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IN THE COMPETITION

APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 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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HEARING (DAY 29)

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 Friday, 18 November 2011
 2 (10.30 am)
 3 SUBMISSIONS BY MR HOWARD (continued)
 4 **THE CHAIRMAN:** Yes, good morning.
 5 **MR HOWARD:** Good morning. May it please the Tribunal, if
 6 I can just summarise what I suggest are the questions
 7 that the Tribunal needs to answer.
 8 The first question: is paragraph 40 of the Office of
 9 Fair Trading's skeleton still part of the OFT's case?
 10 Secondly: if not, what is the effect of the OFT
 11 considered statement on Day 26?
 12 Three: is it open to the OFT to contend that the
 13 refined case is within the decision?
 14 Four: in any event is restriction 2(a) within the
 15 decision, or is restriction 2(b) within the decision?
 16 Five: what is the effect if paragraph 40 is not part
 17 of the case and it is not open to the OFT to contend
 18 that restrictions 2(a) and 2(b) are within the decision,
 19 or you find insofar as that is necessary in the light of
 20 the prior issue that they are not, what is the Tribunal
 21 then required to do?
 22 Six: what is the nature of the jurisdiction under
 23 schedule 8, paragraph 3(2)(e)? Does it permit
 24 the Tribunal to allow the appeal to continue for the
 25 purpose not of considering the appeal against the

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1 decision or the defence of the OFT in respect of the
 2 notice of appeal, but to consider whether the OFT can
 3 make out a different infringing agreement in order that
 4 the Tribunal can then decide whether, when allowing the
 5 appeal and setting aside the decision, to make
 6 a different decision of the kind that the OFT could have
 7 made if still seized of the matter?
 8 Seven: is there any discretion to permit the OFT to
 9 run a case based on saying that there are findings in
 10 the decision on which restrictions 2(a) and 2(b) are
 11 based, or that they are components of the finding in the
 12 decision?
 13 Finally, eight: if there was a discretion, whether
 14 of the type just mentioned or under schedule 8, how
 15 should that be exercised?
 16 That's the order in which I am going to take things.
 17 So if we turn to the first question, is paragraph 40
 18 of the OFT's skeleton still part of its case? In fact
 19 it's tedious, but could we turn up the skeleton in
 20 core 4, if you don't have it loose. {C4/45/1}. You
 21 will remember that at a previous hearing the OFT
 22 conceded that it was not able to prove a case within
 23 paragraphs 40(b) to (d), and that it was -- but it
 24 sought to reserve its position or say it was in fact
 25 still seeking to prove the case under 40(a).

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1 You won't be surprised to know that I suggest that
 2 the Tribunal is entitled to expect a clear and
 3 unequivocal statement from the regulator, the OFT, of
 4 its position. Unfortunately that still is not
 5 forthcoming, although once you analyse the position it
 6 is clear that 40(a) is not being proceeded with,
 7 notwithstanding the continued reluctance to actually
 8 come out and say explicitly what the position is.
 9 Now, just looking at the matter firstly as a matter
 10 of generality, any attempt by the Office of Fair Trading
 11 to cling on to paragraph 40(a) would be highly
 12 surprising, given that the suggestion of a requirement
 13 of this type having been imposed by Imperial would be
 14 plainly risible. What is it they are suggesting?
 15 40(a), if the retail price of Gallaher's brand
 16 increases, then the retail price of ITL's rival brand
 17 must also increase. Why would Imperial have wanted the
 18 price of its product to increase when it had not put up
 19 the wholesale price? Why would it wish to be deprived
 20 of the commercial advantage sought to be gained by
 21 having a lower wholesale price? How could you derive
 22 this from the trading agreements? Moreover, how could
 23 this make sense where the OFT now accepts that Imperial
 24 was free to reduce its price, and the alleged
 25 requirement in 40(c) has gone; in other words, the OFT

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1 accepts that Imperial can reduce its wholesale price in
 2 order to get a competitive advantage and that it has no
 3 expectation of the retailer to reduce the price of the
 4 Gallaher product, whereas here this is just the
 5 flipside, which is Imperial seeks to gain a competitive
 6 advantage by not putting up its wholesale price when
 7 Gallaher has done so.
 8 Now, that's just looking at it as a matter of what
 9 is at all likely. But it's now in fact clear that 40(a)
 10 is not part of the OFT's case.
 11 What one has to remember, if you turn to paragraph 6
 12 of the Office of Fair Trading's recent submission, on
 13 Day 26, Mr Lasok said they were still seeking to prove
 14 40(a). Paragraph 6 of their recent submission says
 15 that:
 16 "The articulation of the infringement set out above
 17 differs from the description in the decision ..."
 18 And it's the next bit that's important:
 19 "... in that it is not a consequence of the
 20 infringing agreements that following a price change
 21 instigated by one manufacturer, the retailer was
 22 required to change the retail price of a competing
 23 manufacturer's brand in order to maintain or
 24 realign ..."
 25 Sorry, I am referring to paragraph 6 of the document

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1 served by the Office of Fair Trading on Wednesday last.
2 **THE CHAIRMAN:** The refined case?
3 **MR HOWARD:** The so-called refined case.
4 **THE CHAIRMAN:** The so-called refined case.
5 **MR HOWARD:** One could say there is not much that's refined
6 about it, but I refrain from saying that.
7 **THE CHAIRMAN:** Paragraph 6.
8 **MR HOWARD:** Paragraph 6.
9 **THE CHAIRMAN:** Yes.
10 **MR HOWARD:** Just read across now, compare that with
11 paragraph 40(a) of their document. In the light of
12 paragraph 6, which explicitly says their case is that
13 the retailer was not required, it's not a consequence of
14 the infringing agreements that the retailer was required
15 to change the retail price of a competing manufacturer's
16 brand.
17 So then if you ask yourself: right, 40(a) says:
18 "If the retail price of Gallaher's brand increases,
19 then the retail price of ITL's rival brand must also
20 increase."
21 That is no longer the case. They are now accepting
22 that is not the case.
23 So we then had Mr Lasok, on Day 27,
24 shilly-shallying -- I have given you the reference to
25 this, it's Day 27, page 79 -- when he stood up and said

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1 "No, no, that wasn't quite the case".
2 Now let's look at the submission that they made
3 yesterday in the speaking note. If you turn in that to
4 paragraph 48 is where any start to address paragraph 40.
5 Paragraph 49, they say:
6 "Paragraph 40 sets out four permutations of the
7 scenario that arose for consideration in the case set
8 out in the decision. These permutations are expressed
9 in absolute terms and are therefore stylised."
10 I've no idea what that means "and are therefore
11 stylised". Those are the terms of their case. I think
12 "stylised" is intended to mean, I assume, "Well, that's
13 not really what we meant when we wrote this down".
14 They then say:
15 "As has been set out above, the OFT's case in the
16 decision was not based on automatic or lock-step
17 implementation."
18 Not true. The only caveat concerns 40(d), which is
19 a Gallaher brand decrease. The central plank of their
20 case is in fact 40(b), which is absolutely based upon
21 this automatic lock-step implementation, and what he was
22 saying the other day about 40(a) on Day 26 was exactly
23 the same.
24 Now, just to make clear the central plank you will
25 need core volume 4, and paragraph 35. {C4/46/152}.

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1 This paragraph is actually of enormous importance in
2 relation to the points that you are having to consider,
3 once one properly understands what it was that the
4 Office of Fair Trading was saying.
5 Paragraph 35 --
6 **THE CHAIRMAN:** Is this of --
7 **MR HOWARD:** It's of their defence. It's at tab 46. Sorry
8 if I am taking things too quickly. Tab 46,
9 paragraph 35. It's very important to understand what is
10 the central plank and why, and I'll come back to the
11 "and why" in more detail in a moment.
12 What they are saying here is, in the first sentence
13 they criticise the ITL summary of the theory of harm,
14 and they say:
15 "In doing so, ITL ignores the central part of the
16 OFT's explanation of the anticompetitive nature of the
17 infringing agreements at decision 6.216."
18 I will read this out, because it is so fundamental
19 to what this case is actually about. Well, you are very
20 familiar -- perhaps if you just read that to yourself,
21 rather than ... my throat is failing.
22 (Pause)
23 **THE CHAIRMAN:** Yes.
24 **MR HOWARD:** Now, this is central to their case, because you
25 have to remember we are talking about an object

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1 infringement. What you are having to ask yourself is,
2 on their case, particularly when you come to the fine,
3 for instance: why is it you are saying this is
4 anticompetitive, and why is it you are saying Imperial
5 ought to have known? What they are saying is "This is
6 it: you, Imperial, what you have done is you have
7 an agreement with the retailer whereby if you put up the
8 price of your product, they have to put up the price of
9 the rival product so you can do that without fear that
10 you are going to lose market share", and that's why they
11 regarded this as the central plank, because it has
12 nothing to do with saying "Well, this is how Gallaher
13 would look at things, this is what you, Imperial, were
14 seeking to get from your agreement. That is why it is
15 said this is an object infringement from your
16 perspective, Imperial, because that's what you were
17 trying to get". That's the point they were making here.
18 Now, that point, firstly the point is perfectly
19 clear, it doesn't matter what you call it, lock-step,
20 automatic, what's perfectly clear is the way it operates
21 is Imperial puts up its price, Mr Retailer has to put up
22 the price of Gallaher, and that's the protection,
23 supposedly, that you are getting.
24 Now, that central plank has gone. If we go back to
25 what they were saying in their skeleton, that it wasn't

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1 automatic or lock-step, completely untrue, it was and
 2 plainly set out there.
 3 Equally, the so-called lock-step operated on their
 4 case in relation to the Gallaher price increase, this is
 5 the situation where when Gallaher puts up its price
 6 there is to be an automatic increase of or a requirement
 7 of the retailer to put up ITL.
 8 Now, going back to Mr Lasok's and the OFT's
 9 submissions of yesterday, at paragraph 50 they purport
 10 to say that the documents were not footnoted on the
 11 basis of automatic or lock-step. Well, that's simply
 12 not the case, and it's perfectly clear from the language
 13 used and the cross-reference I've just given you to
 14 their defence, what they were saying, and that the only
 15 caveat was concerning (d).
 16 Then come to paragraph 51, which is supposed to
 17 explain what their case is now about paragraph 40(a).
 18 I've used the expression "mealy mouthed" before, but
 19 this is about one of the most mealy mouthed positions,
 20 particularly when you consider what they were saying to
 21 you on Day 26. On Day 26 they said "We are standing by
 22 paragraph 40(a)". On Day 27, Mr Lasok seeks to say that
 23 when we said that they weren't -- couldn't any longer be
 24 doing that, he sought to say we were misunderstanding.
 25 Now look at what he says in paragraph 51:

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1 "Under the refined case, two of the factual
 2 permutations set out in paragraph 40 [that's (a) and
 3 (d)] fall within the factual scope of the restrictions
 4 set out at paragraph 10(a). On the refined case, the
 5 factual scenario involved the realigning of P&Ds by
 6 giving instructions by the manufacturer to the retailer.
 7 The difference between the case made out in the decision
 8 and the refined case lies in a different understanding
 9 of what was agreed or concerted between the manufacturer
 10 and the retailer."
 11 He then sets out paragraph 6, and then he says:
 12 "This paragraph simply stated that the OFT's refined
 13 case does not involve a requirement of the retailer
 14 under an agreement with the first manufacturer, say ITL,
 15 itself to change the price of the other manufacturer's
 16 brand, say Gallaher, by virtue of its agreement with the
 17 first manufacturer."
 18 Now, it's very unclear what it is that they are
 19 there trying to say. But if one simply presents it in
 20 a different way, by asking a very simple and very
 21 straightforward question, "Mr Lasok, is it your case
 22 that if the retail price of Gallaher's brand increases,
 23 the retailer is required to increase the price of ITL's
 24 rival brand?" Plainly that is not their case any more,
 25 and that is clear in fact from paragraph 51 and from

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1 paragraph 6.
 2 **THE CHAIRMAN:** Well, in the second half of 52, what they are
 3 saying is that the realignment, if it occurs, occurs not
 4 because of a requirement to realign the Gallaher price
 5 contained in the ITL agreement, but from the likelihood
 6 that Gallaher will itself give an instruction to the
 7 retailer to move its price up to match what ITL has
 8 done.
 9 **MR HOWARD:** Exactly. So if we go to 40(a), if Gallaher puts
 10 up its wholesale price with the consequent effect on the
 11 Gallaher retail price, is the retailer required to put
 12 up ITL's price? Answer: no. If ITL alters its
 13 wholesale price, then the retailer may do so. But there
 14 is no requirement, as set out in paragraph 40(a). It
 15 doesn't actually make any sense, such a requirement. On
 16 the basis --
 17 **THE CHAIRMAN:** I think the difference between you may be
 18 this: what the OFT say is, "Well, this is how we see the
 19 market working in the evidence that we have seen; the
 20 result of how this works is that prices become
 21 realigned", and what they are saying is "So it doesn't
 22 really matter whether this happens as a result of
 23 requirements under the agreement or partly as a result
 24 of requirements under the agreement and partly as
 25 a result of other market factors", whereas what you say

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1 is "Yes, it jolly well does matter because we have been
 2 fined for an infringing agreement".
 3 **MR HOWARD:** Firstly, I say it absolutely does matter, what
 4 it is you are saying is the infringing agreement. You
 5 can't just come along and say, "Well, I said it was
 6 this, but it is not that, I am not quite sure what it
 7 is, but it's something else which may end up with the
 8 same result". How you get there, the fact is
 9 manufacturers can chase each others' prices up and down.
 10 We know that just as a matter of common sense, but we
 11 also know it from the evidence in this case. I've asked
 12 lots of people about that, and they explain it.
 13 But the important point for the moment is
 14 understanding what their case was in paragraph 40.
 15 Their case in paragraph 40 was, as it was in 40(a),
 16 40(b), 40(c) and 40(d). Well, leave aside 40(d) because
 17 of the opportunity to respond. Each of (a), (b) and
 18 (c), and you can see it in the decision that I showed
 19 you a moment ago that's referred to in paragraph 35, if
 20 we take (b), their case was: if ITL puts up its price,
 21 the retailer had to put up the Gallaher price. Here,
 22 this is just the converse. If Gallaher put up its
 23 price, Imperial's price had to be put up, whatever
 24 Imperial -- I mean, Imperial didn't have to do anything,
 25 that was the real point, whereas they are now

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1 recognising it in paragraph 6.
 2 Paragraph 6 actually sets the matter out in
 3 unequivocal terms because it is not a consequence of the
 4 infringing agreements. In other words, it's not the
 5 infringing agreement that is causing this to happen.
 6 The price realignment happens through independent
 7 action.
 8 Now, it is a matter of regret that one has to, as it
 9 were, extract this in this way and that we are not
 10 getting a clear statement of case from the OFT, as you
 11 remarked the other day. But once you analyse this, it
 12 is clear that paragraph 40, in all its glory, has gone.
 13 **DR SCOTT:** I think that characterising it as independent is
 14 probably a step too far, because I think what Mr Lasok
 15 would say is that there was a context for the movements
 16 that took place, and that that was apparent in the
 17 answers given by the witnesses. Now, the causation is
 18 clearly a matter for debate, but I think to describe
 19 what happened in terms of independence is --
 20 **MR HOWARD:** With respect, I think that's not really my point
 21 at all. I think that's where we need to be very
 22 careful.
 23 **DR SCOTT:** I think we can see where you are going, but
 24 I think you want to avoid overstepping where we are
 25 going --

1 **MR HOWARD:** No, my point is this, I think this is where one
 2 is addressing a different point. We are not addressing
 3 at the moment -- I could make a lot of submissions about
 4 what the evidence does and doesn't show, and I could
 5 have come today and said "On the evidence, these points
 6 are hopeless". That's not what we are seeking to do.
 7 **DR SCOTT:** No, we are seeking to understand where Mr Lasok
 8 is with OFT's case.
 9 **MR HOWARD:** Well, we are seeking to identify what their case
 10 is, and if one asks oneself this question, this is the
 11 only relevant question: is 40(a) their case? The answer
 12 to that is it is not their case. They may then say
 13 "What we are saying", and this is what appears in
 14 paragraph 51, "is that within 10(a), we are saying
 15 something which" -- basically what they seem to be
 16 saying now, or 10(a)/2(a), is that if there is
 17 a Gallaher price increase then their case -- I don't say
 18 it's right -- would be that Imperial can, they put it
 19 manipulate, we just say change the wholesale price, so
 20 if it puts up its price, because it knows what the
 21 margin is that the retailer is after, it can be clear as
 22 to what retail price we will arrive at.
 23 I think you are picking me up on whether that's
 24 independent. The point is it's a totally different
 25 mechanism to what was in 40(a), and that's really the

1 point. At the moment we are on understanding whether
 2 that case in paragraph 40 is the OFT's current case. My
 3 submission is it's completely clear that it isn't. They
 4 have already conceded that 40(b) to (d) is not. They
 5 have been mealy mouthed about 40(a). When you actually
 6 properly address what they are saying about 40(a) both
 7 in paragraph 6 of their document and paragraph 51, it's
 8 perfectly clear they are not saying "There is this
 9 requirement", they are saying something different.
 10 That's really the key to this.
 11 Before I move on, just having understood where
 12 paragraph 40 stands, again some points that one mustn't
 13 lose sight of in the current debate.
 14 The first thing is the OFT's case in the decision is
 15 that each of the trading agreements or concertations was
 16 an object infringement, viewed in isolation. It's very
 17 important. Their case, and they have said this on
 18 a number of occasions, is not based on the parallel and
 19 symmetrical allegation. Their case is that each of the
 20 agreements per se is anticompetitive. The
 21 anticompetitive harm that they were alleging, they said
 22 was exacerbated by the parallel and symmetrical nature.
 23 That is important because that is why they are not
 24 embarrassed that they recognise that the parallel and
 25 symmetrical point in the decision couldn't actually be

1 made good and was watered down in the defence to be
 2 saying something similar, ie that they were similar
 3 rather than parallel and symmetrical.
 4 Now, their case is in the decision. Imperial and
 5 the retailers ought to have known that the agreements or
 6 concertations were anticompetitive by their very nature.
 7 So, as I said earlier, what they are saying is that
 8 "When you, Imperial, entered into this, you ought to
 9 have known that it was anticompetitive". So that,
 10 pausing there for a moment, what from Imperial's point
 11 of view were they saying? They were saying -- it's in
 12 paragraph 35 of the defence -- "What's so important and
 13 the central part of our case is that you, Imperial, have
 14 secured this arrangement whereby you can think you can
 15 put up your prices without losing out". And that's the
 16 basis on which they were saying "Imperial, you are party
 17 to something which is obviously anticompetitive".
 18 Now, you have to then contrast that, when we look at
 19 the refined case -- I'll come back to it a bit later --
 20 in the refined case, the central plank has gone. Very
 21 important to not lose sight of that. It is no longer
 22 suggested that the agreements, concertations provided
 23 any certainty to Imperial in relation to the situation
 24 where Imperial put up its price. If one just thinks
 25 about what they are saying in 2(a) and 2(b), 2(a) is

1 just allowing Imperial to alter its wholesale price and
 2 get that reflected in the shelf price. They are no
 3 longer saying that there is this link whereby Gallaher's
 4 price gets affected.
 5 So in fact what they are saying -- and this again is
 6 very important, if you just think about the terms of
 7 2(a) -- is, they are pointing to a vice here, but what
 8 is the vice? The vice is, they say, that if you alter
 9 your wholesale price you can be confident that that
 10 alteration will be reflected in a retail selling price.
 11 Prima facie one would have thought that actually is
 12 likely to be pro-competitive rather than anticompetitive
 13 because the manufacturer who cuts his price wants to be
 14 confident that that feeds through to a full lower price
 15 for the consumer and not only a partial lower price
 16 where the retailer seeks to gain additional margin for
 17 himself.
 18 Now, compared to paragraph 35 of their defence,
 19 Imperial's arrangements, agreements or concertations are
 20 said to be pernicious for a wholly different reason.
 21 Now what they are pointing out is simply how Gallaher
 22 would perceive the situation of Imperial. But what
 23 Gallaher is then perceiving, on the refined case, of
 24 course is something quite different to what they were
 25 suggesting in the decision. So it is impossible to

1 jump, as the OFT does by assertion only, from the
 2 particular theory of harm in the decision to say that
 3 that applies -- mutatis mutandis, insofar as we are
 4 allowed to use such expressions -- to a wholly different
 5 arrangement, or to a different arrangement. That's the
 6 point. You can't simply assert black is white. That's
 7 really what it amounts to.
 8 Now, so my submission is it is in fact completely
 9 clear and the OFT, if they were behaving in the way
 10 a responsible regulator should, would be saying to the
 11 court, instead of being mealy mouthed, "Yes, we are no
 12 longer running paragraph 40", and it's a matter of
 13 regret that they are not, they are so coy.
 14 But that then takes one to the next point: what is
 15 then the position if they are no longer running
 16 a paragraph 40 point?
 17 Now, that then takes you to Day 26. You will
 18 remember Day 26 of course was preceded by the evidence
 19 of Mrs Corfield. I don't propose --
 20 **THE CHAIRMAN:** Which was Day 26? What was the date for
 21 Day 26?
 22 **MR HOWARD:** Day 26 was --
 23 **THE CHAIRMAN:** Oh, 3 November.
 24 **MR HOWARD:** --Thursday, 3 November. It was the date of the
 25 adjournment. We have looked at the transcript of that

1 on a number of occasions.
 2 **THE CHAIRMAN:** This is your point that you made on what was
 3 then Day 27, on the Friday --
 4 **MR HOWARD:** Yes.
 5 **THE CHAIRMAN:** -- as to the concession that you say they
 6 made and that they should be held to.
 7 **MR HOWARD:** Yes. I think I can just take it very simply,
 8 because you have the point.
 9 **THE CHAIRMAN:** We have the point, yes.
 10 **MR HOWARD:** You have the regulator, first coming along and
 11 saying "If I can't prove a case within paragraph 40,
 12 I accept then we are outside the decision and I want
 13 an adjournment in order that I can consider my position
 14 as to whether or not I want to hoist the white flag
 15 completely or whether I say I am within schedule 8".
 16 In my submission, having done that, they can't now,
 17 without any explanation at all, come along and say,
 18 "Actually, something different and I am in the
 19 decision~..."
 20 If you just analyse it for a moment, on their
 21 approach to life there was no need for an adjournment.
 22 That must be the logic of their position. The logic of
 23 their position is, "Well, the experts were all due to
 24 come, our case is in the decision", that's what they
 25 should have been saying on that Thursday, "Now let's

1 carry on".
 2 Of course one sees the tension because it's
 3 self-evident you couldn't actually carry on, we don't
 4 even know properly what the current case is. But if you
 5 take their point at face value, if you take Mr Lasok's
 6 submission that "This is all within the decision and
 7 it's all part and parcel of the case that we are
 8 running", then why did you seek an adjournment? Why
 9 couldn't we get on with the expert evidence? Why should
 10 my clients be put in the position where what's being
 11 said is "Oh, no, we were always pursuing this case", why
 12 didn't we then just get on with it? If one thinks what
 13 is on their case likely to happen now, these
 14 proceedings, if one went down the route they appear to
 15 be proposing, are likely to remain in abeyance for about
 16 another year or 18 months at the minimum, bearing in
 17 mind the steps that they recognise would need to be
 18 taken then you would have all sorts of issues about
 19 people's availability and so on. It really is quite
 20 astonishing. You might think -- and I certainly suggest
 21 you should think -- that it is very peculiar indeed that
 22 the Office of Fair Trading has not sought to explain its
 23 position to the court. We are here dealing with what is
 24 in effect a public body, but if one thinks about
 25 ordinary litigation, a litigant who comes along and says

1 "I want to adjourn the case because I can't prove the
2 case that I've currently put forward, and please give me
3 an indulgence so that I can come back and explain in
4 a week's time what I want to happen", you then turn up
5 a week later and say "Well, I know we said we couldn't
6 prove it and we had an adjournment but actually, court,
7 I can prove it. I would like to carry on and we should
8 do so".

