 24 **THE CHAIRMAN:** Yes, that's very helpful.  
 25 **MR HOWARD:** We don't need to consider at the moment how we

1 have got to where we are. That will be the time when we  
 2 argue about costs, perhaps, or we may never have to  
 3 argue about it. We do need to just consider what the  
 4 OFT is saying.  
 5 Before we adjourn, I just want to be clear: my  
 6 understanding, which I think is now being confirmed,  
 7 firstly is that, insofar as the OFT would wish within  
 8 these proceedings to argue for a restraint, it is in  
 9 fact now limiting it to the situation of a Gallaher  
 10 price increase, and the reason it distinguishes that, it  
 11 recognises that in all other situations, the position is  
 12 that it was any movement where Imperial moved up or  
 13 Imperial/Gallaher moved down, that a corresponding  
 14 movement was subject to wholesale price movements. As  
 15 I understand it, that's --  
 16 **THE CHAIRMAN:** Well, Mr Lasok didn't mention wholesale price  
 17 movements.  
 18 **MR HOWARD:** I think he did.  
 19 **THE CHAIRMAN:** Where we would get to, in my view -- and  
 20 again this is a preliminary view before we rise to  
 21 consider the matters -- is that the first step would be  
 22 for the OFT to provide the Tribunal and the parties in  
 23 writing a description of the restraint that they say now  
 24 they contend for in relation to each of the 15 bilateral  
 25 arrangements, and the nature of that constraint and

1 where it is found described in the decision; and,  
 2 second, the OFT need to come to their own conclusion as  
 3 to whether they are going to apply to the Tribunal -- or  
 4 whether the proceedings are going to continue on the  
 5 basis that the Tribunal is able to and should draw out  
 6 from the decision that element and determine whether  
 7 that amounts to an infringement by object or not.  
 8 That's the question of whether the schedule 8 route is  
 9 one that the Tribunal should take.  
 10 **MR HOWARD:** I think I more or less agree with that, it seems  
 11 to me just a matter of logic. The first stage is,  
 12 before you get to schedule 8, does the OFT claim that  
 13 the decision remains -- are they seeking to uphold the  
 14 decision and, if so, in what respect? It seems to me  
 15 that is the first question. If their position is: in  
 16 order to uphold the decision, the Tribunal would need to  
 17 effectively vary it in some respect -- they can't simply  
 18 say, "Over to you, Tribunal", at least in my submission  
 19 they can't, I can't see how that would satisfy any  
 20 procedural fairness. One would need to have identified  
 21 extremely clearly what it was that they were asking  
 22 the Tribunal to do, ie what the finding was, what the  
 23 issue was.  
 24 Now, you won't be at all surprised, I don't need to  
 25 consult with my team to know that we say in relation to

1 both points this case actually falls to be dismissed at  
 2 this stage.  
 3 **THE CHAIRMAN:** I think you would say the appeal should be  
 4 allowed.  
 5 **MR HOWARD:** Sorry, the decision should be quashed, rather,  
 6 as in the MasterCard, and the appeal should be allowed.  
 7 If the OFT seriously says they are going to start again,  
 8 well, that will be a matter for them; if they do,  
 9 obviously there are other routes that we would have to  
 10 consider at that stage. But it is -- I'll just say this  
 11 at this stage -- impossible, and you will of course have  
 12 looked at what the Court of Appeal has said in  
 13 Albion Water, for instance, it is impossible to see how,  
 14 I think we are in Day 26, on the eleventh hour before  
 15 calling experts, it is impossible to see how you can  
 16 start shifting the ground rules at this stage and for us  
 17 to be expected fairly to deal with it.  
 18 So we will be making a submission, in the light of  
 19 this in any event, that this decision is going to fall  
 20 to be quashed and the appeal allowed.  
 21 What I would suggest is that the Tribunal takes  
 22 a short time and we take time to take stock, but then we  
 23 are going to have to consider where we go. At the  
 24 moment, for instance, I would say it is impossible, in  
 25 the light of the way things are moving and the moving

1 target, for us to move into expert evidence next week.  
 2 This is not how litigation can be conducted.  
 3 **THE CHAIRMAN:** Let's hold it there, Mr Howard, and we will  
 4 come back at quarter past 11. Or do you need a longer  
 5 break?  
 6 **MR HOWARD:** Can I suggest that will be slightly too short,  
 7 at least I would suggest until 11.30.  
 8 **THE CHAIRMAN:** Yes.  
 9 **MR HOWARD:** If that's okay.  
 10 **THE CHAIRMAN:** Very well.  
 11 (11.05 am)  
 12 (A short break)  
 13 (11.30 am)  
 14 **THE CHAIRMAN:** Yes.  
 15 **MR HOWARD:** Just trying to take stock of where we are, the  
 16 first thing I would just respectfully remind everybody  
 17 of is this: this case is not simply about  
 18 an administrator making an administrative decision;  
 19 these are in fact criminal proceedings; you will see the  
 20 judgment of the European Court of Human Rights in  
 21 Menarini on 27 September. Not only are they criminal  
 22 proceedings, the decision has been used as the basis to  
 23 fine my clients no less than £110 million. I think as  
 24 I understand it, that's either the biggest or one of the  
 25 biggest fines that's ever been levied in these type of

1 proceedings in this country.  
 2 Mr Lasok is, on behalf of the OFT, in effect the  
 3 prosecutor. Obviously the way in which these  
 4 proceedings come before the court is we are the  
 5 appellant, and so things are slightly the wrong way  
 6 round, but in effect he is the prosecutor.  
 7 Now, what is very bizarre about this is -- and of  
 8 course you will be familiar from sitting as a Recorder  
 9 in a criminal capacity -- the prosecution there has  
 10 an indictment, which defines what it is it's seeking to  
 11 prove. Where are we in relation to this case? We have  
 12 been told in the defence there was a central plank to  
 13 the OFT's case. It is now acknowledged that central  
 14 plank has gone. It's actually been evident, it's not  
 15 something -- the way Mr Lasok presented his submissions  
 16 was to suggest: well, the OFT is somehow now considering  
 17 the position and come along to state this. I would  
 18 respectfully say the difficulties with their case have  
 19 been apparent for a number of weeks. The difficulties  
 20 became apparent when they weren't actually prepared to  
 21 put their case to the witnesses, and everybody will  
 22 recognise that the only person who was putting the OFT's  
 23 case was me. Now, that's not something I should have  
 24 had to do as the appellant counsel, but that is actually  
 25 what happened.