9 **DR SCOTT:** We are in a strange state that we have neither an
10 application from you to strike out the defence, nor
11 an application from Mr Lasok to amend the defence.

12 **MR HOWARD:** No, you do have an application from me. My
13 application is -- I am sorry, please don't get that
14 wrong --

15 **DR SCOTT:** No, no, we do have an application from you, but
16 it's not an application to strike out the defence.

17 **MR HOWARD:** One could --

18 **THE CHAIRMAN:** Well, as I understand it, your application is
19 that we should allow these appeals and quash the
20 decision.

21 **MR HOWARD:** Yes, and the basis for that is --

22 **THE CHAIRMAN:** And that we have the power under
23 paragraph 3(1) of schedule 8 to do that, it doesn't say
24 you have to wait until any particular time that we
25 should do that, you can do that at any point that it is

21

1 appropriate.

2 **MR HOWARD:** In my submission on that, it's not only you have
3 the power, you actually have a duty to do it, and the
4 reason for that is, once you recognise that paragraph 40
5 has gone, the Office of Fair Trading is not seeking to
6 defend the decision, and so one could formally say
7 strike out the defence, but if they stood up properly --
8 you see, they never actually say to you openly what is
9 the position, we get all this double speak. If you
10 properly analyse what they are saying, they are saying,
11 "We cannot defend the decision on its current terms, we
12 would like to invite you to make a different decision".
13 Now, that's actually where we are, that's the true
14 position. Once you analyse it in that way, we say the
15 answer to that is simple, that the Tribunal then says
16 "Well, under 3(1) I am obliged to decide this case by
17 reference to the notice of appeal; you are not allowed
18 to amend your defence to raise a different decision,
19 that's not what the rules require, therefore that is the
20 end of this appeal in the light of your position, OFT",
21 and that's why we are saying that you are obliged now to
22 set aside the decision and allow the appeal.

23 **THE CHAIRMAN:** I suppose, having regard also to what
24 Mr Thompson said when we were here previously, if one
25 looks at it by analogy with an application for a late

22

1 amendment of the defence, if an amendment of the defence
2 is not allowed, then a defendant has to decide: can we
3 continue with the unamended defence, or is that
4 effectively the end of the case because we have already
5 conceded that we cannot continue to fight the case on
6 the basis of the unamended defence? I understand that
7 you are saying that, having regard to everything that we
8 have seen, they are saying that either they can continue
9 on this refined case or they can't continue at all, they
10 have burnt their bridges as far as the existing defence
11 to the appeals is concerned.

12 **MR HOWARD:** The only case they are seeking to run is the
13 refined case. If the refined case is not supporting the
14 decision, then they are not -- that's the only case they
15 have, therefore the decision necessarily can't stand.
16 One of the ways you actually have to look at that is --
17 well, I'll make the point now and we will look at it in
18 a little more detail.

19 **THE CHAIRMAN:** Yes, we are taking you out of your order.

20 **MR HOWARD:** We are going to look at: are 2(a) and 2(b)
21 within the decision? But you also have to look at what
22 is it on their refined case they would be asking you to
23 do. What would be the decision? Because once you
24 realise it could not be a decision whereby you said
25 "I uphold the OFT's decision" it's necessarily

23

1 a different decision. So that is where we are. That
2 even on their refined case, and even they are saying
3 "Well, there are some elements of this there", what they
4 are actually asking you to do is to make a different
5 decision to that which the OFT made. That being so,
6 they are not seeking to defend the current decision.

7 Now, anyway, the point I was making was that they
8 have made a concession, and there is no basis on which
9 they have asked to be released from that concession, so
10 it's slightly difficult for me to address. They have
11 just ignored it, and that being so, you can actually
12 deal with it rather easily. But without prejudice to
13 that, I obviously go on to consider the next issues,
14 namely: are 2(a) and (b) within the decision?

15 We have gone over some of this already yesterday,
16 but in asking that question, you have to remember that
17 what we are talking about is an object infringement in
18 a vertical context. So that what you are asking
19 yourself is: what is the restriction for these purposes
20 which is alleged to have been imposed by the agreement
21 or practice on the retailer? What is the restriction on
22 the retailer? Then secondly: does that restriction have
23 an anticompetitive effect and, if so, what?

24 You will remember on Day 27 -- we have already
25 referred you to the bit of the transcript -- where

24

1 Mr Lasok actually concedes in terms that the current
2 restrictions are not part of the infringing agreement
3 set out in the decision. What he said was:
4 "If you put the broad question: is the infringing
5 agreement arising from the restraints in paragraph 2 of
6 the Wednesday document the same as the infringing
7 agreement which is described in the decision?, the
8 answer is no, because there is a difference between
9 them."
10 So we say that actually answers the point anyway.
11 **THE CHAIRMAN:** There is an ambiguity in that passage, and
12 there is a limit to which one can attempt to analyse
13 this kind of statement, but it's not clear to me whether
14 there is a distinction being drawn there on the one hand
15 between it not being the same as the infringing
16 agreement but being a subset of the infringing agreement
17 on the one hand, and on the other hand, not being part
18 or the whole of the infringing agreement but being
19 nonetheless within the decision, treating the decision
20 as something different from the infringing agreement.
21 **MR HOWARD:** Yes.
22 **THE CHAIRMAN:** Now, I am not sure which of those two
23 Mr Lasok meant.
24 **MR HOWARD:** I think he said yesterday he was trying to make
25 both points. In the particular passage to which

1 I referred you, he was actually simply unequivocally
2 accepting that these restraints are not the same as the
3 infringing agreement described in the decision.
4 What, as I understand it, he has now in the latest
5 position put forward yesterday, he tries to run it in
6 two ways, if you get to this. One is, as I understand
7 it, he says "This is a component of the infringing
8 decision", so --
9 **THE CHAIRMAN:** The infringing agreement.
10 **MR HOWARD:** Sorry, of the infringing agreement found. But,
11 for instance, if you said "Well" -- anyway, that's the
12 first way -- whether it's the first way or second way,
13 that's one way he puts it.
14 The other way he puts is he says, "You can look at
15 this decision very broadly and if you can extract
16 a finding from it, then that's good enough". I think
17 those are the two points, and both are bad.
18 Now, the first thing to do, we would suggest, is to
19 look at the Court of Appeal authority in EWS v Enron,
20 which gives some guidance as to the approach. It's at
21 volume 13 of the authorities, tab 175. This case is of
22 course a case concerned with follow-on damages under
23 section 47(a), but as you can see at paragraph 29, the
24 statute provides it's section 47(a) subparagraph 6(a)
25 that:

1 "You can rely on a decision of the OFT that the" --
2 **THE CHAIRMAN:** We are reasonably familiar with the
3 judgments, so ...
4 **MR HOWARD:** The key paragraphs are paragraph 31 of
5 Lord Justice Patten, and paragraph 64 of
6 Lord Justice Carnwath and Lord Justice Jacob agreed with
7 both of them.
8 If you go to paragraph 31, what is clear is what you
9 are concerned with is the conduct -- if you look in the
10 middle of it:
11 "There is no right of action unless the regulator
12 has actually decided that such conduct constitutes
13 an infringement of the relevant prohibition as defined.
14 The corollary to this is that the Tribunal must satisfy
15 itself the regulator made a relevant finding and
16 definitive finding of infringement."
17 Then at the end:
18 "The Tribunal ought therefore, in my judgment, to be
19 astute to recognise and reject cases where there is no
20 clearly identifiable finding of infringement."
21 Then Lord Justice Carnwath, second sentence:
22 "It's not enough to be able to point to findings in
23 the decision from which an infringement might arguably
24 be inferred. By the same token, it's important that in
25 drafting such a decision, the regulator should leave no

1 doubt as to the nature of the infringement which has
2 been found."
3 All that's being said there is actually obvious: as
4 a matter of common sense, you can't fine somebody in our
5 case £112 million without identifying very clearly what
6 it is that you are saying constitutes the infringement
7 of the statute.
8 Once one bears that in mind, it is, for the reasons
9 I largely went over yesterday and I don't propose to
10 repeat and we have set them out in writing, it is clear
11 the nature of the infringement was that there was
12 an agreement or practice as one which restricted the
13 ability of the retailer to determine its retail prices
14 for competing tobacco products, and that was
15 anticompetitive by object because it both increased
16 Imperial's incentive to raise its prices and decreased
17 Gallaher's incentive to lower its prices, and that's
18 what is stated repeatedly in the decision and indeed was
19 reflected in the skeleton argument.
20 When we come to paragraph 2(a), if we turn to each
21 of the restrictions elements of the case,
22 paragraph 2(a), so we are looking for an agreement or
23 consultation of specific retail prices in the context of
24 the maintenance of the manufacturer's P&D strategy
25 regarding the retail prices of its own brand relative to

1 the retail prices of linked brands.
 2 As I've already made clear, the central plank has
 3 totally gone and this is a totally different creature to
 4 what was previously alleged because the horizontal
 5 link -- and by that what one means is -- one needs to be
 6 careful with language here, and you will see in their
 7 speaking note the OFT are deliberately ambiguous about
 8 this -- the link in the decision was the link which if
 9 you move one, it's linked to the other and that has to
 10 move.
 11 This is explicitly --
 12 **THE CHAIRMAN:** Well, this is a straightforward RPM case in
 13 the context of the reason why the price is chosen is
 14 because of the manufacturer's own strategy.
 15 **MR HOWARD:** That is bang on point, but there is a slight
 16 difficulty with that, the OFT acknowledge they did not
 17 have an RPM case at the SO stage.
 18 **THE CHAIRMAN:** Well, I noticed you said that in your
 19 skeleton, that that was one of the points that had been
 20 made in the statement of objections and dropped.
 21 **MR HOWARD:** Yes.
 22 **THE CHAIRMAN:** Where do you find that?
 23 **MR HOWARD:** I had better show you that. I didn't realise
 24 there was any doubt about that.
 25 **THE CHAIRMAN:** It doesn't seem to be mentioned in the

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1 decision as one of the points that was dropped. I may
 2 have missed it.
 3 **MR HOWARD:** I think the best thing is, rather than my doing
 4 it on the hoof, we will give you the references after
 5 the break.
 6 **THE CHAIRMAN:** Yes.
 7 **MR HOWARD:** You are right that -- there are two points about
 8 that -- in essence the case now is RPM. Two points
 9 about that: one is they investigated that at the SO
 10 stage, but secondly, what has come to light now which
 11 should permit them to introduce an RPM case in these
 12 proceedings? The allegation that they are making, if it
 13 were a good allegation, was one that was always apparent
 14 to, and if they dispute that, you will see in the SO
 15 they were actually making the point.
 16 This actually picks up a point that Mr Lasok made
 17 yesterday, he says "Oh, well, you know, we are entitled
 18 at the OFT to take account of the evidence and nobody
 19 should criticise us that we now want to run a different
 20 case". The difficulty with that is this: the different
 21 case that they want to run is not something that has
 22 emerged in the course of the evidence. If this were
 23 a good case, this case was evident at all stages. What
 24 they are saying is "I sought to prove a different case,
 25 I can't prove that different case, now I want to try and

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1 prove this case". But what they don't do is say "This
 2 is a case that has only emerged in the course of these
 3 proceedings", and if they did say that, it would just be
 4 nonsense.
 5 **THE CHAIRMAN:** This is a case that at least did seem to be
 6 being put to the witnesses when they were being
 7 cross-examined in that they were taken to those letters
 8 and emails in which there was a price instruction and
 9 there were questions asked about whether that was
 10 an instruction to go to that price or not.
 11 **MR HOWARD:** That is right, but I am making a different
 12 point. The fact that you could put that case shows that
 13 it's not something --
 14 **THE CHAIRMAN:** No, no, I understand.
 15 **MR HOWARD:** -- that's emerged from these proceedings. Over
 16 the summer when my learned friends were preparing their
 17 cross-examination they obviously thought this was
 18 a relevant line. So in other words, if so far as you
 19 are saying the setting of specific prices is part of the
 20 case, that was something that they must have always
 21 thought was a relevant ingredient and therefore they
 22 could see, otherwise the cross-examination would be
 23 improper, because you are not supposed to cross-examine
 24 on irrelevant issues.
 25 The critical point that I am on at the moment --

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1 I do not want to lose sight of it -- is that this is not
 2 a horizontal linking case.
 3 **THE CHAIRMAN:** No, no, I understand.
 4 **MR HOWARD:** I've already shown you the fundamental
 5 proposition in their skeleton, and I've shown you the
 6 references, for instance, at paragraph 9 of the skeleton
 7 saying "It's useless to look at a different case". This
 8 is a different case.
 9 That the Tribunal actually has, in terms of a case
 10 that's to be put forward, is this document which
 11 actually just comprises nine flimsy paragraphs. So the
 12 position now is that Imperial are to be fined
 13 112 million on the basis of these two pieces of paper.
 14 If one actually tries to piece it together, one might
 15 say that of itself ought to cause one to think: what on
 16 earth is going on here with this public body?
 17 What one then has to see is, well, where is the
 18 theory of harm on this new case? And it is just in one
 19 paragraph, paragraph 9. Paragraph 8 contains
 20 an assertion, paragraph 9 is the so-called theory of
 21 harm.
 22 Now, this is where we are just completely losing
 23 sight of the process. At the SO stage, what the OFT
 24 does, and we see it here, is they set out their theory,
 25 they set out their story on the facts, their

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1 interpretation of the facts, and then their economic
2 theory based on that.
3 The appellants -- or the people against whom the
4 complaint is made -- put in a response and then they put
5 forward their decision which sets out all of this, and
6 it sets out a proper economic analysis. One can argue
7 about it, obviously, before this Tribunal. All that we
8 have at the moment is this paragraph 9. This is the
9 economic analysis which is supposed to support whatever
10 it is going forward.

11 Now, it's very important, when you look at that, to
12 contrast what they were saying in the decision with this
13 theory of harm. Because what they were doing in the
14 decision was trying to say why these vertical agreements
15 are anticompetitive. What they were trying to say, and
16 they say it in numerous places both in the decision and
17 in their skeleton argument, is that this is horizontal
18 price-fixing, that's what it amounts to. Once you take
19 away the horizontal price-fixing, where are you? You
20 are in a vertical context with vertical restraints.

21 Now, vertical restraints are a thing of everyday
22 life, and so if you are trying to say a vertical
23 restraint is, by its very nature, anticompetitive, one
24 would have thought you start off with an uphill struggle
25 and it requires some economic analysis to explain why.

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1 Now, what they do is they refer, both here at
2 paragraph 9 and in their speaking note, to
3 paragraph 6.217 of the decision. But paragraph 6.217 of
4 the decision -- this is now what's said to be the theory
5 of harm for the new case -- is being plucked out of
6 context.

7 So if you remember how this all fits together, there
8 is a sequence here. 6.213 is explaining that there is
9 a restriction on determining the retail price of
10 competing linked products. Then you see at the end of
11 6.213 what happens if a parity or fixed differential
12 requirement is implemented, you get this increase or
13 reduction in one brand leading to a corresponding
14 increase or reduction in the other. Now, that's
15 explaining what then follows.

16 6.214 explains what happens for the manufacturer
17 imposing the requirement, and 6.215 is then -- this is
18 the point I've already taken you to this morning --
19 6.215 and 6.216 are the position where Imperial puts up
20 its price, and 6.216 is the counterfactual.

21 6.217 is then looking at the alleged impact on
22 a rival manufacturer. But the impact is following what
23 has been set out at 6.213.

24 **THE CHAIRMAN:** Yes.

25 **MR HOWARD:** You can't just --

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1 **THE CHAIRMAN:** Is this the position, then: although 2(a)
2 seems now to be a resale price maintenance case, which
3 is resale price maintenance is generally considered one
4 of the few vertical restraints which does amount to
5 an object infringement, the theory of harm underlying
6 the case law that decides that retail price maintenance
7 is anticompetitive is a different theory of harm to do
8 with competition at the retail price level. From this
9 theory of harm into which the OFT is still trying to
10 link the restraint in 2(a), they say the link arises
11 because within the manufacturer's mind, the reason for
12 the price picked is to achieve the P&Ds rather than
13 anything arising from the vertical agreement?

14 **MR HOWARD:** A lot of what you said -- if not everything --
15 is entirely right. Of course, the Tribunal is always
16 right --

17 **THE CHAIRMAN:** No, we are not always right.

18 **MR HOWARD:** The starting point is that, properly analysed,
19 the allegation could only be an RPM allegation, but the
20 OFT doesn't want to run an RPM allegation. The reason
21 for that is actually obvious, because that would be
22 a gross abuse because they themselves recognised at
23 an earlier stage they could not establish RPM and they
24 would have to explain to the Tribunal why that flip-flop
25 should be permitted. So they don't want to call it RPM

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1 and rely on an RPM theory of harm. So they have to rely
2 on a theory of harm which they say is essentially
3 a transparency one, that what they want to say is this
4 renders things more transparent. That's, I think, the
5 nature of the theory.

6 But the thing that is firstly rendering things more
7 transparent and giving rise to a harm is a different
8 thing to what they had in the decision. And the
9 difficulty, once you are looking at it in this way,
10 firstly from Imperial's perspective when it enters into
11 these agreements, it isn't doing anything, as it were,
12 anticompetitive in the sense of the central plank.
13 That's gone. So that it would be quite an odd thing --
14 and this is what one actually needs to think about -- to
15 say that "My agreement -- I, manufacturer -- with the
16 retailer is anticompetitive because, although from my
17 perspective it is not doing anything, I should have
18 realised that somebody else looking in at my agreement
19 would be able to work out something which would affect
20 the way that person was going to operate".

21 In the context of an object infringement, that's
22 a pretty odd allegation. I can understand it if you say
23 "You, Imperial, realised and intended that you got this
24 protection where you put up your prices". That's
25 perfectly capable of being understood. But it's quite

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1 a different thing to say "You should realise that
 2 somebody else will work out something from what you are
 3 doing".
 4 **DR SCOTT:** This is happening in the particular context of at
 5 least an oligopoly, if not a duopoly, and so I think
 6 that's the context in which the OFT would place that
 7 very brief paragraph.
 8 **MR HOWARD:** Sorry, which very brief paragraph?
 9 **DR SCOTT:** Paragraph 9.
 10 **MR HOWARD:** Yes, but my real point is: that may be true, but
 11 we shouldn't have to be spelling this out and trying to
 12 work it all out. It is actually quite an incredible
 13 thing that we have these three lines and that is
 14 supposed to be the theory of harm.
 15 **DR SCOTT:** As we had said to you earlier on, part of our
 16 concern was what is to be put to the experts who are
 17 coming to give the economics to illuminate our
 18 understanding, of what is going on.
 19 **MR HOWARD:** We now say nothing, because you are not going to
 20 get to that stage.
 21 But the point is, this is what again we mustn't lose
 22 sight of, the only point I am addressing at the moment
 23 again is that the theory of harm here is not a theory of
 24 harm in fact by reference to what they are currently
 25 talking about.

1 **DR SCOTT:** It's still horizontal.
 2 **MR HOWARD:** Yes, and what they are doing is plucking that
 3 out. What they are really saying, if you think about
 4 it, is "Under my original theory of harm, under my
 5 original case, we had these paragraph 40(a), (b) and (c)
 6 plus (d). That meant prices moved up and down as
 7 a result of a requirement of a retailer, that then
 8 affects Imperial who have imposed it because they get
 9 the protection, they can put up their prices, and
 10 Gallaher would, through this mechanism, also learn the
 11 position".
 12 Now they are saying something rather different, they
 13 are saying "Imperial can feed through wholesale price
 14 cuts to the retailer, its wholesale price cuts would be
 15 reflected in the retailer's selling price". But then if
 16 you are going to say "I have an object theory of harm
 17 based on that" you have to look at the entirety of the
 18 position and you would have to look at a counterfactual.
 19 Because if what you are saying -- and this is what was
 20 very interesting in what Mr Lasok appeared to be saying
 21 yesterday, that in the counterfactual world, which they
 22 haven't spelt out, nobody has analysed, he appears to be
 23 saying that the retailer would not necessarily, if you
 24 cut your wholesale price, feed that through to the shelf
 25 price.

1 Now, therefore he says here is a different situation
 2 whereas in our situation that he wants to prove he says
 3 they will reflect it. And therefore he says that is
 4 anticompetitive. One would have to consider, if you
 5 went down that route, well, hang on a minute, why are
 6 you saying that's anticompetitive when surely it's
 7 a good thing to get to a situation where if you cut your
 8 wholesale price that that is reflected in the selling
 9 prices because that means lower prices for consumers.
 10 In other words, once you start to look at this
 11 different case, it becomes self-evident --
 12 **THE CHAIRMAN:** But that was why I asked Mr Lasok yesterday
 13 whether it was a key element of their new case that the
 14 price was a minimum as well as a maximum, because that
 15 is the advice with retail price maintenance, not that
 16 the retail price follows down the manufacturer's reduced
 17 wholesale price, but that it supposedly can't follow it
 18 down further than the manufacturer instructs the
 19 retailer to do.
 20 **MR HOWARD:** But the thing is, you see, in relation to his --
 21 well, when you asked --
 22 **THE CHAIRMAN:** It may be that this is -- fascinating though
 23 this is -- taking us rather away from your main point,
 24 which is that if this had been pursued as an RPM case,
 25 it would have been a much shorter case at every step of

1 the way, and it would have been a different case.
 2 **MR HOWARD:** It's a different case. The point is even today
 3 you might say -- I can't resist pointing out that when
 4 you asked Mr Lasok that question, he actually wasn't in
 5 a position to give you an answer and he had to take
 6 instructions. You might think that itself is a pretty
 7 puzzling position, that they don't know that element of
 8 their case. But we got the answer eventually that he
 9 says, having taken instructions from whoever, that it is
 10 based upon the price being a fixed price. But for
 11 whatever reason, they are not running an RPM case as
 12 such, therefore there is no reason to, as it were,
 13 approach it as an RPM case. But even if one did, that
 14 would be a fundamentally different case.
 15 The critical point about all of this is that what --
 16 not the critical but an important point about this is
 17 that if you look at the -- I've lost my file. Can we
 18 look at what ... (Pause). I was looking for the
 19 speaking note, sorry.
 20 If we look at the speaking note on this, what you
 21 see, the new case is addressed at paragraphs 24 and
 22 following, leading up to paragraph 29, where it's said.
 23 "The essence of the theory of harm and that of the
 24 theory of harm underlying the OFT's case are the same."
 25 But they are not. It's self-evident they are not.

1 They are different. Saying something is similar in
 2 effect is not the same as it's the same.
 3 What is clear, in fact, the theories of harm are
 4 completely different because, and this is what the OFT
 5 just ignores, the central plank has gone. So that what
 6 we are now left with is you take away all of that and
 7 you are simply left with a theory of harm which is
 8 based, insofar as one can understand it -- I am picking
 9 up Dr Scott's point -- based upon saying there is
 10 a duopoly and this is going to create greater
 11 transparency than having the RRP's. But you asked
 12 Mr Lasok yesterday: is that what you are saying, there
 13 is greater transparency than in the RRP world? He says
 14 yes, but none of that is explained, we don't have any
 15 economic analysis. If this case were a serious case,
 16 that's what one would require, a proper analysis, that's
 17 what a decision would actually reflect, proper thinking,
 18 not Mr Lasok making it up on his feet when asked a
 19 question, or having to ask somebody behind him "What
 20 should we say in answer to that?" These things are
 21 required and should be properly thought through.
 22 **THE CHAIRMAN:** Is that a convenient point to break?
 23 **MR HOWARD:** That is, yes.
 24 **THE CHAIRMAN:** We will come back at five to 12, thank you.
 25 (11.45 am)

1 (A short break)
 2 (11.55 am)
 3 **MR HOWARD:** For your note, in relation to the RPM case that
 4 was ventilated in the SO, you can see that in
 5 paragraph 13 and later paragraphs, but paragraph 13,
 6 there is a whole section addressing RPM.
 7 In the decision at --
 8 **THE CHAIRMAN:** Paragraph 13th of the SO?
 9 **MR HOWARD:** Of the SO. In the decision, paragraph 8.19 to
 10 8.21 the OFT explains why it's not appropriate to fine
 11 on the basis of a vertical RPM, because that was
 12 an argument that had to be considered, or it was being
 13 put forward I think by some of the retailers and the OFT
 14 said that that was not the case.
 15 More fundamentally they are not today saying this is
 16 an RPM case, it's really as simple as that, and one
 17 can't shift to yet another variant of the case.
 18 Now, I think I have probably both in writing and
 19 orally explained sufficiently what are the problems with
 20 the 2(a) case when you contrast it with what's in the
 21 decision. So I am not going to sort of elaborate
 22 further.
 23 What I do want to make is this point at this stage,
 24 and to consider this: assume for the moment that the
 25 Office of Fair Trading was permitted to amend its

1 defence in order to run a case on a new infringement.
 2 The simple answer is it's not actually allowed to do
 3 that, and that's why -- although that's actually what
 4 it's trying to do, it doesn't come out and say it.
 5 What I am more interested in at the moment is,
 6 leaving the question of whether it could amend the
 7 defence, leave it on one side and ask oneself, assume
 8 that is what was happening and they said "I want to
 9 prove this case", is there material on which this
 10 Tribunal could permit an amendment of the defence at
 11 this stage of the proceedings? In my submission, once
 12 you ask that question, you would say, well, what the
 13 Office of Fair Trading has put forward in these nine
 14 paragraphs is wholly insufficient. If you actually
 15 examine what the true position is of the Office of Fair
 16 Trading, it appears to be saying "I don't actually
 17 currently have the material to prove this, what I want
 18 is there to be an investigation by the Tribunal to see
 19 whether or not this case could be made out".
 20 Even if they are saying "I currently can prove
 21 this", a party that is seeking to amend at this late
 22 stage of proceedings would be expected to come along
 23 firstly with a properly formulated coherent case,
 24 including properly setting out an economic analysis, and
 25 at this stage supporting it with independent economic

1 evidence. It's an extraordinary thing to think of
 2 a litigant coming to court, still less a public body,
 3 with this document at this stage and saying "Adjourn the
 4 proceedings", because that's what they are saying has to
 5 happen, "Adjourn them for some indefinite period to
 6 allow us to set this out properly", because I think they
 7 recognise it is not properly set out, notwithstanding
 8 the order that the Tribunal made, "then the appellants
 9 would respond to it, then we would see what factual
 10 evidence is required, then we would see what expert
 11 evidence is required"; in other words, a whole new case
 12 developing.
 13 Now, on what basis can the Tribunal, if it were
 14 an amendment application, conceivably allow that? The
 15 answer would be utterly obvious, and if you put it as
 16 an amendment application, you would be laughed out of
 17 court. One would say: this isn't a basis on which you
 18 can come to court and seek amendment.
 19 Look at it another way. Let's assume that we are at
 20 the stage at which they publish a decision. These nine
 21 paragraphs, could the Office of Fair Trading put that
 22 forward as a decision under its statutory duty and say
 23 "That's the basis upon which I am going to fine people"?
 24 The answer is that doesn't begin to comply with what
 25 they are required to do. It would be again a joke if

1 that was what the Office of Fair Trading produced.
 2 So the 2(a) restraint, for the reasons I've
 3 explained, is not within the decision and not part of
 4 the infringing agreement as properly understood. I'll
 5 come separately to this point about a component.
 6 2(b), you already have our submission, I think, and
 7 we have set it out in writing, that 2(b), the
 8 self-funded retailer reductions, there is no theory of
 9 harm to this day that addresses that.
 10 Just before I move off, can I ask you to look at
 11 Mr Lasok's speaking note, because in fact, once you look
 12 at it, once one unpicks what is said here, it's actually
 13 perfectly clear again that they are recognising that
 14 this case is not within the decision, the refined case.
 15 If you go to paragraphs 36 onwards, at paragraphs 36
 16 and 37 they try to point up paragraphs of the decision
 17 where they say they can extract these restrictions.
 18 What's interesting is how little correlation there
 19 is, of course, to the theory of harm. What they try
 20 then to do is to do this jump at paragraph 38 where they
 21 say that:
 22 "The paragraphs in the decision that refer
 23 compendiously to the restriction of the retailer's
 24 ability encompass here the restrictions including the
 25 second restriction in paragraph 10."

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1 Now, we don't accept that for a moment. If you then
 2 go on to paragraph 40, what they then say is that the
 3 restrictive nature involves a combination of constraints
 4 affecting the shelf price of A's brands and constraints
 5 affecting the shelf price of B's brands."
 6 Stopping for a moment, that's actually completely
 7 untrue, in that the restrictive nature of the agreements
 8 put forward in the decision is 2, not 1, and that's
 9 stated in all of those references that I gave you.
 10 But more important than that is look at
 11 paragraph 42:
 12 "The reasoning set out in the decision supporting
 13 the conclusion that the infringing agreements were
 14 object, read as a whole, was not directed at the
 15 situation in which only the restrictions in paragraph 10
 16 above are present."
 17 So the answer to that is: exactly, that however you
 18 look at it, you do not have a theory of harm, even on
 19 their way of putting it, trying to say the theory of
 20 harm was based upon the two lots of things that they set
 21 out at paragraph 40, what they don't have -- and that's
 22 what they are saying -- is the theory of harm which is
 23 based upon one element, and that's what paragraph 42
 24 acknowledges.
 25 So once you recognise that, it is in fact fatal to

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1 the argument that they want to run, however you put it,
 2 because what you don't have is any theory of harm, you
 3 don't have any basis of saying "These restrictions that
 4 I now rely on are themselves the subject or what give
 5 rise to the object infringement", it's something
 6 different.
 7 **THE CHAIRMAN:** Just to try and find an analogy, suppose one
 8 was looking at a traditional horizontal cartel, and the
 9 finding in the decision was that it fixed prices and
 10 allocated customers to the members of the cartel.
 11 And if there was an appeal, and it became apparent
 12 that the customer allocation part of the infringement
 13 was not really supported by the evidence, but the
 14 price-fixing was, what do you say would be the result in
 15 that situation?
 16 **MR HOWARD:** Of course there, I mean, the question that would
 17 arise there is whether -- it's actually rather similar
 18 to the question you put yesterday about if you had
 19 alleged a period of 92 to 98 and it's now 92 to 96, it's
 20 whether there is within what is said to be the
 21 infringement, whether if you apply a blue pencil, you
 22 can still see an infringement.
 23 So on your example, if you said "Well, price-fixing
 24 in a horizontal cartel is well known to be
 25 anticompetitive by object", so even though what you were

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1 trying to prove was both price-fixing and customer
 2 allocation, if only price-fixing is made out, it would
 3 still be open to say that is part of the decision, that
 4 price-fixing, that is part of the same, insofar as you
 5 had to have a theory of harm, that we have put forward.
 6 But here we are not in that territory at all, you
 7 are in something which is a different restraint, and the
 8 linking part has completely gone, and what you can't do,
 9 as it were, is extract out of the decision, Mr Lasok
 10 acknowledges that you couldn't apply a blue pencil, you
 11 have to come up with a completely different theory.
 12 If you took your example, of course you have given
 13 a stark example, but if you had a case where what has
 14 happened is the infringing agreement consists of two
 15 elements, and you have a theory of harm which is based
 16 upon the existence of those two elements, and you don't
 17 put forward a theory of harm which is based on the
 18 existence of one, then you would be running a different
 19 case. It's only if you can say that what I've put
 20 forward can survive with a bit that falls off.
 21 **THE CHAIRMAN:** So if you had a price-fixing cartel but it
 22 emerged on the evidence that actually they weren't
 23 fixing prices, they were exchanging information about
 24 historical prices, which is generally regarded as
 25 an effects based infringement, if at all, then you would

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1 say because the -- that kind of information exchange is
 2 not really a component of the infringement that was
 3 found, you couldn't purport to uphold the price-fixing
 4 decision or the infringement decision but say they
 5 weren't fixing prices, they were exchanging pricing
 6 information.
 7 **MR HOWARD:** It's a different infringement and a different
 8 decision. You can test this case or any case where this
 9 point arises by asking -- where what the OFT seeks to
 10 say is "I am narrowing my case", which is the way they
 11 try and put it, you have to ask yourself: having
 12 narrowed your case, can the case on the narrowed basis
 13 survive so that one can get to, on the basis on which
 14 you put in the decision, to paragraph here 8.2. The
 15 point is you can't here, once you drop off all this
 16 linking, because that's a critical feature of the
 17 allegation. So --
 18 **DR SCOTT:** That's what Mr Lasok appeared to be saying
 19 yesterday that they hadn't got an alternative, there
 20 wasn't a clear route from the facts, if one can find
 21 this in the facts, to 8.2 along the way, there is
 22 a missing bridge.
 23 **MR HOWARD:** Yes. It would be quite difficult to follow
 24 quite a lot of that. But he seemed to be recognising
 25 "We have not articulated it".

1 One actually has to think about it, "We have not
 2 articulated it", so we have not responded to it, and
 3 where are we? It's not part of the decision. Something
 4 that's not articulated is not the decision. A lot of
 5 these points are really a statement of the obvious.
 6 It's very difficult to understand how you can say
 7 something is part of the decision when you actually have
 8 this missing bridge, and now you just want to assert
 9 "Well, I can somehow put this pontoon across and say
 10 that will survive, I can somehow create a link with what
 11 I previously said", whereas what you were previously
 12 saying was about something different. It just doesn't
 13 work.
 14 You can't get away from what the OFT was saying to
 15 you in their skeleton argument at paragraph 38:
 16 "The OFT is not surprised that fundamentally
 17 changing the way the agreements work also fundamentally
 18 changes the effect they have."
 19 They said the issue is not whether a different set
 20 of agreements would be pro-competitive but whether the
 21 current agreements, based on the facts which they were
 22 putting forward, are anticompetitive.
 23 Now, that takes me through 2(a) and 2(b), and I've
 24 explained to you why those, in our submission, are not
 25 within the decision.

1 I'll come a little bit later to the point that
 2 emerges from the way Mr Saini has approached it. I am
 3 now going to come to what I described this morning as
 4 issue 5, which is the approach to paragraph 3(2)(e) of
 5 schedule 8.
 6 In our written document we raised the question --
 7 and this remains a question -- of what actually is the
 8 OFT asking you to do? This remains an oddity in the
 9 case, in that on Day 27 -- and we don't need to turn it
 10 up, I've given you the reference at 124 of our
 11 document -- Mr Lasok says it wasn't the case that the
 12 OFT was seeking permission to do something. It's the
 13 OFT making an application to the Tribunal for
 14 the Tribunal to do something, namely operate the
 15 schedule 8 powers which are not limited to 3(2)(e), it's
 16 a bit broader than that.
 17 What on earth are we talking about? The Office of
 18 Fair Trading, armed with the many people who are sitting
 19 in court today, no doubt can decide whether or not they
 20 wish to invite you to allow them to prove a different
 21 case. What they are saying is "Oh, no, no", because
 22 they know they can't do that, that's the curiosity about
 23 this, they know they can't seek leave to amend their
 24 defence, "Oh, I am not doing that, I am not actually
 25 asking for anything" is what they were saying on Day 27,

1 "I am just saying to you, Tribunal, that you might want
 2 to exercise your powers under schedule 8".
 3 Before you get there, these proceedings are of
 4 course adversarial in nature, and it's for the OFT
 5 properly to make an application. Either they are
 6 applying to do something or they are not. If they are
 7 not, then that's the end of it, because if we are right
 8 they are outside the decision, then that answers the
 9 point.
 10 We have to proceed on the basis, notwithstanding
 11 Mr Lasok's position last Friday, that they are indeed
 12 seeking permission to run a new case for the purpose of
 13 then getting you ultimately to make a decision different
 14 to that which the OFT made. That's the only basis on
 15 which you can understand this.
 16 We suggest that that is not open because of the
 17 jurisdiction that you have, which is that under
 18 paragraph 3(1) of schedule 8 you are unsurprisingly
 19 required to determine the appeal on the merits by
 20 reference to the grounds of appeal set out in the notice
 21 of appeal. That's absolutely mandatory. That's what
 22 Parliament has laid down that you must do.
 23 So what the statutory scheme does not envisage is
 24 that you -- and this is actually what Mr Lasok is saying
 25 conversely, to the opposite effect -- get to a stage

1 where you can see that the decision has to be set aside
2 and the appeal allowed, but then you keep hold of the
3 proceedings, so you don't make your order, you keep hold
4 of the proceedings in order that somehow new material
5 could come forward and you can then decide in the light
6 of that new material whether you would do something
7 different to that which the OFT have done.

8 In other words, somehow what the OFT are saying is
9 that there is an independent jurisdiction, we have all
10 come along here to determine the case on the basis of
11 the decision and the notice of appeal, but something has
12 sprung up, he is saying, in the jurisprudence, and
13 that's what we have to look at, whereby we depart from
14 the decision and the Tribunal has its own capacity
15 whereby it's now an investigative body, effectively, and
16 for these purposes it would really be instructing
17 parties to go out and get evidence so that the CAT can
18 decide what it thinks.

19 This is a very surprising submission, and you will
20 have noticed that yesterday in making this submission
21 Mr Lasok, what he seeks to do is to say "Ah, well, we
22 don't need to look at any of the old jurisprudence,
23 that's all been overtaken by Albion Water, and it's
24 Albion Water which has effectively overturned the
25 jurisprudence of the CAT".

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1 **DR SCOTT:** Just before you leap to (e), there is also (d),
2 and (d) says:
3 "... give such other actions or take such other
4 steps as the OFT could itself have given or taken."
5 So that is complementary to (e) in that steps might
6 have to be taken that weren't simply making a decision.
7 **MR HOWARD:** We make exactly the same point. What (d) is all
8 about is the remedy that is being imposed at that stage
9 where you are setting aside or allowing -- you may be
10 confirming the decision. You have to remember this is
11 in the context of confirming or setting aside. And part
12 of what the OFT could have done is give a direction as
13 to what is to happen in the future in a particular
14 market. That's what (d) is looking at. It's not
15 looking at the context of saying "Oh, let's carry on
16 with this hearing", because if that were right, the
17 decision in Floe -- which we are going to have to look
18 at -- wouldn't make any sense because what Floe is
19 making clear is once you have set aside, you are
20 functus, you couldn't there say "Oh, OFT, we require you
21 to do this within a particular period of time".

22 **DR SCOTT:** Yes, I am not trying to say that we have formed a
23 view, what I am saying is that we do need to look at
24 both (d) --

25 **MR HOWARD:** No, no, if I was suggesting that you had formed

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1 a view, I wasn't. I am just responding saying that
2 paragraph (d), the context in which you have to consider
3 this is what is being said is that, how are these
4 so-called schedule 8 powers going to arise? The
5 appellants say they actually just arise when you get to
6 making your decision, and these are therefore remedial.
7 What is the OFT saying? What the OFT is saying is two
8 things. They are saying that, in the course of the
9 proceedings, the Tribunal could itself say "Although
10 this is not part of the decision, I would like to
11 investigate the following thing and I require the
12 parties to make submissions and come up with evidence on
13 these points". In other words, that one has some
14 independent function. Or that when you get to the end
15 of the process, rather than actually set aside the
16 decision, you would say "Well, actually, I do not want
17 to set it aside at the moment, even though I'm
18 ultimately going to, because I want to carry on
19 an investigation". In other words, what they are saying
20 is that the function of 3(2) was to give rise to
21 an independent investigative role rather than your
22 resolving matters on the basis of the decision and the
23 notice of appeal.

24 **THE CHAIRMAN:** When you use the word "independent" there,
25 independent of what?

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1 **MR HOWARD:** Well, independent of the appeal.
2 **THE CHAIRMAN:** Yes.
3 **MR HOWARD:** What I mean is, what they are saying is your
4 function is not to do what paragraph 3(1) says,
5 because --
6 **THE CHAIRMAN:** Well, it's rather saying that -- and you may
7 disagree with this -- when you are deciding what the
8 obligation is in 3(1), you interpret that having regard
9 to the scope of the powers that you are given in 3(2),
10 and that the obligation to determine an appeal on the
11 merits, which are the words that Mr Lasok stresses --
12 **MR HOWARD:** But he doesn't stress the words that follow.
13 **THE CHAIRMAN:** No -- are to be read having regard in the
14 context of the very wide powers that we have.
15 Now, you may say, well, that's making the tail wag
16 the dog. I think that's the case that you have to meet.
17 **MR HOWARD:** No, I follow that, and firstly it is the tail
18 wagging the dog, but of course -- by letting the tail
19 wag the dog what you do is completely undermine the dog,
20 to mix analogies, if you can undermine such a thing.
21 Because where you get to on that argument is that 3(1)
22 actually far from being mandatory has become completely
23 meaningless because it actually is saying -- this is
24 actually what Mr Lasok's submissions amount to -- once
25 the OFT has made a decision, the appellants appeal and

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1 once you are in the CAT, then all bets are off, you
 2 can -- it's just a free-for-all, it doesn't really
 3 matter.
 4 **THE CHAIRMAN:** Well, he has said that in so many words.
 5 **MR HOWARD:** He has, and it is an extraordinary submission,
 6 particularly when you look at the jurisprudence. But
 7 actually think about how this is to operate. The reason
 8 you have the OFT doing an investigation and you have the
 9 investigative phase is that that's meant to define the
 10 issues.
 11 When you come before a court, here the CAT, or if
 12 you look at other criminal proceedings, you have
 13 a definition. In a normal case, you have an indictment
 14 so that the defendant knows, the accused knows, what the
 15 charge is, and a prosecutor in a normal case can't just
 16 come along and say "Well, I know I said you did this,
 17 but actually now I want to put it like this, and the
 18 criminal court has, as it were, an independent public
 19 interest in making sure that villains get caught", which
 20 I think is part of what Mr Lasok said yesterday, that
 21 people who had done bad things shouldn't really
 22 complain. But the point is that in a democracy and
 23 under our system generally you are entitled to know what
 24 the charge is that you have to meet, and that's actually
 25 the purpose of the procedure here, which is that we know

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1 what it is that we have to deal with, and you, as
 2 a Tribunal, are then given a duty to determine the
 3 appeal on the merits by reference to the grounds of
 4 appeal.
 5 You are then given a power, when you are doing that,
 6 which is confirming or setting aside the decision, and
 7 given further powers as to what you can do on that
 8 occasion. What it doesn't do, and nowhere in this
 9 statute do you see it being said, "Well, what the CAT
 10 is", that's what you would expect to see if Mr Lasok's
 11 submission were right. "We are setting up the CAT as
 12 a further level of investigative tribunal and we are
 13 going to actually equip it to carry out investigations
 14 by giving it" -- I am sorry --
 15 **THE CHAIRMAN:** There are instances in the institutional
 16 framework of Competition enforcement in this country
 17 where that is effectively what happens, but the CAT is
 18 not one of them.
 19 **MR HOWARD:** That's really my point. I don't mean any
 20 disrespect to you. The CAT has been set up as a court,
 21 as an appeal tribunal, that's why it's called the
 22 Competition Appeal Tribunal. That may be my best
 23 submission.
 24 **THE CHAIRMAN:** We try and do what it says on the tin!
 25 **MR HOWARD:** Yes, generally what it says on the tin is

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1 accurate. That's why the advert is such a good one. Or
 2 it's certainly memorable anyway.
 3 Having looked at the statute -- you are very
 4 familiar so I am not going to take a lot of time, with
 5 the jurisprudence. Of course we have the trilogy of
 6 cases which were Napp, Aberdeen and Argos. Argos
 7 summarised the law. It's probably worth just very
 8 briefly turning it up in volume 13 at tab 180.
 9 (Pause)
 10 The critical paragraphs are at paragraph 63, for
 11 what we are considering, through to 66.
 12 (Pause)
 13 Those paragraphs explain how the procedure works,
 14 why it's important, what is happening at the OFT stage,
 15 and how the OFT is held to the decision, particularly
 16 66.1 making it clear it's the final administrative act
 17 which fixes the directors' position.
 18 Actually this is a rather interesting point, what
 19 they say here:
 20 "An attempt to strengthen by better evidence
 21 a decision already taken should not in general be
 22 countenanced."
 23 We are not in a position simply about evidence here.
 24 If one thinks about cases like this, where what
 25 happened, as I understand it, in this case was the OFT

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1 wanted to put in witness statement, I think transcripts
 2 of interviews, and the thing was sent back in order that
 3 they would take proper witness statements.
 4 If you think about it, we are not in a situation
 5 where they are just saying "Oh, for instance, I had this
 6 transcript of Somerfield, say, and I want to now put in
 7 a witness statement". What they are saying is "I want
 8 to run a completely new case".
 9 I refer you to that, I am not going to read it all
 10 out, but paragraph 66 is important. What, in essence,
 11 you are being told is that this jurisprudence has been
 12 overruled by the Court of Appeal's decision in
 13 Welsh Water or Albion Water, however one correctly
 14 refers to it.
 15 **THE CHAIRMAN:** Yes. Dr Scott points out to me, at the end
 16 of this case, there is a reference to that the
 17 Filiatra Legacy case that you referred to.
 18 **MR HOWARD:** Yes. The point, I can't remember where it is,
 19 yes, it's on page 36, where the Tribunal there was
 20 raising the question as to whether Filiatra Legacy and
 21 the McPhilemy case applied. That would be a point for
 22 another day. Just to spend one minute on it, it
 23 self-evidently must apply because these are civil
 24 proceedings and the principle of Filiatra Legacy is
 25 a principle which applies across the board. It's very