1 Now, what we appear to be left with in relation to  
 2 the case, as we discussed before adjourning, is, I think  
 3 what we have called constraint (a). In any event, it's  
 4 the suggestion that where there is a Gallaher price  
 5 increase, there is a requirement on each of these  
 6 retailers to put up the price of Imperial's  
 7 corresponding brand, whether or not -- in fact, I think  
 8 the relevant point is notwithstanding the fact that  
 9 Imperial hasn't, at that stage, had a price increase.  
 10 Because if it's only putting it up when Imperial's had  
 11 a price increase, then I think it's recognised that it  
 12 would be exactly the same as the other situations.  
 13 Now, just as a matter of fact, on the evidence you  
 14 have heard, this case is no more promising than any of  
 15 the other restraints. It has been repudiated in  
 16 absolutely clear terms by, I think, every single  
 17 retailer witness. But what's more important,  
 18 Fiona Bayley has said this was complete nonsense. I do  
 19 not have the reference, but each one of the restraints  
 20 that I put to her, I put it in terms that this was  
 21 nonsense, and she agreed to it.  
 22 Of course it's actually quite difficult to  
 23 understand how anybody could say this makes any  
 24 commercial sense, because if you recognise that where  
 25 Imperial puts its price down, it pays a bonus, it's

1 trying to get a competitive advantage and therefore the  
 2 Gallaher price wouldn't be expected to come down, why on  
 3 earth would anybody suggest that where Gallaher's puts  
 4 up its price, and Imperial hasn't put up its price, that  
 5 it wants to lose the competitive advantage it has by  
 6 being lower and not having put up its price?  
 7 Indeed, it's completely nonsensical, because in the  
 8 situation --  
 9 **THE CHAIRMAN:** You don't need to argue the case,  
 10 necessarily, Mr Howard.  
 11 **MR HOWARD:** It's not that I can't resist the temptation,  
 12 it's not that I am so wedded to all these points,  
 13 although a lot of this case does seem like  
 14 Groundhog Day.  
 15 **THE CHAIRMAN:** What we need to decide now is what we are  
 16 going to do today and over the next few days.  
 17 **MR HOWARD:** I was getting on to that. The reason I was  
 18 perhaps labouring the point that this point is hopeless:  
 19 the first point that we would make about the OFT  
 20 clinging on to this point as the only point, we say  
 21 actually on the evidence you can determine that it's  
 22 a hopeless point, but secondly, even if you said "Well,  
 23 we are not going to do that at this stage and this is  
 24 just part of the case", it is changing the complexion of  
 25 the case radically. It's a different case to that which



1 is in the decision, it's a different case to that which  
2 the experts have had to consider. That of itself means  
3 that it's impossible to carry on with this case as  
4 things stand.

5 The next point is, though, and this is what  
6 I understand, so we have firstly that if they are  
7 clinging onto --

8 **THE CHAIRMAN:** Well, you don't accept, I gather, that they  
9 have made out, or you don't accept that the one  
10 constraint on which they rely was accepted in one or any  
11 of these arrangements?

12 **MR HOWARD:** I say absolutely not. I couldn't put it any  
13 more clearly than that. I would say it is actually  
14 completely nonsensical, the suggestion of this.

15 What is interesting is the reason this wasn't the  
16 central plank, in that you can understand on their  
17 theory of harm what they were saying, the whole theory  
18 of harm -- I have to just spend two minutes just putting  
19 it into context, because you will remember that what is  
20 said about the theory of harm is this: where the  
21 manufacturer puts up his price, if he can put up his  
22 price in the knowledge that his competitor's price comes  
23 up, then he's free and clear of the normal competitive  
24 constraints. So one understands why they wanted to say  
25 the central plank of their case was that if Imperial

21

1 puts up its price, it can do so without any fear that it  
2 becomes uncompetitive.

3 When you look at it from the other side, if your  
4 competitor puts up his price, why would you want your  
5 price to go up if you are not putting up your wholesale  
6 price? You don't get any benefit from it. All you are  
7 doing is giving a margin there to the retailer, and it  
8 comes back actually to the point that's arisen lots of  
9 times in this case, the difference between whether you  
10 recognise that the retailer may of his own motion do  
11 that, and we know that retailers -- for instance today,  
12 if Coca-Cola puts up the price of Coca-Cola, that the  
13 retailer may use that as an opportunity to put up the  
14 price of Pepsi so that he can gain more margin on Pepsi,  
15 notwithstanding that Pepsi haven't yet put up their  
16 price. He might do that. But to say that that is  
17 a requirement, in that example of Pepsi, or here of  
18 Imperial, is counterintuitive. You have to think of:  
19 why on earth would you want that to happen?

20 So we firstly say it is a hopeless point on the  
21 evidence you have heard, it's hopeless as a matter of  
22 economic sense and common commercial sense. If  
23 necessary, we would say you could actually reach  
24 a conclusion on the facts quite simply.

25 The other point also to recognise in this is -- and

22

1 I am not trying to always criticise the OFT, but one has  
2 to think about how they are saying this arises. Because  
3 you will remember that some of their questioning depends  
4 upon, as it were, a close textual analysis of the  
5 trading agreements. Sometimes they want to have a close  
6 textual analysis, and sometimes they say "No, we have to  
7 look at the course of conduct".

8 Now, for the close textual analysis, the first thing  
9 is there is a decision which came out yesterday of the  
10 Supreme Court, I happen to know it because I argued it,  
11 which is on the correct approach to commercial  
12 construction. It's called the Rainy Sky, and you will  
13 see that the Supreme Court has reiterated -- it doesn't  
14 contain new law, but it has reiterated the position that  
15 you have to construe contracts in a commercially  
16 sensible way.

17 Leaving that on one side, there is this close  
18 analysis for this part of the OFT's case, as  
19 I understand it, on, for instance, where a trading  
20 agreement says "You are to maintain the differentials",  
21 they say "Well, that must mean maintain at all times  
22 whatever happens". But let's just think about their  
23 case for a moment, even where you have that wording.  
24 They recognise that that doesn't apply where there is  
25 a price decrease. So in other words it can't mean

23

1 "maintain at all times". But they also recognise it  
2 doesn't apply where Imperial puts up its price.

3 So one has to actually think, as a matter of just  
4 common sense, if it doesn't apply in those situations,  
5 how does the OFT say the contract could be applying just  
6 in one situation? In other words, if you say this is  
7 symmetrical and it applies in all situations, I can at  
8 least understand how you can put forward the argument.  
9 Lots of reasons why I say it's wrong. Once you break  
10 the symmetry, it doesn't make any sense at all, it's  
11 an impossible argument, whether you look at it as  
12 a matter of just construction of these agreements or  
13 look at the course of conduct. Then when you look at  
14 the evidence and you look at what all the retailers have  
15 said when cross-examined -- Fiona Bayley -- it doesn't  
16 work.

17 But then in terms of just where do we get to in this  
18 case, if they are clinging on to this point and they say  
19 that's it, the question for the Tribunal is: how does  
20 this fit in with the current theory of harm? Is there  
21 a theory of harm that relates to simply having this  
22 constraint? And then as a matter of procedural  
23 fairness, how is it the appellants and their experts are  
24 able to deal with it? We say it is not fair for us at  
25 this juncture to find the decision being altered in this

24

1 way, with some -- because you just have to think about  
2 it. The theory of harm we are now dealing with is that,  
3 assume this factual premise is made out, which is what  
4 the experts would have to consider, but where there are  
5 price decreases it's all subject to wholesale prices,  
6 where Imperial puts up its price it's subject to  
7 wholesale prices, so you are left with one possible  
8 situation, allegedly, a Gallaher price increase and that  
9 causing Imperial prices to go up.

10 You would also have to see how that modelled, you  
11 would have to consider the legal and economic context as  
12 to whether actually it was going to make any realistic  
13 difference if, for instance, in large numbers of cases  
14 what actually happens is that one MPI is followed by  
15 another. But the real point is it's a different case  
16 and at this juncture, it would be procedurally unfair to  
17 expect us to deal with that.

18 If one then comes on to this situation where  
19 Mr Lasok is saying there is a departure, so I think on  
20 that, the first one, there is a clear departure, but  
21 Mr Lasok is seeking to cling on to something. His  
22 variant is he says "Well, even if I can't prove any of  
23 these constraints, I still say that these agreements are  
24 anticompetitive by object."

25 Let's just think about that for a moment. The OFT

25

1 has had years on this case. I'll come to exactly how  
2 long in a moment. But these other restraints which are  
3 said to exist: firstly at the moment Mr Lasok hasn't  
4 even identified what they are, still less has he  
5 identified what the economic theory of harm is, so that  
6 we know on what basis it is said that this gives rise to  
7 an object infringement.

8 Now, how, one asks, if one is observing any form of  
9 fair procedure in these criminal proceedings, how is it  
10 that we are to deal with this? What are our experts to  
11 deal with next week? No idea. It's not simply  
12 a question of the OFT coming up this afternoon or  
13 tomorrow with a piece of paper. This is very, very  
14 serious litigation, as I am sure of course the Tribunal  
15 recognises. This isn't just litigation of the normal  
16 type that one has between commercial parties, hurly  
17 burly, rough and tumble and so on. This is the  
18 prosecutor, the administrator, seeking to fine us. Now,  
19 we simply cannot see where a case hasn't been  
20 articulated, and such cases one can imagine may require  
21 new factual evidence, new expert evidence; it is simply  
22 impossible within the confines of this case to  
23 contemplate it.

24 The next point I would make is under the heading,  
25 frankly, of -- and this comes into the procedural

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1 fairness -- surely enough is enough. The investigation  
2 started, as far as we were concerned, in August 2003.  
3 The SO initially was on 24 April 2008. There was  
4 a supplemental SO on 19 June 2008, culminating in  
5 a decision in April of 2010.

6 Now, you, I think, have very fairly set out in,  
7 I think it's the Co-op's document, the way in which the  
8 case has chopped and changed. There was an allegation  
9 of an ABC infringement. That's been abandoned, although  
10 in cross-examination from time to time we seem to see it  
11 being resurrected, presumably that's just for purposes  
12 of prejudice and not for the purpose of proving anything  
13 proper. An RPM case. That has been abandoned. Again  
14 we see it resurrected in cross-examination, not for the  
15 purpose of proving issues. The effects case, that has  
16 gone, although again that seems to raise its head every  
17 now and again.

18 Now, the simple point we make in the light of what  
19 the OFT has said, and indeed a responsible regulator  
20 ought to be acknowledging this, the decision as it  
21 stands, as it's written, cannot stand.

22 We have, and the Tribunal in our submission has  
23 essentially got, to grasp the nettle. The only sensible  
24 and fair course at this stage is to quash this decision.  
25 If the Office of Fair Trading seriously considers that

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1 it is an appropriate use of public money to re-start the  
2 investigation, that is a matter for the Office of Fair  
3 Trading and that is a matter we will have to consider on  
4 another day. I have to say, speaking for myself, rather  
5 than perhaps for my clients, that for the Office of Fair  
6 Trading to do that in the light of the time and money  
7 that's been spent would be rather incredible. But that,  
8 as I say, is not an issue that the Tribunal or I have to  
9 be detained with.

10 The issue for today is essentially: what shall we do  
11 now? We say very simply it is impossible to carry on  
12 with this case in the light of this, and the only way in  
13 which one can sensibly deal with it is, as I think  
14 happened in the MasterCard case, I think that was the  
15 one, where the decision was quashed, and it's up to the  
16 OFT in the light of that what they want to do.

17 **THE CHAIRMAN:** Thank you, Mr Howard.

18 I understand why you want, as it were, to get your  
19 retaliation in first. I am not yet clear -- and I am  
20 not sure whether Mr Lasok is any clearer after our short  
21 break -- whether the OFT is pursuing the argument before  
22 the Tribunal that we should go down the schedule 8  
23 route. If they are going to pursue that, then clearly  
24 we need to have the basis for that put forward in  
25 a proper way so that the Tribunal can consider it.