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1 difficult to understand why it would not apply here.
 2 The point of Filiatra Legacy, I think what you can't do
 3 is call a witness and then seek to impugn the evidence
 4 of your witness. Of course you can argue as to what
 5 does the evidence mean. We do that in every single
 6 case. What you are not allowed to do is come along and
 7 say "When Mrs Corfield said X you should not believe her
 8 or treat it as unreliable for any reason". They are
 9 stuck with her answers, and you can't -- I don't really
 10 understand why Mr Lasok says "Oh, it's a problem for
 11 Imperial". Firstly, Mrs Corfield's evidence was
 12 100 per cent in our favour. Leave that on one side,
 13 Mr Lasok seems to think it wasn't, although I suspect he
 14 is the only one who was in court who would say that.
 15 But the real point is I can rely on those bits of
 16 her evidence, and I can equally impugn her evidence,
 17 that's what I am allowed to do. He is not. But that's
 18 all for a different day, indeed a day that I suggest, at
 19 least in this case, we are never going to get to.
 20 Now can I go on to, from having looked at that, Floe
 21 and then to Albion Water. Floe you should have in this
 22 bundle at tab 182. If you look at paragraph 20 in Floe,
 23 you can see that:
 24 "The issue was whether the CAT had power, having set
 25 aside a decision and remitted the matter to the relevant

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1 regulator, to impose on the regulator a timetable or
 2 other directions as to how the matter is to proceed."
 3 If you go forward to paragraph 25, the judgment of
 4 Lord Justice Lloyd:
 5 "If the appellant challenges a decision by
 6 a regulator and establishes on grounds taken in the
 7 notice of appeal the decision was wrong, whether as
 8 a matter of procedure or because of some misdirection or
 9 because the CAT takes a different view of the facts,
 10 the Tribunal has a choice of a number of courses open to
 11 it.
 12 "It may set aside the decision and remit the case.
 13 It may feel able to decide itself what the correct
 14 result should have been so that no remission or
 15 reference back is necessary. It may wish to retain for
 16 itself the task of deciding the eventual outcome but
 17 require further findings from the regulator, in which
 18 case it will not remit but may refer all or part of the
 19 decision back under Rule 19(2)(j) with a view to
 20 deciding the appeal with the benefit of the result of
 21 that deferral."
 22 If one looks at that situation, you can have
 23 a situation where the third possibility is where you see
 24 some difficulty in the evidence as to whether you can
 25 decide the case, and therefore you can use 19(2)(j) to

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1 send the matter for a finding of fact by the OFT so the
 2 matter can then come back, armed with that finding of
 3 fact. In other words, what's interesting about that is
 4 it's not contemplated but what this Tribunal does is
 5 itself carry out an investigation.
 6 Then at 28 his Lordship considers a case may occur
 7 where the setting aside of the decision and remittal to
 8 the regulator doesn't dispose of the appeal entirely:
 9 "I wouldn't wish to exclude that possibility
 10 altogether but the facts have to be very unusual."
 11 He doesn't explain actually what situation that
 12 could be. If you go on two sentences:
 13 "With respect to the CAT, it seems to me that in the
 14 prevent case, once it has set aside the decision and
 15 remitted the matter to Ofcom, there was nothing left of
 16 the appeal. Paragraph 3(1) did not compel or allow the
 17 CAT to treat the appeal as still subsisting in order to
 18 decide points which did not arise once it had set aside
 19 the decision complained of. Correspondingly, since
 20 there is no longer a subsisting appeal, Rule 19 did not
 21 apply."
 22 I commend the rest of the paragraph to you. The
 23 point is there, and Mr Lasok accepts this, once you get
 24 to the stage at which you exercise your duty under 3(1)
 25 then you become functus because that is the end of the

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1 process. So that what then you are being asked to do is
 2 not exercise your power in order not to be functus in
 3 order that you can do something else, which is make
 4 a different decision, allowing different evidence to
 5 come forward in the course of these proceedings. Now,
 6 that is turning everything on its head.
 7 **THE CHAIRMAN:** What makes me uncomfortable about this part
 8 of your submissions is, if you say we have come to
 9 a point in the hearing where everyone should realise
 10 that it's inevitable that the decision is going to be
 11 set aside, therefore we have a duty to set the decision
 12 aside now and it's not within our jurisdiction to keep
 13 these appeals on foot in order to explore whether we
 14 will want to exercise our powers under
 15 paragraph 3(2)(e), say. What is it that stops the
 16 following from happening: in the course of any long
 17 trial, after each witness, counsel pops up and says
 18 "Now, Tribunal, because of that evidence it's inevitable
 19 that this appeal is going to win, therefore the shutters
 20 must be brought down, if you are against me on that then
 21 we go on for another two days". Two days later, "Well,
 22 now it must be clear that" --
 23 **MR HOWARD:** The answer to that, there is a very simple
 24 answer, because that's not how we manage cases, and if
 25 somebody did do that, in a normal case, for instance,

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1 firstly if you try and pop up in a case and say, "Look,
 2 we have heard the evidence and it's all hopeless and you
 3 must now dismiss the case", the judge is going to say
 4 "What exactly is your application? Because if you are
 5 saying -- firstly, let's say you were the defendant.
 6 You would obviously have to wait until all the
 7 claimant's evidence had been called, because his
 8 evidence might change as you go through the six weeks or
 9 whatever it is calling.

10 If at the end of the claimant's case you say "This
 11 is all hopeless", then what you are doing is making
 12 a submission of no case and therefore if you want it do
 13 it, I am not going to call any evidence and we have
 14 an early bath, to use the analogy I've used before, and
 15 under our rules what you are allowed to do is say
 16 "Submission of no case, I am not calling any evidence"
 17 and then the order of speeches is reversed, and
 18 that's -- I suspect there are very few people here who
 19 have done it when acting for the defendant. I have
 20 personally done it I think once, but it's a bold
 21 decision because you have to be satisfied that calling
 22 your evidence won't make any difference.

23 In the context of an appeal, simply popping up and
 24 saying "It's all pretty hopeless, we have heard from
 25 Fiona Corfield, you must do something", under the CAT

1 rules there is in fact no provision where the appellant
 2 could have done that, but if we had got to the stage --
 3 I just can't see how it would work, is the answer.
 4 **THE CHAIRMAN:** No, you are putting practical points to me,
 5 but your submissions seem to be directed at saying "Now
 6 that we are at this stage, it's not a matter of
 7 discretion, we simply don't have jurisdiction to
 8 continue, we must bring the case to an end".

9 **MR HOWARD:** Yes.
 10 **THE CHAIRMAN:** You may say that the differential between the
 11 scenario I was positing and where we are is the
 12 acceptance by the OFT that they can't maintain their
 13 previous case.

14 **MR HOWARD:** That's right, that's the critical point.
 15 **THE CHAIRMAN:** But their acceptance of that is not
 16 unqualified, because of the qualifications that Mr Lasok
 17 has put on it.

18 **MR HOWARD:** That's part of what you have to decide now,
 19 because they want to run -- that's the point. You see,
 20 this is why -- what is actually very unacceptable is the
 21 way they are bringing this forward. Where we have
 22 really got to is they want to run the refined case,
 23 which is paragraphs 2(a) and (b). What you have to
 24 decide is: what is the effect of your asking me to do
 25 that? It doesn't matter what they say, the question is

1 for you to decide objectively: does that mean that the
 2 decision is no longer being defended because what you
 3 are asking is something else? If that's right, you are
 4 then in a position -- imagine one puts forward a notice
 5 of appeal and the OFT says, by way of defence "I agree,
 6 the decision cannot stand, but I say before the CAT that
 7 there is a whole lot of other things that are bad about
 8 what these people have done and the CAT should make
 9 a decision to that effect".

10 **THE CHAIRMAN:** That was effectively the MasterCard case,
 11 I suppose.

12 **MR HOWARD:** Yes. MasterCard, perhaps we will look at that,
 13 it's not entirely clear whether -- ultimately the CAT
 14 didn't proceed -- it didn't proceed as a matter of
 15 jurisdiction or discretion. In my submission, it should
 16 have proceeded, if it didn't, as a matter of
 17 jurisdiction.

18 **DR SCOTT:** If the Tribunal faces a situation like this and
 19 it has wide discretion under its rules and in particular
 20 Rule 19(1) would you have thought that the exercise of
 21 that case management discretion was wide enough to bring
 22 proceedings to a halt under 19(1), as distinct from
 23 under ...

24 **MR HOWARD:** Yes. If one says "How do we get to exercise
 25 3(1)?" Under 19(1) you have a constant, as it were,

1 supervision of the process, and you are entitled at any
 2 stage to say "Well, we can't see how this case could
 3 continue". So 19(1) would always allow you to say,
 4 well, we have heard some of this evidence, OFT, are you
 5 defending the decision and if so on what basis?"

6 If the OFT said they were, it's pretty unlikely that
 7 you would kick it out, unless you were saying, as here,
 8 you may say you're defending it but actually you're not,
 9 you're running a different case and I am not going to
 10 permit you to do that, the rules don't allow it and
 11 therefore this case, the decision has to be set aside.

12 I mean, that's the thing. What the OFT is really
 13 trying to do is to create a hybrid world where they
 14 don't put forward an alternative decision, but they say
 15 somehow -- and they can't do that, but somehow
 16 the Tribunal is taking charge and so that's the basis on
 17 which they can be excused or allowed to put forward
 18 something, because it's not that they want to put it
 19 forward, it's that the Tribunal's responding to them,
 20 but it's the Tribunal, as it were, of its initiative
 21 putting it forward.

22 If we perhaps pick up MasterCard and then quickly
 23 look at Albion Water. MasterCard I think is in the same
 24 bundle at 181. The relevant part starts at page 9. At
 25 paragraph 33, where the CAT actually got to is, just

1 before 34 -- everybody is familiar with what happened:
2 "The Tribunal is not satisfied that the procedural
3 foundation for taking these appeals any further is
4 sufficiently secure to justify the Tribunal
5 contemplating that course, particularly given the
6 extensive new material upon which the OFT would
7 presumably seek to rely."

8 So they were not in fact saying there was
9 a procedural basis for doing this, it was actually
10 saying "We are not satisfied there is, but anyway if
11 there was, we wouldn't proceed".

12 So it doesn't actually take the debate any further.
13 Floe, in my submission, does actually, because it
14 shows that the CAT doesn't have an independent, as it
15 were, investigative role. That point was made clearly
16 both in the passage I referred you to at 28 but
17 paragraph 57 in Lord Justice Chadwick makes it clear
18 what the task of the CAT is.

19 **THE CHAIRMAN:** Sorry, which tab is it?

20 **MR HOWARD:** I beg your pardon, I've jumped, it's tab 182.

21 We looked at paragraphs 25 and 28 of Lord Justice Lloyd
22 and it's worth looking at paragraph 34.

23 Lord Justice Lloyd in the second sentence explained
24 that:

25 "The Tribunal as a statutory body has the task of

1 deciding such appeals as are brought to it in accordance
2 with the 1998 Act in the rules, but it doesn't have
3 a more general statutory function of supervising the
4 regulators."

5 Then at paragraph 57, the same point is made by
6 Lord Justice Chadwick, and towards the end of the
7 paragraph:

8 "The task of the CAT is to determine appeals and to
9 do so in accordance with the provisions in schedule 8.
10 For the reasons which Lord Justice Lloyd has explained,
11 the CAT had fulfilled that task when it allowed the
12 appeal and remitted the decision to the Office. There
13 was nothing left for the CAT to do in relation to the
14 appeal which had been brought to it."

15 The whole premise of that is what you do is you
16 decide the appeal as you have to under section 3(1).
17 Once you get to that stage, this is actually how it
18 simply works: if the material before you justifies
19 making some other decision then you can do so. But what
20 you can't do is refuse to decide the appeal on the basis
21 that you say "Well, what we want to do is to have some
22 further investigation, and we will only decide -- we are
23 only going to keep the appeal alive in order to allow
24 the further investigation to take place".

25 **THE CHAIRMAN:** Is this a way one could express what it is

1 you are saying: the interrelationship between
2 paragraph 3(1) and 3(2) is that the scope of the powers
3 which the Tribunal can exercise may influence the nature
4 of the grounds of appeal that are set out in the notice
5 of appeal, so that in Albion, the notice of appeal is
6 not limited to challenging the non-infringement decision
7 but the grounds of appeal, because of the possibility of
8 the Tribunal exercising the powers in paragraph 3(2)(e),
9 asks the Tribunal to go further and make an infringement
10 finding?

11 **MR HOWARD:** Yes.

12 **THE CHAIRMAN:** But it's there that the influence of the
13 scope of the powers is felt, rather than in enabling
14 the Tribunal to go beyond the grounds of appeal in order
15 to exercise those powers?

16 **MR HOWARD:** That's exactly right, and of course Albion, if
17 one thinks about it for a moment, for the CAT not to
18 have been able to make a finding of (a) dominance and
19 (b) therefore of infringement would have been completely
20 absurd, particularly for the complainant, because the
21 complainant has brought his complaint, then he has
22 appealed, because what the OFT says is "I am going to
23 assume dominance, but I don't find there was a margin
24 squeeze and that's the way it worked". They would then
25 appeal and the nature of the appeal is obviously they

1 say "You should have found an infringement, that's the
2 bottom line, and the steps along the way are you should
3 have said there was a margin squeeze and you should have
4 made an actual finding of dominance".

5 So the argument to say "Oh, no, no, the CAT should
6 only have decided part of the appeal and should send
7 everything back" would be a rather odd position.
8 Indeed, one of the things is this is not actually
9 different to the way in which an appeal before the Court
10 of Appeal would operate, where if the material is before
11 the Court of Appeal, but the judge below hadn't made
12 a finding, then you would invite the Court of Appeal to
13 make the finding, because it is in fact a concurrent
14 jurisdiction, and it may or may not do, depending upon
15 whether the material allows it to do so. But it is all
16 part of the appeal that has been brought. That's all
17 actually schedule 8 3(2)(e) in my submission is doing,
18 it's making sure that when you are disposing of appeal,
19 on the material that is then in front of you, you are
20 able to make the decisions, confirming or disposing of
21 the appeal, the decisions that the body below, here the
22 OFT, could have made.

23 **THE CHAIRMAN:** Yes. The scope of the material that is in
24 fact before you is itself influenced by the possibility
25 of the exercise of those powers.

1 **MR HOWARD:** That's right, but the scope of the material is
 2 also defined by the pleadings.
 3 **THE CHAIRMAN:** Yes.
 4 **MR HOWARD:** That's the other way you can look at this: is
 5 there a free range to put forward material that doesn't
 6 go to the decision and the notice of appeal? In other
 7 words, take what the OFT currently want to do, they want
 8 to put in material to support a different decision. The
 9 answer is they are not allowed to do that, and nor would
 10 the Tribunal be properly -- assume there were a case
 11 management conference. Our case management conference,
 12 whenever it was, seems a long time ago anyway, whenever
 13 it was. The OFT had turned up and said "I want to put
 14 in an expert report, the purpose of which is not to
 15 address my theory of harm in the decision but
 16 an alternative theory of harm which you might be
 17 interested in because we might get to a situation under
 18 schedule 8, paragraph whatever it is", to which one
 19 would have said "Hang on, evidence has to be by
 20 reference to the pleadings, and that isn't part of the
 21 pleaded case". And that's the answer.
 22 **DR SCOTT:** Just to be clear, what you are also implicitly
 23 saying is that it would be outwith 3(1) for Mr Lasok to
 24 say at this stage: please exercise your jurisdiction
 25 under 19.2(j) to refer back to the OFT in part to enable

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1 them to rebuild the bridge so that it then produces
 2 a bridge which gets you to 8.2 on, say, 2(a).
 3 **MR HOWARD:** That's the thing, it wouldn't be getting them to
 4 8.2, it would be getting them to something different.
 5 **DR SCOTT:** They would argue it would still get them to 8.2
 6 because they would still be within 8.2.
 7 **MR HOWARD:** That's the problem, in fact, or a problem. 8.2
 8 is by reference to the competing brands, whereas that's
 9 not the case they are now running.
 10 Even so, what they can't do is ask you to send it
 11 back on that basis. In fact, anyway, the point is they
 12 are not asking for that.
 13 **THE CHAIRMAN:** No, well, you dealt with remission in the
 14 close of your written skeleton and there's not been
 15 a response to that.
 16 **MR HOWARD:** There is no response to that, and I think we are
 17 entitled and the Tribunal is entitled to take it that
 18 everything stands or falls on these proceedings, and if
 19 you agree with us, that would be it, you set it aside
 20 and you allow the appeals. The OFT is entitled -- if it
 21 wants to spend public money on doing things, that's
 22 a different matter and not something you have to be
 23 concerned with.
 24 I know I might be taking things slightly quickly.
 25 We have discussed Albion Water and I think largely

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1 the Tribunal probably has the submission. The
 2 overarching point I make is it is actually frankly
 3 a ridiculous submission to say that Albion Water in the
 4 Court of Appeal has overruled the jurisprudence of the
 5 CAT. That is not how the courts of this country
 6 operate, whereby in one paragraph without any reasoning
 7 you are kicking out a whole lot of jurisprudence. It's
 8 a rather startling submission.
 9 If you look at the way Albion Water worked, if you
 10 go to tab 186, we have the decision of the CAT, the
 11 relevant paragraphs which I would suggest one needs to
 12 note are paragraphs 6 and 7 and 208, and then go back to
 13 190 and 196.
 14 (Pause)
 15 And I am reminded of 17, which I think we looked at
 16 yesterday.
 17 When the matter came before the Court of Appeal,
 18 which we have at tab 186, what is self-evident is the
 19 Court of Appeal was not considering the type of
 20 situation with which we are concerned.
 21 **DR SCOTT:** 186 is the CAT.
 22 **MR HOWARD:** Yes, sorry. 183. That's why I couldn't
 23 understand what I was looking at.
 24 The jurisdiction issue starts at 112 and goes
 25 forward. The paragraph that's relied on is 127. It's

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1 worth noting that the OFT's submission in fact was that
 2 the circumstances in which the Tribunal should act as
 3 a primary decision-maker should be limited.
 4 Of course the Tribunal operates as any court does as
 5 a primary decision-maker where, although it is an appeal
 6 from the Office of Fair Trading, there is material that
 7 is put before the Tribunal that wasn't necessarily
 8 before the Office of Fair Trading. For instance, part
 9 of Mr Lasok's submission, that there has been oral
 10 evidence of witnesses, they had chosen not to interview
 11 those witnesses, so the result is that there is
 12 different material in front of you, so you are there
 13 a primary fact finder. That doesn't mean -- which is
 14 the jump he makes -- that your role is to conduct some
 15 independent investigation, it's just the nature of the
 16 process is that you receive material.
 17 I think what you need to ask when you read 127,
 18 which is the paragraph that is relied upon by the OFT,
 19 you need to ask yourself two questions: is this
 20 paragraph saying that the OFT is entitled to adduce
 21 a new case, or put forward a new case in order to seek
 22 to prove a different infringement? That's what they are
 23 saying. Well, there is not a whiff of that in
 24 paragraph 127, and if that were the case, and the Court
 25 of Appeal was intending to overrule Napp and Argos and

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1 Aberdeen, one would have expected that would have been
2 clearly spelt out. It would have been quite
3 fundamental, because it really would be the Court of
4 Appeal saying there has been a fundamental
5 misunderstanding of the nature of this Tribunal's
6 jurisdiction.

7 Then if you ask yourself: is this Tribunal obliged
8 to set aside the decision and to allow the appeal once
9 the OFT ceases to defend the decision, either because it
10 explicitly says so or because it's seeking to put
11 forward a different case, in our submission that answer
12 is provided by schedule 8 3(1), and there is again
13 nothing in this paragraph which could conceivably
14 suggest that the Tribunal, as it were, achieved some
15 independent life.

16 What they are actually talking about, if you think
17 about it again, here what had happened was you had
18 an appeal where the appellant was saying "The OFT made
19 an assumption of dominance, they should have found
20 infringement and so they should have found dominance".
21 What the Court of Appeal was saying, "Well, that is
22 a matter that's all before the CAT, but the CAT itself
23 needs to observe procedural fairness", so there is
24 a question as to whether that issue has been properly
25 ventilated and therefore it has to consider how it

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1 should allow that issue to be tried out before it. But
2 that's basically what you have to do with all the issues
3 that are before you, ensure that there is procedural
4 fairness. That has nothing to do with developing a new
5 case which is not in the decision, or not the subject,
6 as you said earlier, of the notice of appeal. That's
7 why we say Albion Water is being looked at out of
8 context.

9 I could finish probably fairly quickly, and I know
10 others are keen to have their say. I don't know whether
11 it would be convenient to carry on for a little bit
12 longer or whether you would prefer I wrapped things up
13 in about 15 minutes at 2 o'clock.

14 **THE CHAIRMAN:** I think we will take a break now. I am not
15 sure whether you or any of your colleagues were
16 intending to refer us to a decision of the Tribunal in
17 a Telecoms case, BT v Ofcom [2010] CAT 17, which was
18 upheld by the Court of Appeal earlier this year, which
19 dealt with this question of the appeal on the merits and
20 what that means. I think Ms Rose and Mr Kennelly were
21 in that case.

22 **MS ROSE:** Madam, I was; he is not guilty on this occasion,
23 but I was there.

24 **THE CHAIRMAN:** Yes. That was a case concerning the
25 interpretation of the test under the Communications Act,

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1 which is similar in some respects to this test but
2 different from the other test. Anyway, I just throw
3 that out before we pause.

4 **MR HOWARD:** On this occasion I am going to acknowledge
5 complete and utter ignorance, but I am happy to defer to
6 the greater wisdom of Ms Rose, and I am sure she will
7 address the point.

8 **THE CHAIRMAN:** Yes. That may be a sensible way of
9 proceeding. We have copies if somebody does want to
10 take us to it. It seems to us that that may shed some
11 useful light on the matter.

12 Very well, we will come back at five past 2, then.

13 Thank you.

14 (1.05 pm)

15 (The short adjournment)

16 (2.05 pm)

17 **MR HOWARD:** Could I just revert on one point that was raised
18 this morning which concerned schedule 8,
19 paragraph 3(2)(d), just to make the point that the
20 nature of the power there was actually discussed in Floe
21 in the Court of Appeal at paragraph 31 and 32 and it's
22 clear from that that the point I was making to you this
23 morning was right, which is that it's not a case
24 management power under (d), it's looking at the
25 decisions that the OFT could have made and which the CAT

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1 could then make at the final stage.

2 I was then going to come on to the point which was
3 raised in Mr Saini's skeleton argument, which is whether
4 there is a discretion to permit the Office of Fair
5 Trading to run a new case based on saying either that
6 there are findings in the decision on which 2(a) and (b)
7 are based, or that 2(a) and (b) are components of the
8 infringing agreements.

9 I think all that Mr Saini, as I understand it, is
10 saying is that even if the OFT has a hook on which to
11 hang a refined case, it would be a fundamentally
12 different case from that in the decision and you should
13 not permit it. So in essence it's the same point. Our
14 position is that this cannot arise because if you ask
15 yourself: what is the restriction relied on in the
16 decision, and what is the theory of harm?, neither 2(a)
17 nor 2(b) is in fact the restriction, nor is there
18 a theory of harm.

19 But even if you concluded that they comprised
20 elements of what ultimately goes into the infringing
21 agreements, or there are findings of fact in the
22 decision, doesn't advance things for the very simple
23 reason they are not the restraints relied on and they
24 are not the restraints which give rise to the theory of
25 harm and the object infringement.

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1 So there isn't a discretion to put a refined case,
2 and the point about the OFT not being entitled to amend
3 the defence of course is particularly pertinent.