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1 Is there anything that you can add on that point at  
 2 this stage, Mr Lasok?  
 3 Further submissions by MR LASOK  
 4 **MR LASOK:** Well, in our submission, if the Tribunal wishes  
 5 to have a formal submission from the OFT on the  
 6 schedule 8 route, what I would propose is that the  
 7 Tribunal sets a date and a time, which I propose as  
 8 being next Wednesday at close of business, by which the  
 9 OFT is to state its position. If its position is that  
 10 the Tribunal should go down the schedule 8 route then  
 11 a properly formulated submission should be made to that  
 12 effect, with supporting arguments. The other parties  
 13 will then have Thursday to consider that written  
 14 submission, and the Tribunal will reconvene on Friday to  
 15 hear oral argument.  
 16 I put it in that way because, as I said earlier, the  
 17 OFT has not at this stage made up its mind as to whether  
 18 it wishes formally to ask the Tribunal to go down that  
 19 route, and it may well be that come close of business on  
 20 Wednesday the OFT will have come to the conclusion that  
 21 an alternative would be appropriate. In either event,  
 22 it is for the OFT to be specific about what it proposes  
 23 or intends, that is in the interests of everybody, and  
 24 in our submission suggesting close of play Wednesday is  
 25 reasonable, given the time of the week that we are

1 currently at and the necessity for the OFT to make  
 2 a decision of the nature that we are contemplating.  
 3 I will add only a marginal footnote to what I've  
 4 just said, which concerns Mr Howard's submissions. I do  
 5 not want to embark upon my closing submissions, but  
 6 I think it needs to go on the transcript, if it isn't on  
 7 there already, that the OFT has not conceded its case in  
 8 the present appeals. The OFT has submitted, and  
 9 continues to submit, that at least one of the  
 10 constraints in paragraph 40 is present. I say "at least  
 11 one" because in the case of downward movements it has  
 12 always been the OFT's case that the system operated  
 13 through an opportunity to respond mechanism, and that in  
 14 itself is something that was factored into the original  
 15 decision.  
 16 Furthermore, it is not the OFT's case, and I have  
 17 never stated, that there were no other restraints. The  
 18 point that I made was very, very different, and  
 19 Mr Howard has a major problem because even if you take  
 20 his case at the highest, which is the evidence of  
 21 Ms Bayley, she actually accepted that there were  
 22 restraints imposed on the retailer. She accepted that  
 23 in re-examination without any prompting whatsoever. It  
 24 simply is not the case that we have reached the point at  
 25 which the Tribunal could simply, today or tomorrow or

1 whenever, uphold these appeals.  
 2 **THE CHAIRMAN:** So your proposal, Mr Lasok, is presumably  
 3 that we adjourn this case now --  
 4 **MR LASOK:** Yes.  
 5 **THE CHAIRMAN:** -- there doesn't seem to be any purpose in  
 6 hearing Mr Wragg's evidence or starting with the  
 7 experts?  
 8 Just to see how this would work: so we would adjourn  
 9 now, we would direct the OFT by 4 pm on Wednesday to  
 10 serve a statement setting out (a) whether they were  
 11 withdrawing the decision as a whole -- well, we will  
 12 come up with the wording in due course. By Wednesday  
 13 close of play you would state whether the OFT wished to  
 14 continue contesting the appeals and, if so, on what  
 15 factual basis as far as constraints were concerned in  
 16 respect of each of the bilateral arrangements, and  
 17 submissions as to whether it was appropriate for  
 18 the Tribunal to continue with considering the appeals on  
 19 that basis.  
 20 **MR LASOK:** Well, perhaps --  
 21 **THE CHAIRMAN:** We would work out the wording of that. If  
 22 the OFT's decision by Wednesday afternoon is that they  
 23 do not wish to continue, then clearly we know our  
 24 course. If, however, the OFT wished to continue with  
 25 maintaining the decision in the way you have described,

1 or will have described in more detail by Wednesday,  
 2 there is then the question of what the procedure would  
 3 be thereafter, because it will not be simply a matter of  
 4 rescheduling the experts to turn up on the Thursday  
 5 morning, there would need to be a timetable for  
 6 responses and then for the Tribunal to hear submissions.  
 7 It's what we can do practically to enable the case to  
 8 continue at that stage, if it is going to. But  
 9 I understand that that's what you propose, and there may  
 10 be some further details that need to be worked out for  
 11 that course.  
 12 **MR LASOK:** Might I propose that it could be formulated in  
 13 this way: by the specified time on Wednesday the OFT is  
 14 either to serve a written reasoned submission supporting  
 15 or inviting, however you put it, the Tribunal to  
 16 exercise its powers under schedule 8 or, in the  
 17 alternative, setting out in precise terms how it  
 18 proposes that the proceedings continue. I put it in  
 19 that way because if the OFT were to consider that the  
 20 appropriate route is not schedule 8, but instead is the  
 21 alternative that I've already foreshadowed, which is  
 22 an amendment of the decision, then the OFT's response  
 23 would be: no schedule 8, the OFT is intending to amend  
 24 the decision in the following way, the consequences for  
 25 these proceedings are in the OFT's submission as

1 follows.  
 2 So I think the idea is to give the Tribunal and the  
 3 other parties a precise idea of the OFT's position. But  
 4 I would have thought that if the direction was framed  
 5 more or less in the way that I've suggested, that  
 6 the Tribunal would have covered adequately all the  
 7 different permutations.  
 8 **THE CHAIRMAN:** Thank you, Mr Lasok. I am going to invite  
 9 other counsel now to make some submissions, but you will  
 10 have another opportunity, Mr Howard.  
 11 Mr Thompson?  
 12 Submissions by MR THOMPSON  
 13 **MR THOMPSON:** I do not want to detain anyone, given that it  
 14 looks as though the OFT will have a more formal  
 15 opportunity to state its position, I thought it might be  
 16 helpful just to put out the points that I think the OFT  
 17 would need to address, simply as a sort of provisional  
 18 reaction.  
 19 First of all, we would say that pleadings are the  
 20 basis of the Tribunal's jurisdiction under schedule 8,  
 21 it has no inherent jurisdiction to consider any wider  
 22 unpleaded case, let alone to allow the OFT to advance  
 23 a new or wider case without any notice on the pleadings  
 24 and obviously without the procedural protection of the  
 25 statement of objections, et cetera, and insofar as the

1 OFT is suggesting that, that's obviously something we  
 2 would strongly oppose.  
 3 Secondly, Albion Water, if it be suggested, is not  
 4 an authority for the proposed course of action. That  
 5 was a case of a non-infringement decision, appealed and  
 6 determined on the pleadings, whether CAT could provide  
 7 the procedural safeguards equivalent to those provided  
 8 by the SO procedure. So it's no authority for this  
 9 course of action, in my submission.  
 10 Thirdly, and it's a point that I think Mr Howard has  
 11 already touched on, but in my submission it's a major  
 12 problem for the course of action that Mr Lasok seems to  
 13 be suggesting, the sole constraint now relied on is not  
 14 in fact that advanced in the decision.  
 15 If you find 6.215 or paragraph 17 of  
 16 Professor Shaffer's report, it is the ITL agreement and  
 17 the ITL price increase requiring a Gallaher price  
 18 increase that is put forward as the core restriction in  
 19 the decision, and the sole restriction that the OFT  
 20 appears to now wish to advance is really a bizarre  
 21 restriction that in my submission is quite hopeless on  
 22 the facts and was never properly put to anyone.  
 23 Fourthly, there was some strange uses of wording by  
 24 Mr Lasok. He used the words "may or may not" at  
 25 lines 16 to 21 of page 1, and "reasonable grounds to

1 suspect" as the relevant standard at page 2, lines 7 to  
 2 13.  
 3 It may be rather obvious, but the OFT has said it  
 4 and so we ought to address it: those are clearly not the  
 5 correct statutory tests or legal standards in these  
 6 proceedings, and it doesn't appear that even now the OFT  
 7 is prepared to put forward any firm wider case on any  
 8 proper legal standard.  
 9 Fifthly, and this is really the main point from the  
 10 Co-op's point of view, there is absolutely no basis in  
 11 the evidence to allege that the Co-op was party either  
 12 to an agreement in containing the sole restriction that  
 13 the OFT is now prepared to advance, let alone any wider  
 14 case which I don't think has ever been suggested against  
 15 the Co-op in the administrative proceedings, in the  
 16 pleadings, or indeed in any part of this case. So  
 17 insofar as any wider case was going to be advanced, in  
 18 my submission it would inevitably lead to the Co-op  
 19 falling out of these proceedings.  
 20 Then finally, more generally, we would say that the  
 21 wider case in any event is quite impossible to address  
 22 in these proceedings, as we understand in reality the  
 23 OFT seems to want to revert to some variant on the case  
 24 advanced in the original statement of objections which  
 25 you will recall has been very largely abandoned, and we

1 would share with Mr Howard the suggestion of virtual  
 2 outrage that the OFT should in this particular case,  
 3 after such a long delay, seek to widen a case that it  
 4 has deliberately narrowed, and recognised in the  
 5 decision itself at paragraph 6.120 to be unprovable on  
 6 the facts.  
 7 So in my submission as well that's a further factor  
 8 that the OFT would need to address in any submissions  
 9 next week. So those are the points I wish to make.  
 10 **THE CHAIRMAN:** Thank you. Mr Saini.  
 11 Submissions by MR SAINI  
 12 **MR SAINI:** Madam, can I just make two brief points? One is  
 13 a timing point. With respect to Mr Lasok and the OFT,  
 14 it seems to us, given where we have got to, it is a very  
 15 relaxed --  
 16 **THE CHAIRMAN:** You need to slow down, Mr Saini.  
 17 **MR SAINI:** -- timetable. Mr Lasok is suggesting that it  
 18 will take them over a week to put together this  
 19 document. We respectfully suggest that, if the case is  
 20 going to carry on after that, then we should be trying  
 21 to save as much time as possible before Christmas.  
 22 Therefore I was respectfully going to suggest that  
 23 the OFT have until the end of Monday, and that we  
 24 reconvene on Wednesday for an argument in relation to  
 25 where the proceedings go.

1 The second point I want to make -- and this is  
2 something on which we would ask the Tribunal to make  
3 a direction -- is that the OFT have to now unequivocally  
4 state whether they are resisting the appeals and, if  
5 they are resisting them, we would ask the Tribunal  
6 please to direct that they identify which parts of which  
7 appeals they are resisting.

8 Madam Chairman, you did suggest to Mr Lasok that the  
9 OFT indicate whether or not they were withdrawing the  
10 decision. He did not take up that invitation and has  
11 left one with this rather confusing position: either  
12 they are going to suggest a schedule 8 solution, or they  
13 are going to suggest what he calls amending the  
14 decision. We don't really understand what he means by  
15 amending the decision. There is no process to amend the  
16 decision before this Tribunal. What he must be meaning  
17 there is that they are not going to be defending these  
18 appeals and that they are going to start a new process.

19 Therefore we would request with some clarity that  
20 the OFT state their position, and indeed the Tribunal  
21 direct that they indicate whether or not they are  
22 resisting the appeals and, if they are resisting, in  
23 which specific respects.

24 **THE CHAIRMAN:** Mr Flynn.  
25 Submissions by MR FLYNN

1 **MR FLYNN:** Madam, I am not going to seek to get my  
2 retaliation in first, I am not going to seek to argue  
3 against what the OFT may or may not say in this paper;  
4 it's for you to decide how much time they should be  
5 given for that. But I don't think, given the  
6 complexities that it's likely to raise, that a day for  
7 us just to run through it and then turn up and make  
8 submissions is likely to be enough. Because if it does  
9 contain the sort of level of detail that I would suggest  
10 is going to be required, we are going to have to think  
11 about it, and so I would say a day and then turn up for  
12 a hearing is certainly not adequate.

13 I don't have a suggestion for how long it should be  
14 because I don't know what exactly is going to be in the  
15 paper, but I think we are going to need two or three  
16 days at least to discuss things with our clients, and  
17 potentially with our witnesses, who, as you know, are  
18 scattered to the four winds, no longer working for the  
19 company and so forth.