4 So we say that discretion never arises. But insofar
5 as either you have to consider a discretion along the
6 lines that they should be entitled to run a refined
7 case, developing it out of the existing case, or to run
8 a new case under schedule 8, that leads me to the
9 discretionary factors which are going to be the same.

10 Now, we have largely set these out in writing, and
11 in fact when you analyse what is in the speaking note
12 produced yesterday there is very little response to
13 this, very little attempt to engage.

14 The first point we made was the lack of
15 particularity in the OFT's submissions. The OFT appears
16 to recognise that, we have dealt with it and I am not
17 going to read it out, at 145 and following. As
18 I understand it, what the OFT says to this is, "Oh,
19 well, we will produce a proper document setting out our
20 case and then the respondents can reply to it". But the
21 answer to that is at this stage, if you are being asked
22 to do something, assuming you have a discretion, it is
23 incumbent upon the OFT to have put forward before you
24 a proper document which sets out the case. Not only is
25 it incumbent upon them to do that, you actually ordered

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1 them to do it, and that's the order you made.

2 They were supposed to set out the entirety of the
3 constraints in the 15 bilateral agreements, how the
4 constraints fit within the description of the
5 infringements, and whether and how the theory of harm
6 expounded in the decision applied to an agreement
7 including those but only those constraints. They
8 haven't done that.

9 If the Office of Fair Trading, assuming there was
10 a discretion to allow this to happen, were serious, what
11 they would have put before you would have been firstly
12 a proper document setting out the nature of the
13 restraints, including the evidential basis for them;
14 secondly, a proper economic analysis of the basis of the
15 case that this amounts to an object infringement;
16 thirdly, they would have supplied you with expert
17 evidence to support it, bearing in mind the novelty of
18 the situation that would be being put forward; then they
19 would have also dealt with exemption and exclusion and
20 the fine.

21 Now, Mr Lasok seeks to brush aside all of that on
22 a basis that's actually difficult to follow. They are
23 now putting forward a different case. Surely
24 the Tribunal and the parties are entitled to understand
25 how the case feeds through from beginning to end. One

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1 doesn't even begin to have that.

2 **THE CHAIRMAN:** We did raise, I think, with Mr Lasok what is
3 the decision that the OFT contemplates that we would
4 take, because if it's an infringement decision then all
5 those steps have to be gone through in addition to
6 simply finding on the facts whether these restraints
7 actually occurred.

8 **MR HOWARD:** Yes. That's right. It's not sufficient --
9 that's the problem -- just to say there was something
10 which restrained the retailer from doing something. You
11 then have got to say why that is an anticompetitive
12 restraint and why it's an object infringement, and then
13 you have to consider, in relation to what you have said
14 is the restraint which has its object of
15 anticompetitiveness, does it fit within the conclusion
16 order, does it fit within the exemption and what is the
17 position on the fine? That's what the decision-making
18 process was all about. You can't just say "Well,
19 I stand by everything I said", when you just look at the
20 paragraphs of the decision, if you look at the one about
21 the fine, it's all in the context of the restraint that
22 they were dealing with and particularly the central
23 plank. Once you take away that, nobody knows where they
24 stand.

25 For instance, these proceedings, if you imagined

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1 a different decision, it's quite possible that even if
2 the OFT tried to stand by its view that this was
3 an unlawful object infringement, they then may have to
4 analyse it and say "But we realise nobody could have
5 spotted this and therefore there is no fine". That
6 would have meant that the complexion of all of this
7 would have been completely different. The point is at
8 the moment we don't have any of that, so we are just
9 left actually with the case being adjourned and they are
10 asking you to let them go away and write what would
11 actually just be a new decision, that's actually what it
12 amounts to, and that shows how manifestly inappropriate
13 and improper this is.

14 The next heading was that, to continue the
15 proceedings would subvert the administrative procedure,
16 and that we have set out, and again I don't need to go
17 through it in detail, at 159 to 170.

18 Mr Lasok's only answer to that is to say, "Well,
19 Albion Water has trumped all of that, and once we are in
20 front of the CAT we can forget about the administrative
21 procedure". What you see is the learning of the CAT is
22 that where something new is being raised generally that
23 needs to go through the procedure because of the
24 procedural safeguards, and the obvious point is I'm the
25 appellant, what am I now appealing against if you don't

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1 go through that? It's putting everything the wrong way
2 around.
3 The next point is that the OFT could always have run
4 the new case. I've largely addressed that already. The
5 reason that's important is the OFT has chosen to run
6 a particular case, the refined case, their submission is
7 "We always knew about this, it's in the decision, we
8 always had these restrictions there". So they have
9 chosen, whether through a deliberate decision or
10 incompetence, not to put forward a case based on that,
11 so why should they now, without any explanation at all,
12 be entitled to come along to the court and say "Just
13 because the evidence has gone badly for me on the
14 particular sort of recherche case that I did want to
15 run, now I want to run this other case, and you have to
16 remember this is in the context of where they are saying
17 this is an obvious object infringement so it must have
18 been always obvious, these points were there, they
19 didn't run them, and so that's why we make the points we
20 do, that this is a case they could always have run and
21 they shouldn't now be entitled to run it.
22 The prejudice to Imperial. This is actually rather
23 interesting, the way that Mr Lasok seeks to deal with
24 this. He says, "Oh, there can't be any prejudice
25 because Imperial will still have its right of defence in

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1 relation to this new case, therefore no prejudice". He
2 says these are public proceedings so it's not likely --
3 I think he referred to commercial parties being somehow,
4 they are constrained by the court from introducing a new
5 case but that doesn't apply to a public body like the
6 OFT. Well, actually the point applies even more
7 strongly to a body like the OFT which has public duties
8 and responsibilities including a responsibility of not
9 harassing people unfairly. It has made a decision, we
10 have appealed it, we are entitled to expect finality of
11 that process. This court surely is not the old Court of
12 Chancery as described by Dickens in Bleak House. This
13 is not the 18th century, it's the 21st century and this
14 is meant to provide a modern, efficient procedure.
15 We are eight years into this matter. The idea that
16 a further vista is to open up whereby for some uncertain
17 period simply because the OFT has decided it wants to
18 have another go at some different point not yet fully
19 ventilated, in our submission is something that the
20 court should have no difficulty whatsoever in rejecting.
21 Not only does Imperial have an interest in these
22 proceedings coming to an end, but there is a public
23 interest in the finality of litigation. There is
24 a particular public interest here, which is: how are
25 future appellants to understand the position? So you do

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1 what Imperial has done, you face a decision which you
2 say is wrong, and you decide to appeal, you spend a lot
3 of money with Mr Brealey and others charging lots of
4 high fees, and then what? You to Day 26, it's all going
5 swimmingly well, and then the OFT says "Well, that's all
6 very well, and well done you lot, but actually we have
7 another case up our sleeve, so there is absolutely no
8 point appealing this because if you knock that one down,
9 no doubt they will say "We have another one", and where
10 does it end?
11 The OFT of course would like it because what the
12 message would be to appellants in the future is: don't
13 bother appealing because you have no idea how this
14 process is going to go in the sense that nobody can
15 predict whether the OFT will just run some new case in
16 the course of the appeal, it will never end.
17 Of course they would like that, because they like
18 the fact that people may find the procedure oppressive
19 and as a result settle. But that's not what this
20 Tribunal should be saying. This Tribunal should be
21 saying that people are entitled to have the case
22 disposed of on the basis that it was put forward and not
23 to face what is open-ended litigation without any
24 understanding of when it could be brought to an end.
25 Finally, practicalities. There is no proper

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1 submission before you as to the practicalities of any of
2 this. What was originally said is, when they produced
3 their document last week, "We will address the
4 practicalities in due course". Now they say, eventually
5 it comes out, "Well, it can all be dealt with, we will
6 produce a pleading and others will respond". But what's
7 the timescale of all this? When is this litigation,
8 when is this appeal ever going to be brought to an end?
9 And how are you going to take account of the fact that
10 people may not be available, experts are not available
11 and so on. As things stand, I can only speak for my
12 personal position, I was booked to conduct this case
13 until 21 December. I am not available to conduct this
14 case in the New Year; I am not available until next
15 autumn. Now, other people in my team may face similar
16 difficulties and so on. I don't know when our experts
17 would be available. It's simply not how litigation in
18 the modern world is conducted, and that's a further
19 reason why you should unhesitatingly say enough is
20 enough and this now has to come to an end.
21 So I have gone through that rather quickly, but
22 I think, as I say --
23 **THE CHAIRMAN:** The points are very clear.
24 **MR HOWARD:** Yes, and there has been very little attempt to
25 engage with them. So those are my submissions, unless

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1 I can assist you any further.
 2 **THE CHAIRMAN:** Thank you very much, Mr Howard.
 3 **MR HOWARD:** Thank you.
 4 Submissions by MR SAINI
 5 **MR SAINI:** Madam, I have had a word with the other
 6 appellants' counsel and we have agreed I'll go first and
 7 we will all try and confine our submissions so that
 8 Mr Lasok has a generous period of time to reply.
 9 My submissions are going to be divided into three
 10 parts. First of all, I am going to consider the
 11 position if Mr Lasok is right in saying that the
 12 restraints are in the decision. Secondly, I am going to
 13 consider the proper construction and interpretation of
 14 schedule 8. Thirdly, I am going to address the issue of
 15 what the Tribunal should do now in terms of its
 16 procedural powers.
 17 Can I ask the Tribunal have handy a copy of the 2003
 18 rules, because I am going to be referring to those on
 19 several occasions.
 20 I've also copied for the Tribunal, just for ease of
 21 reference, copies of yesterday's transcript which I hope
 22 can be provided just to speed things up, just two pages,
 23 pages 53 and 54, because before I start my first
 24 submission, I want to be absolutely clear what the OFT's
 25 position is. (Handed).

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1 I've identified on this two-page extract under 1 and
 2 2 on the right-hand side at the bottom of the page, the
 3 two different positions which the OFT are taking. First
 4 of all, the bottom of page 53 where I have marked 1,
 5 which is simply that the position that the allegations
 6 are in the decision and you can just get on with it and
 7 eventually decide to uphold the decision and set aside
 8 part of it. The second position, which Mr Lasok said
 9 the Tribunal could easily reach, which is at page 54,
 10 which is that these allegations are not within the
 11 decision and therefore you have to exercise your
 12 schedule 8 powers.
 13 Now, those are the two concrete ways in which the
 14 OFT now puts its case and I am going to undo each of
 15 those.
 16 Dealing with the first way, which is simply just get
 17 on with it, assume it's in the decision and the Tribunal
 18 can go ahead. I emphasise that the submissions I make
 19 are without prejudice to what Mr Howard has said about
 20 whether or not these points are within the decision.
 21 Now, we say that this is in substance an application
 22 either for some kind of direction under Rule 19 or in
 23 substance an application to amend the defence.
 24 There must be some kind of application being made
 25 because Mr Lasok accepts frankly that you can't simply

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1 just get on with it, because even if one finds these
 2 allegations within the four corners of the decision, the
 3 case that we have come to meet is very different to the
 4 case that's now advanced, so something has to happen,
 5 there has to be some procedural step taken.
 6 We say in those circumstances what effectively the
 7 OFT have to do is to persuade the Tribunal to allow the
 8 OFT to run a case which might be within the four corners
 9 of the decision but is essentially a different case.
 10 Now, there are very, very limited powers to amend
 11 a defence, and the Tribunal has the rules. Under
 12 Rule 14 one sees what a defence must contain, and in
 13 particular under Rule 14(3), the defence has to contain
 14 all of the arguments of law and fact that are relied
 15 upon and any directions, and in particular you will
 16 notice, Madam, under (3)(b) that there is a provision
 17 indicating that -- it may seem rather odd for a defence,
 18 but the defence must identify the relief sought by the
 19 respondent, the defendant.
 20 So what in substance is happening here example, and
 21 this is absolutely clear from the first part of Day 28
 22 that I was reading a few minutes ago, is that Mr Lasok
 23 is in effect, without really doing anything, applying to
 24 amend the relief he is seeking in the defence to say
 25 that "I would like part of the decision to be set aside

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1 and part of it to be upheld", so it's application
 2 effectively to amend the defence.
 3 You will recall that in all of the defences they do
 4 actually say something about relief. Just to give you
 5 an example, in the main defence concerning ITL,
 6 volume 4, tab 46, page 307 {C4/46/307}, they do seek
 7 some relief. They seek an order dismissing the appeal.
 8 So what in substance Mr Lasok is trying to do,
 9 without actually articulating it, is he is seeking to
 10 amend paragraph 452 and the similar paragraph in the
 11 other defences to seek some different form of relief.
 12 We know, just while we are back in the rules, under --
 13 I can perhaps give you a cross-reference -- Rule 14,
 14 subrule 7 says:
 15 "Rules 9 and 10 [et cetera] shall apply to the
 16 defence."
 17 If one could please go back to Rule 11, which also
 18 applies to a defence, Mr Thompson showed you this the
 19 other day:
 20 "The ability to make an amendment to a defence under
 21 Rule 11(3)", and under 11(3) where it says:
 22 "The Tribunal shall not grant permission to amend in
 23 order to add a new ground for contesting the decision",
 24 one has to read in there "shall not grant permission to
 25 amend a defence".

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1 The ability to amend is very, very limited. First
 2 of all, matters of law or fact which have come to light
 3 since the appeal was made. No, that's not the case.
 4 (b), not practicable to include such a ground in the
 5 notice of appeal or in the defence. Not the case
 6 because Mr Lasok says that these points were in his
 7 decision in the first place. Then (c), the
 8 circumstances are exceptional. There is nothing
 9 exceptional here.
 10 So in substance what one has is an application to
 11 amend the relief being sought, to seek some other
 12 relief, and that application has to be adjudicated upon
 13 according to 11(3).
 14 Mr Howard has already explained the huge problems
 15 there would be in trying to amend at this stage, the
 16 practical problems. I would summarise those as four
 17 problems.
 18 **THE CHAIRMAN:** Were you the appellant who referred to the
 19 Swain-Mason case?
 20 **MR SAINI:** Yes. I am going to come to that. I am trying to
 21 do it very, very quickly.
 22 Four matters that the Tribunal would have to
 23 consider and four hurdles that have to be overcome,
 24 first of all -- and this is actually made very clear in
 25 the Swain case as well -- that the person seeking to

1 amend has to set out very clearly his case but also at
 2 this stage, not later, he has to show that the amendment
 3 he seeks has a reasonable prospect of success. So on
 4 the basis of the case as it currently is, Mr Lasok would
 5 have to show that the case based on 2(a) and 2(b) is one
 6 that has every reasonable prospect of success. That's
 7 both on the facts and on the basis of some economic
 8 evidence, that first of all the facts show that 2(a) and
 9 (b) are made out, and also that he has a reasonable
 10 prospect of success of showing that they amount to those
 11 restraints amount to an object infringement. He would
 12 have to come to this Tribunal now to do that, not later.
 13 One particular point made in the Swain case,
 14 I believe it was by Lord Justice Lloyd who gave the main
 15 judgment in that case, was that it's not acceptable to
 16 basically set out an outline amendment and then say to
 17 the court, "Let's just see how the evidence develops".
 18 The Court of Appeal said that was not acceptable.
 19 That's one hurdle.
 20 The second is that there would be have to be
 21 an ability on my client's part and on the part of all
 22 the other appellants, to answer that case, and not just
 23 pleadings but we also want the liberty to put in new
 24 evidence.
 25 Just to give you one example, the restraint in 2(b)

1 which is the retailer initiated prohibition. We never
 2 put that to any of our witnesses and none of our
 3 witnesses were cross-examined about it. So one would
 4 have not only pleadings but also both factual evidence
 5 and expert evidence.
 6 My third and fourth points is essentially the need
 7 for factual and expert evidence.
 8 Putting aside those points, a further point made in
 9 the Swain case which represents the current approach in
 10 ordinary civil proceedings is that there are other
 11 public interests at play wherever an application to
 12 amend is made. Once upon a time the position used to be
 13 that you could just about amend at any time because the
 14 ultimate aim of the court was to do justice. That is no
 15 longer the approach under the CPR. The current approach
 16 is that the decision as to whether or not permission to
 17 amend will be given has to be informed by: first of all,
 18 the interest in the finality of litigation; secondly
 19 fairness to private parties who have been harassed by
 20 litigation; and thirdly -- which may or may not be
 21 important but I think it is important in this
 22 Tribunal -- the interest of other litigants who want
 23 timely access to courts.
 24 I am sure there are a queue of people waiting to
 25 enter this court to have their cases heard but they are

1 obviously going to have to be put to the back of the
 2 list. So there is an overwhelming series of hurdles
 3 before Mr Lasok, if he were going to seek to amend. We
 4 are still in this rather Alice in Wonderland world where
 5 he hasn't made an application to amend, but that is
 6 really what he is doing. I am not going to take you to
 7 the Swain case, because I think you have that well in
 8 mind.
 9 I am going to turn then to my second submission,
 10 which is that there is an error in the way Mr Lasok has
 11 approached the powers of the Tribunal under schedule 8.
 12 I may just simply be echoing a point you made before
 13 the short adjournment, Madam, to Mr Howard. If
 14 the Tribunal could please go to schedule 8, Mr Lasok's
 15 submission is that the powers under 3(2), particularly
 16 3(2)(d) and (e), are unconstrained by 3(1), in the sense
 17 that 3(1) imposes no limits, imposes no shackles on the
 18 exercise of the Tribunal's jurisdiction under 3(2). He
 19 made his position very plain. He said that once we
 20 enter the Tribunal, everything is up for grabs, and that
 21 the Tribunal's exercise of powers under 3(2) is not
 22 constrained by the grounds of appeal.
 23 We say the position is exactly completely the
 24 opposite, that the powers under 3(2)(d) and (e) are no
 25 doubt wide but they must be exercised within what we

1 call a jurisdictional box created by 3(1). So 3(1)
2 creates a box, the box is defined by the issues in the
3 appeal, set out in the grounds of appeal, and any
4 exercise of powers under 3(2) must be within that box.

5 We say in fact that our submission is made good both
6 by the Albion Water case and also by the Burgess case,
7 the funeral directors' case, you will recall.

8 In Albion Water it was absolutely clear, see
9 paragraph 208 of the CAT decision, that all the issues
10 that the CAT decided had been raised by the notice of
11 appeal. So issues of dominance and abuse were both
12 raised by the notice of appeal. I think, Madam, you
13 said yesterday that perhaps in Albion Water the CAT had
14 simply, by way of extension, dealt with certain things
15 that were raised. But there wasn't even an extension.
16 The issues that the Tribunal dealt with were fairly and
17 squarely before the Tribunal, by reason of the notice of
18 appeal. So anything that's said by the Court of Appeal
19 has to be taken with some caution, because the Court of
20 Appeal were not dealing with a case where the CAT had
21 dealt with issues that weren't in the notice of appeal.

22 Similarly, in the Burgess case, the Burgesses were
23 not only appealing the finding of abuse, but they were
24 also saying that there was dominance. Again, in their
25 notice of appeal.

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1 By contrast, in the present case Mr Lasok does not
2 even try to suggest that the issues which he would now
3 want the Tribunal to resolve are issues that are raised
4 or debated in the grounds of appeal set out in the
5 notice. So we are completely outside the jurisdictional
6 box.

7 Before I conclude the second of my submissions.
8 I should make it clear that even if the Tribunal were
9 not to accept our submissions as to the limits in
10 relation to 3(2), and there was a discretion to
11 exercise, all of the points I've made earlier and
12 Mr Howard made earlier as to how the discretion should
13 be exercised apply with equal force.

14 Now, finally, I want to deal with an aspect of the
15 Tribunal's powers, and particular provisions I don't
16 think the Tribunal has seen in the rules yet, which in
17 a sense deal exactly with the situation the Tribunal is
18 faced with now.

19 Where we essentially are is that Mr Lasok is saying
20 that his defence, the document by which he defends these
21 proceedings, no longer represents his case as to why
22 there was an infringement. That very issue is
23 contemplated by these rules. Perhaps I can ask you to
24 go back to the rules and please go back, first of all,
25 to the provision dealing with defences. It's

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1 Rule 14(7), and you will recall that I read to you 14(7)
2 which says that:

3 "Rules 9 and 10 except Rules 10(1)(b) and 10(c) and
4 11 shall apply to the defence."

5 We have also looked at the provision about
6 amendments. However, we also know, because Rule 10 is
7 applied, that the rules about power to reject apply. If
8 you would go back to Rule 10, please, and one has to
9 write in here, notice of appeal write in defence.

10 So:

11 "The Tribunal may, after giving the parties
12 an opportunity to be heard, reject a defence in whole or
13 in part at any stage of the proceedings if it considers
14 that the defence discloses no valid defence."

15 That's the position we have reached. One of the
16 questions raised last week in the Tribunal's letter to
17 the parties is: what does the Tribunal do when one
18 reaches the position that we are currently in? Can
19 the Tribunal simply go on and allow the appeal? We say
20 the Tribunal should exercise this power under Rule 10
21 and say that on the basis of a concession by the OFT the
22 defence falls to be rejected, and then if you look at
23 subrule (2) under 10, you can make a consequential
24 order. The obvious consequential order here is that you
25 allow the appeals and set aside the decision.

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1 So the Tribunal has ample procedural powers to deal
2 with the current position, and it's not controversial,
3 and it shouldn't be controversial in this case, that the
4 defence should be rejected, because Mr Lasok effectively
5 concedes that. He is saying that he can no longer
6 defend the case on the current pleaded document. And
7 that's why he is effectively seeking to amend.

8 **THE CHAIRMAN:** Rule 10 is usually exercised clearly before
9 the trial has started.

10 **MR SAINI:** Yes.

11 **THE CHAIRMAN:** And on the basis of an analysis of the
12 document itself rather than an analysis on how the
13 content of that document has been affected by subsequent
14 events. I suppose then it gets us back to the same
15 question I asked Mr Howard, namely: what is there to
16 stop a party jumping up part way through the case and
17 saying "We have now reached a point where the defence
18 should be rejected"?

19 **MR SAINI:** Yes. But you will have seen, Madam, that this
20 makes it clear, Rule 10(1) makes it clear that it can be
21 at any stage of the proceedings. So I quite accept the
22 point that this would be something that would normally
23 apply prior to a trial, but clearly the draftsman had
24 the foresight to see that something might happen in
25 a case at a later stage which meant the defence no

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1 longer represented a tenable position. That appears to
2 be the position we are in. Mr Lasok accepts that.
3 That's why he wants to run what he calls an alternative
4 case.

5 **DR SCOTT:** I did put to Mr Howard that we have not had
6 an application to strike out the defence, which seemed
7 to me one of the logical steps that might be taken by
8 the appellants.

9 **MR SAINI:** Well, we don't need to, because the position we
10 are already in is that Mr Lasok accepts his current
11 defence does not represent his case as a basis for
12 defending the decision. The Tribunal has given the
13 parties an opportunity to be heard, see 10(1), and we
14 ask you to reject that defence and enter judgment. This
15 is the right procedural route.

16 Unless I can assist you any further, those are our
17 submissions.

18 (Pause)

19 **THE CHAIRMAN:** No, thank you very much, Mr Saini. Yes,
20 Mr Flynn.

21 Submissions by MR FLYNN

22 **MR FLYNN:** Madam, sirs, there is obviously a great deal
23 I could say, and in a sense in my client's interest
24 I ought to say, but we are going to keep it short. We
25 have agreed to follow in the wake of Imperial. We have

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1 said in our written submissions, which I here take as
2 read, that we broadly agree with the thrust of what they
3 say, and you have seen our additional points.

4 I think, in the light of something that was said
5 earlier, I will just say we formally reserve our
6 position on remission, should the OFT come back to that,
7 but I think you said in an exchange with Mr Howard that
8 it looked as though the choice was either proceed on
9 some basis or allow the appeals, full stop, so I just
10 put down that marker.

11 So I am not going to say anything about the new
12 points in the speaking note, although we have a great
13 deal to say about it.

14 Plainly we would contest on a jurisdictional basis
15 the idea that it's possible to go forward, as Mr Lasok
16 is suggesting that you should, and we say for the
17 reasons we set out in our paper that Albion Water is not
18 a relevant authority. I refer particularly to
19 paragraph 21.2 of our paper. I think that a discussion
20 that's been had has brought out very clearly that it is
21 highly relevant that Albion Water was a non-infringement
22 decision and one where necessarily the applicant was
23 seeking to prove, or at least show to a sufficient
24 extent, actually that there had been an infringement.

25 So it's very relevant to consider that the applicant

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1 was trying it show abuse as well as dominance. The
2 abuse bit was pretty fully pleaded and the Tribunal went
3 on, if you like, to make the gap between where the
4 regulator had not made a finding of dominance,
5 the Tribunal supplemented that gap. The issue of abuse
6 was fully pleaded out and that was an issue arising in
7 the appeal, in the notice of appeal. So that was within
8 the box, as I think Mr Saini puts it.

9 It is very different when you are dealing with
10 an infringement decision, because what is in the box is
11 a notice of appeal saying why the infringement decision
12 should be set aside. What we are saying is the
13 infringement identified in the decision is not made out
14 and you should set aside that decision. There is
15 nothing in the notice of appeal saying actually it's
16 a different infringement. The example you gave earlier
17 today, Madam, about what if there is a price-fixing
18 cartel decision, and actually what it appears, at the
19 end of the day, is there was not a price-fixing cartel
20 but there was an exchange of information about historic
21 pricing, which might or might not be an infringement,
22 depending on the case.

23 I would say in those circumstances my submission is
24 Albion Water is of no relevance, it's not providing
25 a gateway for the Tribunal to investigate or find some

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1 completely different infringement that's not in the
2 decision. In the example you gave, the appropriate
3 course is to say: no, the OFT has not established the
4 price-fixing cartel. Whether there is something else
5 that can be established is a matter for the OFT at
6 a later stage.

7 That's all I wanted to say on jurisdiction.

8 What I wanted to concentrate on was discretion.

9 **THE CHAIRMAN:** Just a further question on that. Suppose you
10 have an infringement decision, for example suppose in
11 this case there had been more in the decision about
12 whether, for example, having category champions had some
13 anticompetitive effect, say, I can't think at the moment
14 why it would, I am not suggesting it might, but just as
15 an illustration to get to this scenario: there is then
16 in the decision findings that certain aspects of the
17 arrangement constitute infringements but that other
18 aspects of the arrangement either are benign or the OFT
19 is not arriving at a decision in relation to those
20 infringements.

21 **MR FLYNN:** Just so I understand the question, Madam, you are
22 suggesting that the category champion bit would be in
23 the second category?

24 **THE CHAIRMAN:** Yes, that's right. So they don't arrive at
25 any conclusion, we know now that they can't actually

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1 decided they are not infringements, at least of the
 2 European provisions, but they say there is ...
 3 So then one might have a position where those who
 4 have been found to have infringed appeal against the
 5 infringement decision, and say a smaller manufacturer
 6 who's never chosen to be category champion and doesn't
 7 like the whole category champion business wants to
 8 appeal against that non-infringement finding or the part
 9 of the decision that doesn't come to a conclusion on
 10 that. What would be the position then?
 11 **MR FLYNN:** That would be a separate appeal. The smaller
 12 company wouldn't be appealing the main decision, they
 13 would be appealing a non-infringement decision, if you
 14 like, recorded in the principal decision.
 15 **THE CHAIRMAN:** I see. So if their relief, then, in their
 16 notice of appeal, asked for a decision finding that
 17 actually those aspects of the arrangement didn't amount
 18 to an infringement then you would still be within the
 19 notice of appeal --
 20 **MR FLYNN:** They would be like Albion Water and they wouldn't
 21 be like us. But if you just had the cartel appellants
 22 in front of you, the fact that the OFT thought that, you
 23 know, category champions had some questionable aspects
 24 but they hadn't found an infringement about it, and say
 25 the Tribunal was pretty encouraging and said "Actually,

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1 we didn't like the look of those things", if the OFT
 2 then pressed you to make a finding on that, my
 3 submission would be that would not be within the notice
 4 of appeal. That would be trying to find a separate
 5 infringement that's not raised by the appeal, or found
 6 in the decision under appeal, and that's precisely the
 7 boundary I would say that is set and that you should not
 8 cross.
 9 **DR SCOTT:** Imagine a situation where Tesco's decided that
 10 they looked at the decision, they thought the present
 11 appellants were a wicked collection of people who ought
 12 to get their just desserts, but that OFT had got it
 13 wrong, and if Tesco's had brought before us 2(a) and
 14 2(b), or 10(a) and 10(b), then it seems to me what you
 15 are saying is that if Tesco's had in their notice of
 16 appeal said "What was happening here was 2(a) and (b)
 17 and 10(a) and (b)", then we would be in an Albion type
 18 situation. Do I have that ...
 19 **MR FLYNN:** Potentially, you would, sir, if you like, in
 20 another world. It's most unlikely that the Tribunal
 21 will be faced with someone trying to establish through
 22 the Tribunal an infringement of that kind when the OFT
 23 hasn't taken a formal non-infringement decision. That's
 24 the Albion --
 25 **THE CHAIRMAN:** There has to actually be a decision which is

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1 appealed. There has to be an appealable decision within
 2 section 46.
 3 **DR SCOTT:** I am assuming that we have got the decision as it
 4 is, but we have a dissatisfied party who thinks that the
 5 decision isn't the right decision.
 6 **THE CHAIRMAN:** Then they would have to make a complaint to
 7 the OFT. Anyway, we are getting rather far away from --
 8 **MR FLYNN:** I can imagine that if -- Tesco I don't think
 9 would be in a position to do that -- someone came along
 10 and said, "The OFT's decision, not only is it a jolly
 11 good one but there are further infringements they should
 12 have found", the Tribunal might well say your first
 13 course is to take that up with the OFT and see what they
 14 think about it, and we are not going to deal with that,
 15 we are certainly not going to deal with it in parallel
 16 with the main appeal. That would be a subsidiary second
 17 issue, even if it's justicial. I think if one focuses
 18 on the difference between an actual infringement and an
 19 actual non-infringement decision, one sees a very clear
 20 distinction between the cases and that's the principal
 21 submission I wanted to make on that.
 22 Let's assume we are wrong about everything and the
 23 last question in front of the question is: should we
 24 exercise our discretion for something to go forward, and
 25 it almost doesn't matter whether it's something within

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1 the decision that one can discern the decision, or it's
 2 a wholly new and wholly separate case, where are we
 3 then?
 4 Let me make firstly the point that there is nothing
 5 in Albion Water to guide you, because the Court of
 6 Appeal is quite plain -- you were taken to paragraph 125
 7 but it's an important paragraph -- that discretion
 8 didn't arise on the appeal and they were not considering
 9 the exercise of discretion by the Tribunal, they were
 10 only interested in the jurisdictional question of
 11 principle, was it open to the Tribunal to follow the
 12 route that it had. Whether it should have done was
 13 another question entirely.
 14 **THE CHAIRMAN:** I think it was also a question where
 15 permission to appeal was refused.
 16 **MR FLYNN:** Particularly given that Lord Justice Richards
 17 himself had refused all permission, I think that's why
 18 he was quite careful to delineate the scope of the
 19 appeal. Nevertheless that's what he does in the
 20 judgment of the court at paragraph 125. I am just going
 21 to read it, because I think it's a significant
 22 paragraph:
 23 "The written observations of the OFT [who of course
 24 were not the regulator who had taken the decision but
 25 they were intervening, as it were, or making submissions

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1 about the scope of schedule 8] accept that the Tribunal
 2 has jurisdiction under paragraph 3(2)(e) to reach its
 3 own decision in respect of the matter forming part of
 4 the decision under appeal."
 5 Then they go on to say that the fact that it was
 6 taken by the regulator on the basis of the assumption,
 7 an assumption doesn't prevent the Tribunal from going
 8 further and making that into a finding. It says that
 9 the circumstances in which this should happen should be
 10 limited.
 11 Then Lord Justice Richards says:
 12 "That, however, engages the issue of discretion,
 13 which is not before us on this appeal."
 14 So it's impossible to read Albion as in any way
 15 endorsing what the Tribunal had done in that case as
 16 a matter of discretion, and indeed I think if one were
 17 to read anything into the judgment, it would probably be
 18 the other way, given the comments at least about the
 19 number of stages in the proceedings and the length of
 20 the judgment and so forth. Leaving that aside, it is
 21 most definitely not any endorsement of what the Tribunal
 22 had done, even in the circumstances of an Albion case.
 23 So in this open world, if you were to exercise your
 24 discretion and let the case go forward, what steps would
 25 follow? It's accepted by the Office of Fair Trading

1 that it would have to issue a full statement of its
 2 case. Let's not call it a statement of objections but
 3 there would have to be something which set out in full
 4 the new case, something that we could respond to.
 5 Mr Lasok says, well, then the appellants might need
 6 to recall their witnesses. Well, that's not exactly
 7 right. We would need probably to lead new factual
 8 evidence, directed at the new case, because the current
 9 factual evidence is not relevant to the new case. Our
 10 evidence might not be confined in our case to the three
 11 witnesses that were called in this case. You might need
 12 to go further or to find different Asda personnel,
 13 leaving aside the difficulties we have that two of our
 14 chaps are retired and one works for the competition.
 15 So the case would be on a new factual basis.
 16 The OFT might itself want to provide a witness
 17 statement, if it is really being suggested that this is
 18 a JJB type case where you need something from someone
 19 without an axe to grind, whereas my submission would be
 20 all these documents were perfectly open and there is no
 21 suggestion there was anything covert going on. That
 22 evidence would have to come from the manufacturer, given
 23 the way the OFT is now presenting the case, and to say
 24 no more about it, there could be some considerable
 25 problems in getting a statement from Gallaher, who may

1 have entered into an early resolution agreement in
 2 respect of the infringement in the decision, but have
 3 not about any new infringement.
 4 By taking the discretionary route of going into
 5 these proceedings, the Tribunal would be making that
 6 problem its own.
 7 New economic evidence would have to be called. It
 8 is not just a question of putting things to our
 9 economists. They would have to prepare economic reports
 10 at basis of the new case. The existing economic
 11 evidence does not address the case that is being put
 12 forward. It doesn't address the incentives of the
 13 retailers, our evidence doesn't address the incentives
 14 of the retailers to enter into this different form of
 15 arrangement. The adherence analysis would have to be
 16 started again because it would need to be pegged to
 17 wholesale prices, not compliance with the schedules. So
 18 we would have to start again. This is a different
 19 economic case. You would have to have evidence on
 20 whether the price changes observed in response to
 21 wholesale price changes would have been different in the
 22 absence of any alleged restraint.
 23 The OFT might itself want to put in new expert
 24 evidence because Professor Shaffer certainly doesn't
 25 give any support to the new theory except as we read it

1 to say that it could arguably be pro-competitive and you
 2 might need an effects analysis.
 3 Finally, you would have to set it down for a trial
 4 and for legal argument, at some length. This is all
 5 going to take a great deal of time. It's impossible for
 6 that to be done in a year, and we are probably looking
 7 at something like two years. It would have to be
 8 actively case managed throughout. You might have
 9 interlocutory issues with possible appeals on those.
 10 The Tribunal would have to hold the panel together
 11 throughout that whole time and it would involve
 12 a considerable amount of additional cost compared with
 13 a renewed investigation, if that's what the OFT chose to
 14 do.
 15 In my submission, the Tribunal should only go down
 16 this route if it is persuaded that the law and
 17 schedule 8 positively requires it to do so, and nobody
 18 is making that submission to you.
 19 Ultimately the question is, I was going to say does
 20 it appeal to you, that's probably the wrong word, does
 21 this course commend itself to you? What possible public
 22 interest could there be in this? What benefit could
 23 there be through going through a Tribunal process as
 24 compared with those which the OFT itself has? The OFT
 25 has the power to investigate any alleged infringement

1 that it considers worthwhile. Why would the Tribunal
 2 see any benefit in conducting an elaborate and complex
 3 procedure of this kind in respect of these essentially
 4 historical matters?
 5 Madam, those are my submissions just going purely to
 6 the exercise of your discretion right at the end of the
 7 process and in my submission it's pretty plain that you
 8 really should not take that course and these appeals
 9 should be allowed now.
 10 **THE CHAIRMAN:** Thank you very much, Mr Flynn.
 11 Submissions by MR THOMPSON
 12 **MR THOMPSON:** Madam Chairman, gentlemen, the advantage of
 13 coming third is that I'm sure most of the best points
 14 have already been said, so I can be brief.
 15 The basic position is that CGL submits, if it hasn't
 16 already submitted, but it submits it now, that
 17 the Tribunal should set aside the decision, both against
 18 CGL and in reality in its entirety given the nature of
 19 the decision and the way that the reasoning is
 20 essentially rolled up particularly at the beginning of
 21 part 6 of the decision.
 22 Our overall position is that the OFT's case is now
 23 an embarrassment and should be put out of its misery.
 24 We are really in fact surprised that the OFT hasn't
 25 recognised that fact and thrown in the towel.

1 So far as what I want to say today, I still maintain
 2 the points made on Day 27, pages 39 to 49. I made them
 3 in summary form, but in my submission they are sound
 4 points and good points, and I draw them to the attention
 5 of the Tribunal.
 6 I also maintain the points that were made in summary
 7 in the letter that we wrote to the Tribunal on
 8 16 November.
 9 Today I simply want to touch on five points very
 10 briefly. First of all, the case within a case point
 11 which seems to be the OFT's position now. There is
 12 a decision within the decision.
 13 Secondly, and I'll touch on this only in a couple of
 14 sentences, the obvious difficulties facing the new case.
 15 Thirdly, I think it's a point I should address
 16 because for some reason the Co-op was picked out by
 17 Mr Lasok yesterday, and a couple of points were made
 18 specifically at the Co-op, then I'll just briefly say
 19 what we say about 3(2)(e) and our position on the other
 20 appellants. These are all very brief points.
 21 Just in relation to the point that was made before
 22 lunch by the Tribunal in relation to the BT case, I'll
 23 leave that to Ms Rose. I would simply refer in support
 24 of our case to paragraphs 70 and 71 and 76 of the
 25 Tribunal ruling, and in particular the citation of the

1 approach of Lord Justice Jacob admittedly on a judicial
 2 review and the approach to the pleadings referred to by
 3 the Tribunal at paragraph 76 where they say that the
 4 issue was defined by reference to the notice of appeal,
 5 and we would say that applies equally to the defence on
 6 the facts of this case.
 7 On the first point, the case within a case, we would
 8 say that really the OFT's case is a sort of homunculus
 9 or Russian doll approach to the decision. It says that
 10 it has a new case on the facts which is part of the
 11 decision, and our submission on this, and I think it's
 12 echoing something that Mr Howard and others have said,
 13 we would say that this does not assist unless the
 14 decision and the CGL defence articulates a clear and
 15 discrete theory of harm based on those facts. Various
 16 hypothetical points have been put by the Tribunal to
 17 other advocates about what might arise. The first case
 18 I appeared in this Tribunal before was a case called
 19 Genzyme where the OFT had found an abuse based on
 20 a bundling abuse and also a margin squeeze and
 21 the Tribunal set aside the bundling abuse but upheld the
 22 margin squeeze abuse, and so in a sense it was
 23 an example of this, the narrower case was upheld and the
 24 wider case fell. But in that case, there was a fully
 25 articulated theory of exclusionary harm based on the

1 narrower case and so it was perfectly acceptable for
 2 the Tribunal to go ahead on the basis of that narrower
 3 case.
 4 The problem here is that no narrower case was ever
 5 articulated in either the decision or the defence, and
 6 so that there is nothing -- or indeed in Mr Lasok's
 7 opening, and so we would say that since the wider case
 8 is the only case that has ever been run and if that case
 9 fails, then the decision must fail and must be set
 10 aside. If the OFT wants to run the narrower case, the
 11 humunculous or Russian doll within a doll, then it must
 12 issue a new SO or supplementary SO and deal with the
 13 matter itself.
 14 So far as the new case itself is concerned, this is
 15 obviously a matter that would have to be dealt with at
 16 length were the matter to go forward, but it was raised
 17 as an issue by the Tribunal itself in its letter of
 18 10 November, so I will simply say this: first of all,
 19 the 2(a) allegation is in my submission obscure and
 20 wholly unproven. Insofar as it includes an allegation
 21 that the Co-op was bound to raise its prices on
 22 instruction by ITL, then in my submission it is no more
 23 credible than the paragraph 40 case which has now been
 24 abandoned. There is nothing to support it in the
 25 documentary or the witness evidence.

1 Insofar as it is simply an allegation that, as
2 a quid pro quo, for obtaining competitive discounts,
3 a retailer such as CGL was expected to reduce its
4 prices, then in my submission that is an entirely
5 pro-competitive and indeed innocuous restriction which
6 should not trouble the Tribunal.

7 2(b), the retailer case, is, in my submission,
8 an obviously new case and indeed was expressly
9 recognised and argued not to be part of the OFT's theory
10 of harm at paragraph 40 of the CGL defence. CGL had
11 made a point that it had no incentive to reduce its
12 prices, and in response the OFT said, "Well, that
13 doesn't matter because our theory of harm is about
14 manufacturer incentives, so even if retailers have no
15 incentives, that's nothing to do with this case". So in
16 my submission, it's plainly and obviously a new case.

17 **THE CHAIRMAN:** Where did the OFT say that?

18 **MR THOMPSON:** That's paragraph 40 of the CGL defence, Madam.

19 **THE CHAIRMAN:** Right.

20 **MR THOMPSON:** That's core bundle 5/57. {C5/57/1}.

21 **THE CHAIRMAN:** Where had CGL made its point?

22 **MR THOMPSON:** It had made the point at section 2.13 to 17 of
23 the notice of appeal.

24 The points that were made against the Co-op, first
25 of all there was reference to Dr Jenkins as a devotee of

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1 the margin parity assumption. That was pages 30 to 32
2 of the Day 28 transcript, by reference to paragraph 30
3 of the note put forward by the Office of Fair Trading.

4 In reality, in my submission, that simply displays
5 the OFT's lack of understanding of the expert evidence.
6 Dr Jenkins' theoretical analysis was not in fact
7 a margin parity case. Her reports explain in detail
8 that the P&Ds floated on MRPs, which is a different form
9 of restriction on her understanding, and she explained
10 in detail how on Professor Shaffer's own modelling
11 assumptions that type of arrangement could actually
12 sharpen manufacturer incentives. Indeed, that seems to
13 have been to a large extent common ground between the
14 experts.

15 Mr Lasok made some reference to Mr Goodall's
16 evidence at paragraphs 84 and 85 of his note. That's
17 page 82, lines 12 to 14 of the Day 28 transcript. In my
18 submission, that is a complete misreading of the
19 evidence. Mr Goodall merely confirmed that CGL was not
20 prepared to engage in own funded promotional
21 discounting, and that was simply a matter of its ethical
22 policy and its lack of commercial interest in such
23 matters because of its margins.

24 The third point I would make is that at the start of
25 his submissions, Mr Lasok made play of the fact that the

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1 OFT had relied on the contemporary documents. In my
2 submission, that is a transparent figleaf, at least in
3 relation to CGL. The Tribunal will recall that the
4 documentary position was put in issue very strongly by
5 CGL in its opening by reference to annex 4 to the reply,
6 the failure of the OFT to refer to a single document
7 relating to CGL in opening, the failure to put any such
8 document to any CGL witness or ITL witness, and the
9 schedule that was put in by me during our opening on
10 13 October, and also the reference to the Gallaher
11 documents that I went through in some detail, and none
12 of that material has been addressed. So in my
13 submission, the contemporary documents certainly didn't
14 justify the OFT's conduct to date.

15 So far as Albion Water is concerned, I will not say
16 any more than has been said already, with two very short
17 exceptions. First of all, I would adopt what Mr Flynn
18 has said about the OFT's own intervention in that case,
19 and in my submission both the OFT itself and the Court
20 of Appeal would have been quite astonished by the
21 submissions that were made by Mr Lasok in relation to
22 the freewheeling nature of the Tribunal's jurisdiction.
23 That was very much not what the OFT said to the Court of
24 Appeal, and obviously if this matter were to go further,
25 that would be a matter that would warrant further

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1 attention.

2 Insofar as the CAT judgment is concerned, the
3 references I would give, in addition to those that have
4 already been given, paragraph 17 I think Mr Howard
5 referred to, I would also refer to paragraphs 51 and 70
6 in relation to the pleadings point, I would also refer
7 to paragraphs 183 to 197 to the way the Tribunal itself
8 dealt with dominance, 240 in relation to excessive
9 pricing, 284 in relation to margin squeeze, and also the
10 final analysis in the last paragraph of the judgment,
11 paragraph 360, and the basic submission I would make was
12 that, far from a freewheeling jurisdiction, the Tribunal
13 was extremely careful in each of the different cases to
14 work through its specific jurisdiction under the rules
15 and the suggestion that Albion Water is authority for
16 some general freewheeling approach is, in my submission,
17 misconceived.

18 My basic point on 3(2)(e), which has obviously been
19 dealt with in some detail, is that it is an ancillary
20 power to the power to confirm or set aside the decision
21 which is the subject of appeal. It is not
22 a freestanding power to investigate matters outside the
23 scope of the decision or the pleadings.

24 So far as the other retailers or ITL points are
25 concerned, first of all I would endorse strongly ITL's

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1 general account of the OFT's ever-shifting case.
 2 I would endorse Mr Saini's account of the pleadings,
 3 indeed it appears that Mr Saini has to some extent on
 4 consideration adopted the points that I made last week,
 5 and I would endorse others' approaches in relation to
 6 the evidence, both factual evidence and, as I think
 7 I stated at pages 46 to 47 of the transcript of Day 27,
 8 particularly in relation to the expert evidence where,
 9 in my submission, the reality is that there would have
 10 to be a comprehensive re-casting of the expert case if
 11 this matter were to go forward, and that is a very
 12 strong issue that the Tribunal should take into account
 13 in the exercise of its discretion.

14 Thank you.

15 **THE CHAIRMAN:** Thank you very much. Ms Rose, I am wondering
 16 whether we should have a short break now.

17 **MS ROSE:** Madam, can I suggest, I am going to be very short,
 18 so it might be convenient to hear me and then to take
 19 a short break.

20 **THE CHAIRMAN:** Okay.

21 Submissions by MS ROSE

22 **MS ROSE:** Madam, I just want to address two points. The
 23 first is the 080 case that you raised just before lunch.