20 So a day just to run through this isn't really  
21 enough.

22 I shan't say more, except that I think it really is  
23 incumbent on the OFT, if the case is to go forward, to  
24 set out what it considers to be the factual basis for  
25 that in some detail, because that we haven't had in the

1 cross-examination, notably for example effectively no  
2 Gallaher case was put to our witnesses whatsoever. So  
3 we need a great deal of clarity in this paper, and if  
4 it's not there we are going to have to make some  
5 detailed submissions to you when we reconvene. I think  
6 on any view clearly the timetable is now out of the  
7 window and some very detailed directions are going to be  
8 needed if these proceedings are to continue on any  
9 footing whatsoever.

10 **THE CHAIRMAN:** Mr Kennelly.

11 Submissions by MR KENNELLY

12 **MR KENNELLY:** Madam, if I may, on behalf of Shell, echo what  
13 has been said in relation to clarity, and in particular  
14 Mr Saini's request for a specific direction because that  
15 is the only way we can be guaranteed the level of  
16 clarity that we require and to which we are entitled in  
17 these proceedings.

18 On Shell's behalf, we were particularly concerned  
19 that even now, in the outline manner in which Mr Lasok  
20 explained his so-called wider case, it's still related  
21 in no way to any of the evidence that emerged in  
22 relation to Shell. It is still entirely unclear to us  
23 how Mr Lasok, on behalf of the OFT, intends to proceed  
24 against Shell. He continues to fail or to choose not to  
25 engage with the particular points which have arisen in

1 relation to Shell and which have now been ventilated at  
2 length in the evidence, and we would ask for particular  
3 clarity in relation to that issue in relation to Shell's  
4 appeal, preferably by way of the directions which  
5 Mr Saini seeks.

6 **THE CHAIRMAN:** Thank you. Just one moment.

7 (Pause)

8 Mr Howard, the Tribunal is minded to direct  
9 a timetable for the next stage of this case in which we  
10 will, as Mr Lasok suggests, direct the OFT to decide  
11 whether it is continuing to resist these appeals and, if  
12 it is, on precisely what basis, both factual basis as  
13 regards each of the bilateral arrangements, and legal  
14 basis as to how they say that fits within the scope of  
15 the Tribunal's powers in schedule 8.

16 We agree with Mr Flynn that a day is not adequate  
17 for the parties to consider that. If the OFT's decision  
18 is that they do seek to ask the Tribunal to continue  
19 with these hearings in some form, it doesn't seem to us  
20 that the timetable for this process should be truncated  
21 since it's not realistic to expect the economists to be  
22 able to respond instantly to whatever case the OFT now  
23 seeks to put forward.

24 What we would suggest, subject to what you want to  
25 say, is that we should rise now, that the parties should

1 consider between now and 2 o'clock if they can come up  
 2 with some wording for a direction for the Tribunal to  
 3 make which will set a realistic timetable and also  
 4 ensure that the clarity which the parties are seeking as  
 5 to what the case is, if the OFT decides to go down the  
 6 schedule 8 route, as we have referred to it, so that  
 7 they can understand the case that is now being put.  
 8 Are you asking us now to do something different from  
 9 that?  
 10 Further submissions by MR HOWARD  
 11 **MR HOWARD:** Yes. Because I think we need to just stand back  
 12 and actually, before you get to what it is you are  
 13 suggesting and the OFT are suggesting they would do on  
 14 a date yet to be defined, what are the OFT actually  
 15 asking you to do today? What they are actually asking  
 16 you to do today is to adjourn these proceedings. They  
 17 are asking you to adjourn these proceedings because they  
 18 don't know where they stand and they want time to  
 19 consider where they stand and either to abandon the  
 20 case, withdraw it, or to reformulate the case.  
 21 Obviously if they are going to withdraw it, fine,  
 22 and we will have an argument or may not have an argument  
 23 about costs because they may concede the position.  
 24 Let's assume there is a possibility they are going to  
 25 seek to say "in some respect I am going to seek to

1 uphold this decision", whether it's by using the  
 2 schedule 8 route or not. We say that you should not be  
 3 granting an adjournment for that purpose because it is  
 4 impossible for this case, which has been scheduled in  
 5 the way it has, to carry on without our side suffering  
 6 undue and unfair prejudice. You can't -- I mean, this  
 7 case was -- I can't remember when the CMC was when you  
 8 fixed it, but it was some considerable time ago, and you  
 9 will understand that a lot of people's diaries have to  
 10 be scheduled to fit it in, experts' reports have been  
 11 prepared some time ago, and then everybody has to fit  
 12 in.  
 13 Now, what is absolutely evident is that the  
 14 timetable has now gone for this term, this case is  
 15 not -- you can't -- it's not some minor variation we are  
 16 talking about, so that you can just say "Well, that's  
 17 a hiccup". On any view we are losing the opportunity  
 18 for the expert evidence now, and the timetable is tight,  
 19 as we have seen so far, so that this case cannot  
 20 continue before this Tribunal, and it's not just  
 21 a question of losing a day or two.  
 22 So that, in my submission, in the light of where we  
 23 are, with the OFT saying "I need to adjourn in order to  
 24 reformulate my case, either abandon it or reformulate  
 25 it, the Tribunal should be saying it is simply not

1 appropriate for you to be given that opportunity at this  
 2 stage, if your case can no longer proceed as it is, then  
 3 that should be the end of the road". But we can't  
 4 contemplate a situation where the appellants -- I am  
 5 only speaking for Imperial -- where Imperial has to deal  
 6 with a moving target where its expert evidence is about  
 7 to come forward.  
 8 Again, imagine this were conventional litigation and  
 9 the test here should be much more rigorous if one were  
 10 in court after six weeks, having heard factual evidence,  
 11 and the claimant said "Well, I'm not really sure what my  
 12 case is, judge, I would like an adjournment for a week,  
 13 forget the experts coming next week, so I can  
 14 reformulate it as I think best". What would any  
 15 Commercial or High Court judge say? They would say  
 16 absolutely ridiculous, the idea that suddenly at this  
 17 stage a claimant could reformulate -- or a defendant for  
 18 that matter -- and I am going to grant an adjournment,  
 19 they would say "if you can't proceed with the case as it  
 20 is, and you don't even know what an alternative case is,  
 21 then that's too bad for you, that's the end of it".  
 22 In my submission, that is actually the simple  
 23 solution that the Tribunal should be looking at at the  
 24 moment: why am I adjourning this case? Because the OFT  
 25 doesn't know what its case is. Is that something that

1 is appropriate to do today on the eve of expert  
 2 evidence? The answer in my submission is clearly not.  
 3 The only appropriate thing to do today is to say that if  
 4 Mr Lasok, if the OFT's position is it cannot today  
 5 maintain its position on the decision, then in the light  
 6 of where we have got to, there is no choice other than  
 7 to quash the decision. So that the OFT has to, to use  
 8 the vernacular, put up or shut up, and the Tribunal, in  
 9 the exercise of its jurisdiction, what you are having to  
 10 decide is: is it fair to the parties to allow  
 11 an adjournment for the OFT to reformulate its case?  
 12 Once you phrase it in that way, in my submission it's  
 13 clear that it isn't an appropriate use of the procedure  
 14 at this stage for the OFT, and so that since they don't  
 15 seem to be in a position today to say they wish to  
 16 continue with the decision, then the decision in my  
 17 submission should be quashed today.  
 18 **THE CHAIRMAN:** Yes, thank you, Mr Howard. We will adjourn  
 19 now until 2 o'clock, when we will decide how to take  
 20 this forward. It would be helpful, Mr Lasok, from  
 21 an abundance of caution, if you could come up with  
 22 a formulation of a direction in case that is the course  
 23 that we decide to adopt.  
 24 **MR LASOK:** Would it be appropriate if we drafted something  
 25 and then circulated it to the appellants?

1 **THE CHAIRMAN:** Yes. That's what I had in mind. And the  
 2 parties can consider that without prejudice, of course,  
 3 to your submissions that you have just made, Mr Howard.  
 4 **MR FLYNN:** Madam, could I just say that I endorse the  
 5 submissions Mr Howard has just made, as what I would  
 6 envisage saying to you when we get the OFT's paper, more  
 7 or less whatever it says. I do not want Mr Howard to  
 8 think that none of the other appellants take the same  
 9 position. It seems to me in effect the Tribunal is  
 10 being put in an impossible position by what the OFT has  
 11 to say. I was just simply saying I was not going to get  
 12 my retaliation in first. But let there be no doubt that  
 13 this is not just a procedural adjustment, but a major  
 14 problem for the OFT and a major problem for the Tribunal  
 15 in proceeding with this case.

16 **THE CHAIRMAN:** Thank you. We will come back at 2 o'clock.  
 17 (12.20 pm)

18 (The short adjournment)

19 (2.00 pm)

20 RULING

21 **THE CHAIRMAN:** On Monday, 31 October, which was Day 23 of  
 22 this hearing, the Tribunal asked the OFT to clarify  
 23 whether the evidence from the factual witnesses we had  
 24 heard so far caused it to reconsider its case in  
 25 relation to the restraints it maintained had been

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1 accepted by the parties in each of the 15 bilateral  
 2 agreements which is the subject of these appeals. The  
 3 OFT undertook to provide an update on that this morning.  
 4 This morning Mr Lasok for the OFT indicated that,  
 5 although the OFT does not concede any particular points  
 6 in the appeal, it recognises that there are evidential  
 7 problems with it being able to establish to the standard  
 8 of proof that is required in these proceedings that  
 9 three of the four constraints set out in paragraph 40 of  
 10 its skeleton argument existed in any of the  
 11 15 arrangements.

12 As we understand it, the OFT does maintain that the  
 13 evidence establishes that one of those constraints  
 14 existed in the arrangements between each manufacturer  
 15 and each of the retailers.

16 The question, therefore, arises as to where this  
 17 acknowledgement by the OFT leaves the future course of  
 18 these appeals.

19 The OFT considers that there are two possible  
 20 courses it could take. The first is to concede that  
 21 these proceedings should now be brought to an end, the  
 22 appeals should be allowed and an appropriate order made  
 23 by the Tribunal under paragraph 3(2) of schedule 8 to  
 24 the Competition Act.

25 The second is for the OFT to apply to be allowed to

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1 reformulate its case to carry on resisting the appeals  
 2 on the basis that it will, at the end of the day, ask  
 3 the Tribunal to exercise its powers under  
 4 paragraph 3(2)(e) of that schedule. This would involve  
 5 the Tribunal in effect making a decision which the OFT  
 6 could itself have made and thereby upholding the appeals  
 7 by finding that an infringement of the same kind as was  
 8 condemned in the decision, albeit a different  
 9 infringement, has been established.

10 To that end, the OFT has asked the Tribunal to  
 11 adjourn the hearing to give it time to decide which of  
 12 those two courses it is inviting the Tribunal to take.

13 The appellants this morning have, not surprisingly,  
 14 expressed serious concern about the prospect of this  
 15 hearing proceeding on a different basis from the basis  
 16 which everyone was originally expecting. The last of 21  
 17 factual witnesses, who was scheduled for today, has, we  
 18 assume, been sent away for the time being.

19 On Tuesday, 8 November we were due to start two  
 20 weeks of evidence with the cross-examination of seven  
 21 economics experts. Clearly that is not now going to go  
 22 ahead on the timetable to which we have been adhering.  
 23 The appellants have pointed to the length of time the  
 24 investigation into tobacco pricing took before the OFT  
 25 adopted the decision, and the time and cost of these

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1 appeals so far.

2 The OFT recognises that if it decides to invite  
 3 the Tribunal to take the second course, what we have  
 4 called the schedule 8 course, then there is still quite  
 5 a lot more work that needs to be done. The OFT has  
 6 accepted that if it were to decide to ask the Tribunal  
 7 to allow the proceedings to carry on, it would have to  
 8 explain in very clear terms (a) the entirety of the  
 9 constraints that it now contends were included in the 15  
 10 bilateral arrangements; (b) how those constraints fit  
 11 within the description of the infringements set out in  
 12 the decision; and (c) whether and how the theory of harm  
 13 expounded in the decision applies to an agreement  
 14 including those, but only those, constraints.