24 It's obviously a little difficult to draw an analogy
 25 between the Communications Act appeal regime and the

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1 Competition Act appeal regime on this particular point,
 2 because the one difference between section 192 and the
 3 schedule 8, paragraph 3 power is that the CAT does not
 4 have the power under section 192 to take a decision that
 5 Ofcom might have taken, it only has the power to remit
 6 the matter for the decision to be retaken.

7 If you look at the CAT decision in the 080 case, you
 8 can see that this point is noted. If you go to
 9 paragraph 75, the Tribunal makes the point at
 10 paragraph 77 that under section 193:

11 "It is not for the Tribunal to usurp Ofcom's
 12 decision-making role. The Tribunal's role is not to
 13 make a fresh determination but to indicate to Ofcom
 14 what, if any, is the appropriate action for Ofcom to
 15 take in relation to the subject matter that the decision
 16 has to be on and then remit the matter back to Ofcom."

17 So that's actually a distinction between the
 18 Communications Act regime and the Competition Act regime
 19 which means that you do have to treat this decision with
 20 a lot of caution.

21 Having said that, it is of course right to note that
 22 at paragraph 76 it is stressed that the aim of the
 23 appeal is that:

24 "The notice of appeal must set out specifically
 25 where it's contended Ofcom went wrong identifying errors

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1 of fact, errors of law and/or the wrong exercise of
 2 discretion. The evidence adduced will go to support
 3 these contentions, what is intended is the very reverse
 4 of a de novo hearing. Ofcom's decision is reviewed
 5 through the prism of the specific errors that are
 6 alleged by the appellant. Where no errors are pleaded,
 7 the decision to that extent will not be the subject of
 8 a specific review, what is intended is an appeal on
 9 specific points."

10 That's going to the question of the meaning of
 11 the Tribunal considering the appeal on the merits by
 12 reference to the notice of appeal, and that of course is
 13 the same as the wording that's in the Competition Act.

14 Then when we come to the Court of Appeal judgment --

15 **DR SCOTT:** I think just before you turn from that, for those
 16 who are unfamiliar with this, in 78(a) and (b) basically
 17 what he is saying is this is a sharp tool, this is not
 18 an all-embracing --

19 **MS ROSE:** Yes, it is not an all-encompassing eventuation.
 20 Exactly right, sir, yes.

21 So then when you get to the Court of Appeal, the
 22 Court of Appeal at paragraph 63 notes the fact that
 23 there are differences in wording between the
 24 Competition Act and the Communications Act and then
 25 says:

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1 "... but the CAT has a similar function under both
 2 Acts. The same rules apply. Parliament must be taken
 3 to have been aware of the approach taken by the CAT
 4 towards the determination of appeals from the relevant
 5 regulator."

6 Now, the focus of the Court of Appeal is obviously
 7 only specifically on the question of the admissibility
 8 of fresh evidence by an appellant which was not put
 9 before the regulator and they say that it is admissible
 10 but there is no right to admit fresh evidence, it's
 11 a matter for the discretion of the Tribunal.

12 What the Court of Appeal certainly did not do was to
 13 in any way differ from or doubt the conclusions that
 14 were expressed by the CAT in that case as to the task of
 15 the Tribunal on the appeal. If you read the two
 16 decisions together, you can certainly derive the
 17 conclusion that the function of the CAT is intended to
 18 be the same, essentially the same, under both statutory
 19 regimes, even though it's right to say that the CAT has
 20 the extra power under the Competition Act. I should
 21 stress that of course before the Court of Appeal we were
 22 making much of the fact that under the Competition Act
 23 there is a power in the CAT to take the decision, and
 24 seeking on that basis to distinguish the appellate
 25 regime under the Communications Act and the Court of

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1 Appeal was rejecting that very submission.
 2 **THE CHAIRMAN:** And the practice of this Tribunal in the
 3 Communications Act appeals, because of the on the merits
 4 jurisdiction, has in fact been to arrive at a conclusion
 5 as to what should happen so that it's remitted with
 6 directions rather than remitting it in some more general
 7 way. So one can't exaggerate, I think, in the way these
 8 cases in fact are --

9 **MS ROSE:** Well, it depends a little bit, actually. If you
 10 consider a case like the mobile number portability case,
 11 that was a case where it was found that Ofcom had erred
 12 because it had not conducted a sufficient impact
 13 assessment, and in that case the CAT did remit it to
 14 Ofcom for it to re-take the decision with a proper
 15 impact assessment and the CAT didn't in that case seek
 16 to pre-empt what Ofcom might conclude.

17 There is just one final point on the Court of Appeal
 18 judgment, reflected in the postscript to the judgment,
 19 that Ofcom was making the point to the Court of Appeal
 20 that there was a difficulty for the regulator if the CAT
 21 entertained fresh evidence which had not been considered
 22 by the regulator at the time it took its decision.
 23 because Ofcom's point was: how can we take a stance on
 24 the appeal if we haven't evaluated this evidence and
 25 made a decision? We don't actually have a position on

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1 this evidence. The Court of Appeal acknowledged that
 2 concern and said "As a matter of fact, Ofcom doesn't
 3 necessarily have to take an active role in the appeals"
 4 and the Court of Appeal was recognising that as the
 5 regulator of course Ofcom would have to maintain
 6 a neutral and impartial stance in case the matters
 7 should be remitted to it for reconsideration.

8 Madam, I suggest that that also is resonant with the
 9 very startling position in which the OFT has got itself
 10 in this case, because we start from the position that,
 11 as I understand it, it is accepted by Mr Lasok that the
 12 OFT did not find in its decision that the two restraints
 13 which the OFT now contends for constituted an infringing
 14 agreement. It's not suggested that there is any such
 15 finding in the judgment, either as an alternative or as
 16 a part of the decision, it's simply not put forward.

17 That means that the OFT has never taken a decision
 18 that these two alleged restrictions constitute an object
 19 infringement. Indeed, Mr Lasok also accepts that the
 20 OFT has not even put this proposition to its expert
 21 witness, and therefore does not have any economic
 22 evidence to support the proposition that these
 23 restrictions constitute an object infringement. It is
 24 very difficult to understand, on that basis, how it is
 25 that the OFT as a public authority can be seeking in

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1 this Tribunal to put forward a positive case that these
 2 restrictions amount to an object infringement. It's
 3 a very odd situation.

4 Now, we in general terms adopt the submissions that
 5 you have heard from all of the other appellants, and in
 6 particular we adopt the submission made by Mr Saini that
 7 this is a situation in which the OFT's expressly no
 8 longer standing by its pleaded defence, it concedes that
 9 its pleaded defence no longer represents its case.

10 In that situation, the OFT only has two choices, one
 11 of which is to concede the appeal and the other of which
 12 is to seek permission to amend its defence. And yet the
 13 OFT has not sought permission to amend its defence. Of
 14 course there has been a lot of discussion about
 15 jurisdiction under schedule 8, but in a sense we don't
 16 even get to schedule 8 because the current situation is
 17 that there is no pleaded case before this Tribunal
 18 putting forward the propositions that Mr Lasok is
 19 seeking to put forward, and no application has been made
 20 by the OFT to put forward such a case.

21 Now, we submit it's obvious why no application for
 22 permission to amend the defence has been made by the
 23 OFT, because if any such application were made, it would
 24 immediately bring the matter into focus and make it
 25 obvious why the application would have to be refused,

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1 because the OFT would be asking the Tribunal to give it
 2 permission to exercise a discretion to permit the OFT to
 3 amend its defence after 28 days of hearings, after the
 4 factual evidence had concluded, in relation to a case
 5 which the OFT has itself not produced any evidence to
 6 support, no expert evidence, no theory of harm, which
 7 the OFT itself accepts would require completely new
 8 expert evidence, and in a situation in which -- again as
 9 the OFT accepted at paragraphs 79 and 80 of the speaking
 10 note -- the OFT accepts that it has not yet developed at
 11 all any analysis of how these two alleged restrictions
 12 apply on the facts to the individual
 13 retailer/manufacturer agreements.

14 We simply have no factual basis at all, from the
 15 perspective of Shell, of how it is said that Shell was
 16 engaged in what is now alleged to be the agreement or
 17 concerted practice with ITL and Gallaher. That's
 18 a matter of considerable significance for Shell in
 19 particular, because in response to your questioning,
 20 Madam, it was made ultimately clear by Mr Lasok that
 21 they do contend that there was an agreement or concerted
 22 practice between Shell and ITL to fix particular shelf
 23 prices, and without going through it, you will
 24 immediately see why that's a matter of considerable
 25 significance for Shell.

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1 But if they were seeking permission to amend in
2 a situation where no factual case at all is made out
3 against any retailer, we submit it would be doomed to
4 fail. So that's why we are in what Mr Saini aptly
5 called the Alice in Wonderland world where they are
6 seeking to persuade the Tribunal to continue with the
7 appeal on the basis of a pleading that they now
8 acknowledge they cannot sustain, but without even
9 applying to amend that pleading.

10 Such a course, we do submit, would be not only
11 plainly wrong but also in the public law context
12 contrary to the most basic principles of good
13 administration and natural justice and indeed would
14 constitute an abuse of process.

15 Mr Lasok sought to characterise the issue as purely
16 one of procedural fairness, whether or not the parties
17 could be granted their rights of defence. You have
18 heard a whole range of submissions as to why that is
19 inadequate. In any event, procedural fairness is only
20 one aspect of the concept of abuse of process. It is
21 also for this Tribunal to ensure that its processes are
22 operated in such a way as to maintain the integrity of
23 this appellate system, and we submit that what is being
24 put forward by the OFT fundamentally undermines the
25 credibility and integrity of the system under the

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1 Competition Act and before this Tribunal.

2 There are of course very significant practical
3 difficulties in the way of what's been suggested, and we
4 agree with what was said in particular by Mr Flynn about
5 those. We would particularly stress a couple of points.

6 First, that these are purely historic infringements,
7 dealing with events now almost a decade ago, it is not
8 alleged that there is any continuing infringement or any
9 continuing detriment to the public. Shell is in
10 a situation, as the Tribunal knows, where one of our
11 witnesses has moved to Australia. If a new factual case
12 which has still not been announced or pleaded is at
13 some future date to be put forward against Shell, we
14 would then have to have the difficulty of pinning that
15 person down, locating them, and seeking to take yet
16 a further statement from them. We submit that it is
17 simply unjust for us to be placed in that position now,
18 so many years after the events.

19 There is a very strong public interest in both the
20 proportionality of legal proceedings, the
21 proportionality of the conduct of regulators, and the
22 finality of litigation and certainty of litigation, and
23 those public interests are intensely engaged by the
24 course that the OFT urges upon you.

25 I began my submissions many days ago with

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1 a reference to the film Kes. We are no longer in that
2 territory. I need to take you back further in cinema
3 history. We are now looking at Frankenstein. Mr Lasok
4 seeks to dig up from the grave of his decision
5 components -- his word -- of the decision and stitch
6 them together. What you would have is not a living
7 entity but a corpse, and I invite you to bury that
8 corpse now.

9 **THE CHAIRMAN:** Thank you very much, Ms Rose.

10 We will take a break now and come back at 20 to 4.

11 (3.26 pm)

12 (A short break)

13 (3.45 pm)

14 **THE CHAIRMAN:** Mr Lasok, I am not sure what you are planning
15 to cover in your remarks, but there are three points
16 that we would be interested in particular in hearing
17 what you have to say. The first is if you want to
18 respond in any way to the points that Mr Howard and
19 others have made about what was said by the OFT or by
20 you on behalf of the OFT on Day 26 of the proceedings.

21 The second is if you have any comments on the
22 question of remission of the matter to the OFT as
23 a possible course for the Tribunal to take, given that
24 ITL raised this in their skeleton argument.

25 The third is whether you accept the

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1 characterisation that we have been discussing of the
2 restraint in paragraph 2(a) as essentially being
3 a resale price maintenance restraint.

4 Reply submissions by MR LASOK

5 **MR LASOK:** If I can take the remission point first, the OFT
6 hasn't at this stage suggested remission. It was
7 considering it at an earlier stage. But it took the
8 view that we might as well, as it were, bank the
9 progress that had already been made before the Tribunal
10 in these proceedings and move on from there.

11 The alternative, because it involves the matter
12 going back to the OFT, the issue of an SO and so on and
13 so forth would simply be much more cumbersome and
14 involve more time and more costs, it would be more
15 onerous actually for everyone, not just the OFT but also
16 for the appellants.

17 Now, I fully understand the forensic points made by
18 the appellants this afternoon about the consequences if
19 the matter were to proceed before the Tribunal. I have
20 to say that one must express some polite scepticism
21 about the suggestion that any witness of fact other than
22 a tobacco buyer would have to be heard at least so far
23 as the retailers are concerned, because on the face of
24 it all these arrangements took place involving
25 communications between the manufacturer and the tobacco

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1 buyer, and in fact we have already got evidence from the
2 tobacco buyers that the retailers considered appropriate
3 to put forward as witnesses.

4 It is perfectly true and we accept that the experts
5 would have to be asked to consider the current way the
6 OFT sees the case, but we don't regard that as being
7 particularly onerous.

8 So the upshot is that although one fully respects
9 what people say about the next steps, one entertains
10 some doubts as to whether or not there has been a bit of
11 exaggeration about it. But in the round, in our
12 submission, it would just be more efficient to proceed
13 before the Tribunal and that's why we have not proposed
14 remission.

15 **THE CHAIRMAN:** So do you accept that this is where we are,
16 then: if we were to decide that the restraints in 2(a)
17 and 2(b) are not part of the decision, in the sense that
18 we decide to give to that term, and we cannot see at the
19 moment how we could -- well, either we decide we then
20 don't have jurisdiction to keep the appeals on foot for
21 any purpose, or we decide we can't envisage now
22 exercising our powers under paragraph 3(2)(e), that the
23 consequence is that we should now bring these appeals to
24 an end by allowing them and quashing the decision?

25 **MR LASOK:** Following that scenario, that's the decision that

1 the Tribunal would reach.

2 **THE CHAIRMAN:** Yes. Just to push that a bit further, we
3 have a decision here against which only some of the
4 addressees have appealed. I am not sure where that
5 leaves us in terms of setting aside the decision where
6 there are some addressees who have not appealed against
7 the decision. Maybe that's a discussion for another
8 day, if we get to that.

9 **MR LASOK:** That would be for another day, but technically
10 the appeals would be allowed in relation obviously to
11 the appellants. So that that means that the decision
12 would be set aside to that extent only.

13 **THE CHAIRMAN:** Yes. Thank you.

14 **MR LASOK:** Now, the first question that you asked me was
15 about what was said on Day 26, and the position was in
16 the run-up to Day 26 and since then the OFT had been
17 giving serious and ongoing consideration as to the
18 proper way forward, and that wasn't a straightforward
19 matter as it appeared to the OFT. There was
20 a difference of emphasis between what was said on Day 26
21 and what was said on Day 27, but on Day 26 we made no
22 particular concession, as in fact the Tribunal recorded
23 in its judgment, and on Day 27 we articulated the
24 position that we are arguing now.

25 I think that, so far as the phrase "departure from

1 the decision" is concerned which has been bandied about,
2 one needs to bear in mind that the position of the OFT
3 in relation to the use of that phrase has been
4 consistent since it was first used, but a departure from
5 the decision is not the same thing as saying that the
6 matters in issue are not in the decision at all. That
7 needs to be made abundantly clear. I specified
8 yesterday what the departure was.

9 Now, the question about 2(a) and whether or not it's
10 RPM. The way that the OFT looked at the case was and
11 remains that it is not a simple RPM case, because
12 a simple RPM or a classic RPM case is vertical in
13 nature. Although I suppose it has to be said that there
14 are a number of different views as to what the theory of
15 harm lying behind RPM actually is, there is not one
16 single view about it.

17 The feature which struck the OFT in the present case
18 and still strikes the OFT is the horizontal aspects of
19 the arrangements, because both under the case advanced
20 in the decision and under the case that the OFT
21 currently sees to be the case made out on the evidence,
22 the feature that strikes one is this horizontal linking
23 of the prices of competing brands. What actually
24 happened, I think it's well worth bearing this in mind,
25 is that in the decision in paragraph 220 I think it is,

1 the OFT specified which bits it had dropped from the
2 allegations made at the time of the SO and the
3 supplementary statement of objections.

4 Paragraph 220 doesn't refer to RPM as an allegation
5 that was dropped. That largely explains why it is that
6 when you get into the sequence in section 6 which is
7 6.241 to 6.254. The previous paragraph was 2.120, if
8 I got that wrong.

9 When you get into the sequence in section 6 at 241
10 to 254, you have a discussion there which I referred to
11 yesterday that led to a conclusion in 254 that the
12 infringing agreements shared an element that one sees in
13 RPM. So that the position of the OFT is that even the
14 restriction in 2(a) isn't what you could loosely
15 describe as a straight RPM allegation, because it's got
16 this horizontal element, it isn't concerned with the
17 absolute level of prices, it's more concerned with the
18 relativities.

19 Now, a resale price maintenance case is not the same
20 as a parity and differential case. So although you have
21 a restraint that relates to specific pricing points,
22 these specific pricing points are there not as a means
23 of, if you like, overriding the retailer's strategy in
24 terms of its placing of its prices by comparison with
25 its competitors; it's there because of the

1 manufacturer's concern to achieve a relativity within
2 the retailer's stores between that manufacturer's brand
3 and the competing manufacturer's brand.

4 So that's why, although we have got -- if you look
5 at it in terms of a literal understanding of the words
6 "retail", "price", "maintenance", you have "retail",
7 "price", "maintenance", but I was going to make a joke,
8 and I think I ought to forebear from that, because it
9 was a joke about a film, but we have had too many of
10 those.

11 The point simply is that because it's got this
12 horizontal element and it's concerned with parities and
13 differentials between competing linked brands it's not
14 your classic RPM, and that's the position of the OFT in
15 relation to in fact the two restraints that we have, or
16 two restrictions that we have identified, whether you
17 call them paragraph 2 or paragraph 10 doesn't really
18 matter.

19 So that's the answer to that question, but I don't
20 know whether I've answered it fully.

21 **THE CHAIRMAN:** I think you have, and I think that that is
22 why you say that the same theory of harm as is described
23 in the decision is the harm that results from
24 a combination now of this resale price maintenance and
25 the way that the market operates, whereas you used to

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1 say that it derives purely from the restraints accepted
2 under the trading relationship.

3 **MR LASOK:** If one uses that to describe the alteration of
4 the case from one in which it is the retailer, as it
5 were, who does the work to one in which, as in the first
6 restriction, 2(a) or 10(a), you look at it as
7 an agreement or concerted practice between the
8 manufacturer and the retailer whereby the retailer
9 prices in accordance with the instructions and the
10 requests of the manufacturer for the purpose of
11 achieving the manufacturer's parity and differential
12 strategy.

13 The two restrictions go hand in hand, because you
14 need both of them in order to achieve the end result.
15 In a straight RPM case you wouldn't need the restriction
16 2(b) in order to --

17 **THE CHAIRMAN:** That's helpful, because we noticed there
18 wasn't either an "and" or an "or" at the end of 2(a) but
19 you say that one reads it as an "and".

20 **MR LASOK:** Yes.

21 **THE CHAIRMAN:** Yes, thank you.

22 **MR LASOK:** Perhaps because we are discussing the theory of
23 harm, it may be useful to fill out certain details that
24 appear not to have been fully assimilated by ITL. The
25 way we see it is that the manufacturer was in

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1 a situation in which it wanted to implement a parity and
2 differential policy, and thus far there is no contest on
3 the facts. The ordinary and natural consequence of that
4 kind of policy is, as we see it, to reduce the rival
5 manufacturer's incentives to lower prices and increase
6 the rival manufacturer's incentives to increase the
7 prices. Now, that's the current case, the current way
8 in which the OFT sees the infringement. Again, thus far
9 we are not dealing with anything new, with anything that
10 differs from what was in the decision.

11 The manufacturer implemented the parities and
12 differentials itself through the use of instructions to
13 the retailers. It couldn't implement the policy if the
14 retailer was independently pricing. In other words, if
15 the retailer, acting independently, was effectively
16 standing in the way of the manufacturer achieving its
17 intention, which was to control the shelf prices so as
18 to ensure that they were in line with the parity and
19 differential requirements.

20 So the manufacturer needed to ensure compliance by
21 the retailer so that the P&D strategy could be
22 implemented. That led to what we perceive to be now the
23 two elements that we have described in paragraph 2 or
24 paragraph 10, of whichever document that one is looking
25 at.

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1 As I've said, this is not a straight RPM case, and
2 it's also a case which is based upon a combination of
3 both of those restrictions.

4 Given the implementation of the strategy in that
5 way, the harm that results from the restrictions is
6 actually the same as that identified by
7 Professor Shaffer in his reports, and you end up with
8 the same situation in which the P&Ds alter the rival
9 manufacturer's expectations about how the manufacturer
10 with the parity and differential agreement with the --
11 or the concerted practice with the retailer will react
12 to price changes.

13 In that respect, I ought for the sake of
14 completeness again to clarify what seems to be somewhat
15 obscure. In paragraph 51 of yesterday's speaking note
16 we made it crystal clear the fact that our case had
17 departed from the case made out in paragraph 40 of the
18 skeleton argument, because paragraph 51 at the very end,
19 or from the last sentence, says:

20 "The difference between the case made out in the
21 decision and the refined case lies in a different
22 understanding of what was agreed or concerted between
23 the manufacturer and the retailer."

24 Now, if you go to -- just as a practical
25 illustration of this -- the skeleton, which is in core

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1 bundle 4, I think, it's tab 45 at page 24. {C4/45/24}.
 2 Just for a moment focusing, because this is a reply,
 3 and what I want actually to do is simply to respond to
 4 a submission made earlier today by counsel for ITL, and
 5 he focused on paragraph 40(a). So 40(a) is:
 6 "If the retail price of Gallaher's brand increases
 7 then the retail price of ITL's rival brand must also
 8 increase."
 9 Then we have a footnote which sets out the documents
 10 that were cited by the OFT and that appear in the
 11 decision as being relevant to that particular way of
 12 looking at the restraint that had featured in the
 13 decision.
 14 Just pausing there for a moment, today -- I think
 15 the transcript reference is page 3 at lines 13 to 25 --
 16 counsel for ITL said that it was risible to suggest that
 17 ITL would have intended what was said in paragraph 40(a)
 18 to happen. Now, that means that he was submitting to
 19 the Tribunal that any suggestion that ITL had composed
 20 or sent the documents in footnote 41 would be risible.
 21 The problem is that --
 22 **MR HOWARD:** I hesitate to rise, but that is not what I have
 23 submitted. If Mr Lasok wants to make absurd
 24 suggestions, fine, but that's not what I submitted.
 25 It's his reply.