15 It seems inevitable that the appellants would  
 16 strongly contest any application by the OFT for  
 17 the Tribunal to adopt the schedule 8 course.

18 The Tribunal would have to decide not only whether this  
 19 was really a practical course but also whether it was  
 20 fair. We would need to hear submissions on all these  
 21 points, and deliver a ruling. Only after there had been  
 22 such a ruling could we start, assuming for the moment  
 23 that we decided in the OFT's favour, to reschedule the  
 24 timetable to complete the hearing on the revised basis.

25 Mr Howard for Imperial Tobacco argued this morning

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1 that the Tribunal should not allow the OFT this extra  
2 time to consider its position. He stressed the shaky  
3 evidential ground on which Imperial say even a remaining  
4 single constraint stands. He also emphasised the  
5 unfairness and impracticality of the possible schedule 8  
6 course, should the OFT invite the Tribunal to take that  
7 course. He asked us, in effect, to reject any such  
8 invitation now and allow the appeals and bring this  
9 hearing to an end.

10 The submissions that were made by Mr Howard and on  
11 behalf of the other appellants this morning can have  
12 left the OFT in no doubt about the strength of the  
13 resistance they would face if they decided to invite  
14 the Tribunal to go down the schedule 8 route. But we  
15 are not prepared at this stage to anticipate how we  
16 would respond to the OFT's submissions when the OFT's  
17 stance is clearly not yet fully resolved. We therefore  
18 are prepared to allow the OFT time to consider its  
19 options now.

20 What we are minded to do now is to direct that the  
21 OFT indicate to the parties and to the Tribunal by 4 pm  
22 on Wednesday, 9 November whether it continues to contest  
23 these appeals and, if so, on what factual and legal  
24 basis.

25 We would therefore adjourn this hearing until Friday

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1 morning, 11 November. On that morning, if the OFT has  
2 decided, as it says, to amend the decision and so has  
3 ceased to contest these appeals, we will consider what  
4 order it is appropriate to make to bring the appeals to  
5 an end. We will not at that stage consider costs.

6 If the OFT has decided to invite the Tribunal to  
7 adopt the schedule 8 route, we will next Friday hear  
8 submissions from the parties about whether they are  
9 satisfied with the OFT's description of its case, in  
10 terms of its clarity, and we will at that stage set  
11 a timetable for hearing any dispute about the  
12 appropriateness of proceeding as the OFT wishes.

13 We have had handed to us a draft possible direction,  
14 which we have not unfortunately had a chance to  
15 consider.

16 **MR LASOK:** It's not agreed. It was something that was drawn  
17 up by the OFT and circulated to the appellants about 20  
18 or 30 minutes past 1.

19 **THE CHAIRMAN:** What I am wondering, therefore, is how best  
20 to proceed with the formulation of the direction,  
21 whether we should adjourn now and deal with the matter  
22 on paper, or whether we should adjourn only briefly to  
23 allow the parties to formulate a direction and then come  
24 back later this afternoon to deal with that.

25 **MR LASOK:** Might I suggest that it be done by paper, not

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1 least because in fact we have put forward in the draft  
2 that you have currently got something that we think  
3 encapsulated what the Tribunal said before lunchtime,  
4 and it's really a mechanical exercise to sort out the  
5 terms, the precise terms. The other parties can put in  
6 writing their proposed amendments. The current draft  
7 would have to be amended in any event to take account of  
8 in fact the timings that the Tribunal has indicated.  
9 But to be absolutely frank, we for our part would prefer  
10 to concentrate our efforts on the next stage, rather  
11 than spend some time in a pleasant room round the back  
12 tinkering with a drafting exercise.

13 **THE CHAIRMAN:** Mr Howard, I appreciate that this is not the  
14 course that is your client's preferred course,  
15 nonetheless you will no doubt have comments on the  
16 draft. Would ITL be prepared to undertake drafting  
17 a direction for the Tribunal to consider?

18 **MR HOWARD:** Yes, we certainly could do that. The direction,  
19 as I understand it, that you would expect is one that  
20 largely corresponds to the judgment you have just given,  
21 and I don't believe that what we have from the OFT does  
22 do that.

23 **THE CHAIRMAN:** Well, I think Mr Lasok is acknowledging that  
24 it needs a bit more work.

25 **MR HOWARD:** We can do that. We can take the carriage of

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1 that.

2 **THE CHAIRMAN:** If you could undertake that, that might then  
3 leave the OFT to concentrate on other matters.

4 **MR HOWARD:** Yes. Just to seek clarity, as I understand it,  
5 if the OFT is intending to continue, as it were, then  
6 next Friday will simply be an opportunity to see whether  
7 or not we have sufficient clarity, but then further  
8 directions will be given as to how we proceed. So in  
9 other words the substantive argument, if there is going  
10 to be one, wouldn't be next Friday, that would only be  
11 an argument as to whether they have clarified their  
12 case, if there is a case.

13 **THE CHAIRMAN:** Yes. That's exactly right.

14 **MR HOWARD:** Okay.

15 **THE CHAIRMAN:** Does anybody else want to say anything before  
16 we rise? Very well. Thank you very much, everybody.

17 **MR HOWARD:** Sorry, could I raise one other thing?

18 **THE CHAIRMAN:** Yes.

19 **MR HOWARD:** Obviously we have various experts who were  
20 scheduled, not least Professor Froeb, who is due to fly  
21 over on Friday night or Saturday night, I can't remember  
22 which, but obviously we will stand everybody down on  
23 an indefinite basis.

24 **THE CHAIRMAN:** Yes. We are now adjourning the hearing  
25 until, we decided 12 o'clock on Friday, 11 November.

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1 At that point, as you say, we won't be hearing  
 2 substantive argument, but we will be considering either  
 3 what order to make if the OFT is not contesting the  
 4 appeals, or how we go ahead if they are.

5 **MR HOWARD:** Yes, and I imagine the OFT will be cognisant of  
 6 what you have said so far.

7 **THE CHAIRMAN:** Thank you very much, everybody.

8 (2.20 pm)

9 (The court adjourned until 12 noon on  
 10 Friday, 11 November 2011)

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