1 **MR LASOK:** So he said that it was risible to suppose that
 2 paragraph 40(a) was a possibility, but the problem is in
 3 the footnote we actually see ITL seeking to achieve the
 4 result that he describe as risible.
 5 **THE CHAIRMAN:** One of the few things we don't have to decide
 6 is whether the restraint in paragraph 40(a) was made out
 7 on the facts as we have so far heard them.
 8 **MR LASOK:** If you look at the documents cited in
 9 footnote 41, you will see these are the ones where
 10 an instruction or request is made to move a price. The
 11 reason for going to this is to show you that in a sort
 12 of rather crystal clear way that the departure from the
 13 case made out in the decision doesn't concern
 14 a departure from the true meaning, if you like, or what
 15 one gleans from the evidence. It is instead a different
 16 interpretation of what the evidence shows.
 17 It is undoubtedly a departure in that sense, because
 18 it is undoubtedly the case -- and we have made this
 19 crystal clear -- that the way that evidence was
 20 interpreted in paragraph 40(a) which we are taking by
 21 way of example is not the way that the OFT thinks that
 22 that evidence is to be interpreted in the light of the
 23 evidence as a whole. It produces a different conclusion
 24 as to how the P&D strategy actually worked through the
 25 particular agreements or concerted practices entered

1 into between the manufacturer and the retailer.
 2 In some respects, that exemplifies the problem that
 3 is before the Tribunal, because it is one of those
 4 situations in fact which is much closer to some of the
 5 illustrations that the Tribunal has been putting to
 6 counsel for the parties and some of the counsel seem to
 7 appreciate. The difficulty we have here is a situation
 8 in which -- let's try and reduce it to a rather simple
 9 case -- the OFT adopts a decision and finds an object
 10 infringement based on certain matters of fact and
 11 an analysis of the facts, which produces the conclusion
 12 set out in the decision that restriction X existed. You
 13 then have an appeal, and in the course of the appeal
 14 a wider view of the evidence is taken because there is
 15 additional material that's put before the Tribunal.
 16 Let's suppose that the Tribunal then concludes, in
 17 the light of that evidence, that it is indeed presented
 18 with an object infringement. An object infringement of
 19 the type or sort or genus described in the decision. It
 20 arises out of the same factual matrix but there is
 21 a difference, and the difference lies in the description
 22 of the restriction.
 23 That description of the description doesn't
 24 radically alter the theory of harm because it's the same
 25 kind of harm. There may be some tweaking with the

1 details of it, but it's the same kind of thing.
 2 However, an alternative case based on this other
 3 restriction is not set out in the decision. So that's
 4 the situation, and the parties before the Tribunal put
 5 forward differing views as to how the matter is to be
 6 resolved, because the appellants say "Well, we have to
 7 have finality, the fact of the matter is that the OFT
 8 analysed the matter in a particular way and it's lost,
 9 therefore the appeals ought to be allowed and we come to
 10 an end of the proceedings".
 11 The OFT puts forward a different way of dealing with
 12 the matter, and the OFT is also seeking finality,
 13 because what it too would like to see is to achieve
 14 finality in relation to the basic question whether or
 15 not there was an infringement of the Chapter 1
 16 prohibition.
 17 Now, the rhetorical question is: what then does
 18 the Tribunal do? And the reality of the position is
 19 that that, reduced to its essentials, is the problem
 20 before the Tribunal today, because that's a fairly
 21 accurate description of what has actually happened. We
 22 can all argue about which bits are out of the decision
 23 and in the decision, and we can say "Well, maybe the
 24 whole of it is out of the decision" because the critical
 25 part of the reasoning which is the description of the

1 restriction wasn't in the decision as an articulated
2 restriction which had attached to it a theory of harm
3 that produced a connection between the beginning, if you
4 like, of the decision and the end of it. We can all
5 have a debate about that.

6 When one reduces it to simplicity, that actually is
7 the situation that we are confronted with, and that's
8 the reason why the OFT has taken the view that the
9 proper way of dealing with the problem is as we propose.

10 I am going to make a related point about this which
11 concerns the debate that has taken place about the true
12 meaning of schedule 8, paragraph 3(2). This is this is
13 the bit where it is said that the Tribunal decides the
14 appeals on the merits and by reference to the grounds in
15 the notice of appeal.

16 If one construes that provision as stating that
17 the Tribunal decides the appeal on the merits and only
18 by reference to the grounds stated in the notice of
19 appeal, which is not actually what the provision says
20 but is a narrow interpretation of the provision, you
21 still end up in our submission with a situation in
22 which, when the appellant challenges a particular aspect
23 of the decision in order to succeed in its appeal,
24 the Tribunal has nonetheless to decide the question at
25 issue on its merits, and that is not a decision we

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1 submit that is based upon some kind of combat between
2 two opposing views because although the issue is raised
3 in the notice of appeal, that's to say the ground in the
4 notice of appeal says, for example, the finding of the
5 decision as to the restriction that was accepted by
6 whoever it is is incorrect. That's the issue, the
7 ground.

8 But the problem is if the Tribunal takes too narrow
9 a view of its jurisdiction and comes to the conclusion
10 that its jurisdiction is concerned basically with
11 deciding which of two theories is right and which wrong,
12 or rather an even narrower one, which is whether or not
13 a challenge is successful, if you forget everything
14 else, you don't end up with a decision on the merits,
15 because these things are not necessarily what is
16 commonly described as a binary question. And you can
17 get situations in which, in the course of the
18 proceedings, when the evidence is looked at, let's say,
19 a third possibility emerges. In our submission, it's
20 not for the Tribunal to say "Well, because in the
21 grounds, in the notice of appeal, only one possibility
22 is raised", it's rather a negative than a positive, "but
23 yet when we look at the merits of the case, we conclude
24 that there is another possibility that has emerged, we
25 close our minds to that and instead we focus only on how

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1 the pleadings have defined the issue between the
2 parties".

3 Because if you go down that route, you are then
4 deciding appeals by reference to formal pleading
5 positions but not by reference to the underlying merits,
6 and that is one of the reasons why, in our submission,
7 the focus of the appellants on things like pleading
8 points and on the idea of a model for the Tribunal
9 proceedings being the model used in straightforward
10 civil proceedings or anything else like that is
11 erroneous.

12 That of course is a point that emerged earlier on in
13 the case law of the Tribunal when the Tribunal was
14 actually looking at the problems that emerged when the
15 evidence before the Tribunal is different from the
16 evidence that was before the regulator, because then at
17 that point you may be moving away from positions adopted
18 both by the regulator and by the appellant.

19 **THE CHAIRMAN:** Yes, but that doesn't matter, to move away
20 from the decision, to an extent; it's moving away from
21 the appeal that objection is taken to here.

22 **MR LASOK:** That's quite right, but as I've submitted, the
23 difficulty is if you say that the ground of appeal acts
24 not so as to identify the issue or the part of the
25 decision that is challenged, but it is instead something

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1 else, the ground is the only reason why, or something of
2 that nature. The problem is that you will not then be
3 able to decide appeals on the merits, particularly in
4 situations in which, as a result of the nature of the
5 administrative processes, the group or class of evidence
6 that the Tribunal receives on an appeal may not be the
7 same as the group or class of evidence that the
8 regulator is looking at, because the regulator of course
9 doesn't have the power to get people to make statements
10 to it if they don't want to, the regulator doesn't have
11 power to cross-examine.

12 Whereas, before the Tribunal, it is commonly the
13 case that the Tribunal has a broader class of evidence
14 that it can look at. As soon as you have this situation
15 in which the material that the Tribunal is working with
16 is broader in class than the material that the regulator
17 can work with, you are going to encounter these
18 situations in which the facts or the conclusions of fact
19 that one draws from the evidence may not be the same as
20 the conclusions that the regulator originally drew, or
21 indeed the conclusions that the appellant has drawn.
22 And the problem is that the function of the Tribunal is
23 not to decide which of A and B has the better case, it's
24 not that kind of a game. The function of the Tribunal,
25 in our submission, is to decide the case on the merits,

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1 and that's how the system works in connection with the
2 enforcement of the competition legislation.

3 That brings me to the reliance placed on the Floe
4 case in the Court of Appeal. Most of the debate in Floe
5 was about a question of the existence of any powers that
6 the Tribunal has once an appeal has been disposed of.
7 So most of Floe is not relevant to the central part of
8 the debate that has been conducted over the last two
9 days, but what is significant in our submission is the
10 description of the options open to the Tribunal, which
11 is in I think paragraph 25 of Floe, because that is
12 a description of what it is open to the Tribunal to do.

13 It's not a description that is limited to any
14 particular factual situation, such as appeals that
15 concern non-infringement decisions, it's a general
16 description and similarly in relation to Albion Water,
17 although Albion arose out of a non-infringement
18 decision, the Tribunal and indeed the Court of Appeal
19 have actually taken care to cast their description of
20 the Tribunal's jurisdiction and its powers in general
21 terms and not by reference to particular factual
22 situations. Indeed, that's one of the points that
23 the Tribunal was very, very careful to do in, I think it
24 was Albion Water itself, it might also have done it in
25 Burgess. The Tribunal may acknowledge that the issue

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1 that it's considering has arisen in the context of
2 a non-infringement decision, but what it then does is to
3 look at the extent of the jurisdiction in a more general
4 way, and that was exactly the approach that was followed
5 by the Court of Appeal in Floe and in Albion Water.

6 Then that brings me to the EWS case, which was the
7 Enron case. In our submission, that's not relevant. In
8 that case there was a specific issue that was before the
9 Court of Appeal, which was: what exactly was the
10 infringement that was binding and that therefore
11 generated a damages claim? There are other provision of
12 the Act which deal with things like which findings are
13 binding. But the point in EWS was the necessity to
14 identify the infringement specifically for the purpose
15 of generating a damages claim that, by reason of its
16 follow-on nature, would not involve any reconsideration
17 of the decision that had been made.

18 Now, that is foreign to the debate that we are
19 conducting before the Tribunal. At its most obvious we
20 are not seeking to identify here a decision that is
21 binding on the Tribunal, because ex hypothesi
22 the Tribunal is here to consider the legality of the
23 OFT's decision. More particularly, when one looks at
24 the appeal process, the appeal process in which
25 the Tribunal is engaged is not a process in which one

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1 seeks to identify some particular part of the decision
2 as being the infringement decision, and then you look at
3 nothing else, because the Tribunal actually has to look
4 at the entirety of the decision.

5 The Tribunal will, I think, be relieved to know that
6 I am rapidly coming to an end, but there are a number of
7 these miscellaneous points that I need to deal with.

8 I should say that I forgot to mention when I was
9 looking at the OFT's view of the anticompetitive nature
10 of these arrangements that, although the appellants have
11 tended to apply the paragraph 2 or paragraph 10
12 restrictions by reference to downward movements, they
13 are in fact concerned with upwards or downward
14 movements, and that's something that, perhaps it was
15 a Freudian slip on the part of the appellants, but it is
16 something that one does need to bear in mind.

17 A related point concerning the theory of harm is the
18 2(b) restriction. It was suggested on behalf of the
19 Co-op that there was something in paragraph 40 of the
20 Co-op defence on this point, but I read paragraph 40 and
21 I can't see what the relevance of paragraph 40 is.

22 So far as ITL is concerned, it asserted -- and the
23 reference in the transcript is Day 28, page 130, lines 9
24 to 15 -- that the 2(b) restriction was not in the
25 decision "in the sense of there being any theory of

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1 harm."

2 Now, sensibly, ITL didn't dispute the fact that the
3 2(b) restriction is actually in the decision, because it
4 is in there, repeated in a number of places. But on the
5 theory of harm point, in our submission one needs to
6 bear in mind that the description of the restrictive
7 nature of the infringement which is set out in
8 paragraph 6.205 and following of the decision deals with
9 the restrictive nature of the infringing agreements.
10 The approach taken in the decision was to look at the
11 infringing agreements and consider them as a whole.
12 That explains why what you don't find in the decision is
13 the articulation of separate theories of harm for each
14 restriction contained in the infringing agreements, each
15 one taken in isolation. Because what the decision did
16 was to wrap them all up together in the infringing
17 agreements and analyse the restrictions in the
18 infringing agreements as a whole.

19 If the analysis had been done restriction by
20 restriction, then probably we wouldn't be having this
21 debate at all.

22 **THE CHAIRMAN:** Are you saying, then, that if one looks at
23 10(b) and then you look at old 40(a) to (d), that what
24 10 or 2(b) is saying is that each of those four
25 restraints in old paragraph 40 did exist but the

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1 restraints only operated in respect of retailer led
 2 retail price changes and not manufacturer led retail
 3 price changes?
 4 **MR LASOK:** You see, I had read 40 as referring to
 5 manufacturer led.
 6 **THE CHAIRMAN:** Oh.
 7 **MR LASOK:** Anyway ...
 8 **THE CHAIRMAN:** Well, I had read it in your favour, I think,
 9 and I think I did make this point at some stage, that,
 10 as I understood it, 40, so far as the restraints are
 11 concerned, putting aside the theory of harm for the
 12 moment, dealt with both increases of retail price or
 13 decreases both triggered by -- Mr Howard is shaking his
 14 head. Let me just finish anyway. Both -- or didn't
 15 distinguish, if I can put it like that, between
 16 manufacturer led and retail led.
 17 **MR HOWARD:** I think you can see from 41, it is actually
 18 clear, and I think this is common ground. 40 is only
 19 dealing with the situation where something is induced by
 20 the manufacturers, that's why 41 -- that's why we have
 21 the debate about that, that is dealing with the position
 22 of the retailers, doing something of their own accord.
 23 **THE CHAIRMAN:** I see, so you read 41 as meaning insofar as
 24 those restraints apply for retailer led, those fall
 25 within the category of constraints that are all

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1 constraints placed on the infringing agreements but not
 2 within those four permutations, it's not put very--
 3 **MR HOWARD:** 2(b), if it was in the skeleton at all, was in
 4 paragraph 41.
 5 **THE CHAIRMAN:** Right. So I have misunderstood that, then.
 6 **MR HOWARD:** You will remember my point was, made on more
 7 than one occasion, is that none of that, what is in
 8 paragraph 41, is part of the decision.
 9 **MR LASOK:** The problem with that is that's completely wrong.
 10 My learned friend has never attempted to make that point
 11 good.
 12 **MR HOWARD:** I have made it repeatedly and I have asked
 13 Mr Lasok repeatedly to show us where in the decision
 14 that featured, and he has never once sought to do it and
 15 it would be a very odd thing now in the reply to do it.
 16 **MR LASOK:** This is getting ridiculous.
 17 **THE CHAIRMAN:** Wait a minute. Perhaps it doesn't make any
 18 difference, if you accept, Mr Lasok, that the true issue
 19 is whether 2(b) gives rise to the same harm as is
 20 covered in the theory of harm in the decision.
 21 **MR LASOK:** 2(b) applies to the same harm, and 2(b) is in the
 22 decision, it always has been in the decision. One of
 23 the difficulties with Mr Howard's case is that, if you
 24 are trying to contend that 2(b) isn't in the decision,
 25 then you have to read paragraphs like 6.7 and 6.108 in

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1 an extremely weird way. So, for example, if you go to
 2 6.7, it says at the end of the first line:
 3 "The restriction on a retailer's ability to
 4 determine its retail prices for competing tobacco
 5 products imposed by each of the infringing agreements
 6 was, by its very nature, capable of restricting
 7 competition."
 8 It goes on:
 9 "In particular, the manufacturer's parity and
 10 differential requirements precluded the retailer ..."
 11 and so forth.
 12 In order to arrive at Mr Howard's interpretation of
 13 6.7, you have to read that as saying something like:
 14 otherwise than in respect of a retailer initiated change
 15 of price, the restriction on a retailer's ability and so
 16 forth. You would have to introduce words into all this
 17 that are not there.
 18 A similar thing occurs in relation to 6.108.
 19 **THE CHAIRMAN:** Well, we will need to go back to look at the
 20 decision, but it may be that the distinction that I am
 21 trying to draw isn't actually an important one.
 22 **MR LASOK:** That's for the Tribunal. I think it's much
 23 easier at this stage to make the point that if one looks
 24 at the -- and I can make it generally, I've given you
 25 two examples, 6.7 and 6.108 -- paragraphs like that and

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1 tried to read them in such a way as to leave out 2(b),
 2 you would have to introduce words that simply are not
 3 there. Their ordinary and natural meaning is such that
 4 they comprise 2(b) and there cannot really be any
 5 serious dispute about the fact that 2(b) was part of the
 6 infringing agreements. The reality is that if you
 7 hadn't had 2(b), then the parity and differential
 8 strategy would have fallen apart. What would have
 9 actually happened is that the appellants would have used
 10 that argument as their prime argument in the appeals,
 11 and that never happened.
 12 **DR SCOTT:** And to be fair, we did talk about the steady
 13 state situation with a number of the witnesses.
 14 **MR LASOK:** Yes, quite so.
 15 Now, that I think brings me to a brief observation
 16 about Fiona Corfield, because counsel for ITL
 17 represented that his favourite case said something that
 18 in fact it doesn't say. So far as a witness is
 19 concerned, if a party calls that witness, there is
 20 nothing to prevent the party from submitting that the
 21 witness has made a mistake or has forgotten something.
 22 What is not generally permitted is to attack the credit
 23 or credibility of the witness, and there are processes
 24 you do for that.
 25 But the Court of Appeal case he cited is quite

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1 helpful on that point, because it makes it clear that
 2 there is nothing to prevent the OFT from pointing out
 3 that Ms Corfield's evidence has to be seen in the round,
 4 and if she made a mistake, then she made a mistake.
 5 Going back to paragraph 40, one has to bear in mind
 6 it was actually concerned with summarising in
 7 an abstract and stylised way what ITL had set out in its
 8 skeleton argument, and it was concerned with the
 9 question of implementation of a parity and differential
 10 arrangement. It doesn't refer to who's implementing it,
 11 although the footnotes refer to documents that include
 12 manufacturer led price movements.
 13 Then I think I ought to make this point: in relation
 14 to some of the pleading points that have been made, in
 15 our submission this is not a case in which an amendment
 16 of the defence is at all relevant, because it's actually
 17 concerned with the decision rather than the defence.
 18 There is a point about independent investigations.
 19 The phrase "independent", "roving", "freewheeling
 20 investigations" have been bandied around, but it needs
 21 to be borne in mind that we are not proposing
 22 an independent, roving or freewheeling investigation.
 23 What we are actually raising is the continuation of the
 24 proceedings for the purpose of addressing the evidence
 25 that has emerged in these appeals concerning this

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1 particular decision and these particular infringing
 2 agreements. So it has not got this sort of free ranging
 3 character that has been suggested by the parties.
 4 Finally, I think that I need to make this point, it
 5 has a preamble to it. In the heat of the moment one
 6 tends to sometimes make an observation that sounds good
 7 at the time, but in retrospect perhaps it's not as fine
 8 sounding as it was when it was first uttered. So when
 9 advocates do this kind of thing, it's not the kind of
 10 thing that I am particularly worried about. That's the
 11 end of the preamble. The OFT has asked me to say this:
 12 it finds it regrettable that counsel for ITL has
 13 considered it appropriate to make a number of serious
 14 allegations suggesting that the OFT lacks propriety in
 15 its conduct of proceedings, including the proceedings
 16 before this Tribunal. The OFT considers that it takes
 17 its responsibilities as a public body very seriously,
 18 both in the administrative process and when it is
 19 defending an appeal before the Tribunal. If you just
 20 give me a minute, I'll check if there is anything else
 21 that I need to say. (Pause).
 22 Those are my submissions.
 23 **THE CHAIRMAN:** That should conclude the proceedings, unless
 24 there is anyone who is really burning to say anything.
 25 Mr Howard, you are burning, yes.

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1 Further submissions by MR HOWARD
 2 **MR HOWARD:** I literally want to spend one minute, because
 3 there are two points, other than that last point, that
 4 emerge from what Mr Lasok said.
 5 One, it just occurred to me why Mr Lasok's
 6 submissions are directing you down the wrong route, and
 7 that's his submission to what on the merits means, and
 8 it's a total misunderstanding of the statutory
 9 provisions. You need to contrast an on the merits
 10 appeal, the CPR 52.11, which provides that an appeal
 11 generally, and that was one of the changes in the CPR,
 12 will be limited to a review. There is a difference that
 13 in the Court of Appeal the general approach is review,
 14 occasionally it's re-hearing. And that's the point
 15 about a merits appeal, it allows you to look at the
 16 evidence completely, you are not simply deciding, you
 17 are not simply reviewing the decision of the OFT. So
 18 it's not meant to give you this wide-ranging
 19 jurisdiction. You have probably already understood
 20 that.
 21 The other point on 2(b), I just refer you to Day 1
 22 of the transcript, page 152, when I explained what the
 23 position was in relation to paragraph 41, and you will
 24 also see the exchange with the Tribunal on pages 154 to
 25 156, and particularly the Chairman said to me:

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1 "Because the theory of harm is based on competition
 2 at the wholesale level and not at the retail level."
 3 To which I answered:
 4 "Exactly. That's the whole thing."
 5 And that's what the OFT's decision and
 6 Professor Shaffer's report was about.
 7 **THE CHAIRMAN:** Do you mean Day 1, the first day of this
 8 whole trial?
 9 **MR HOWARD:** I do.
 10 **THE CHAIRMAN:** What are you referring to? Paragraph 51 of
 11 what, though?
 12 **MR HOWARD:** Paragraph 41 of the OFT's skeleton. I addressed
 13 why paragraph 41 was not part of the case.
 14 **THE CHAIRMAN:** Yes.
 15 **MR HOWARD:** Where we got to is you make the point to me:
 16 "Because the theory of harm is based on competition
 17 at the wholesale level and not at the retail level."
 18 And that's the whole point.
 19 Finally I don't think I need to respond to the point
 20 that Mr Lasok made, other than to say I entirely stand
 21 by every single submission I have made, including
 22 submissions about the unsatisfactory way in which the
 23 OFT has conducted these proceedings. I do not withdraw
 24 a single word of criticism, and I would expect in your
 25 judgment in due course that you will have something to

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1 say about the way in which these proceedings have been
 2 conducted.
 3 **THE CHAIRMAN:** We will now then retire to consider what we
 4 are going to do. We appreciate, of course, the parties
 5 will want to know as soon as possible where they stand
 6 in relation to the continuation of these appeals, and we
 7 will therefore endeavour to produce a ruling as quickly
 8 as possible, although you will appreciate these issues
 9 are quite complex. We therefore continue with the
 10 adjournment of the hearing for the time being.
 11 Finally may we just thank the parties for their
 12 submissions and all the hard work that's gone into this
 13 case thus far, and we will let you know through the
 14 usual channels when we are ready to hand down the
 15 ruling.
 16 **MR HOWARD:** Firstly, can I thank you, but secondly, is it
 17 fair for us to assume that we are released in the sense
 18 that one obviously has one's diary booked.
 19 **THE CHAIRMAN:** If you want to come back tomorrow, Mr Howard,
 20 you can, but we won't be here!
 21 **MR HOWARD:** Not least because it's a Saturday and on Monday
 22 I have other things to do. I am simply saying that
 23 obviously we shouldn't regard days which previously were
 24 sitting days as days that we have to keep free for the
 25 moment.

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1 (Pause)
 2 **THE CHAIRMAN:** I don't wish to say anything that prejudices
 3 of course the outcome of the submissions we have just
 4 heard, but I think that realistically, even if we were
 5 to decide that this was going to continue in some form,
 6 there would need to be a further CMC to discuss in what
 7 way it was going to continue and what the timetable was
 8 going to be. And we would, if necessary, fix that CMC,
 9 having regard to counsel's commitments as at the time
 10 that we come to fix it. We don't expect everyone to
 11 keep free the days that were otherwise fixed for this
 12 hearing in case of that eventuality. I think that's the
 13 most I can say.
 14 **MR HOWARD:** Thank you very much.
 15 (4.50 pm)
 16 (The court adjourned)

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