

Case No. 1008/2/1/02

New Court  
Carey Street  
London WC2A 2JT

18 March 2003

Before:

SIR CHRISTOPHER BELLAMY  
(President)  
PETER CLAYTON  
PETER GRANT-HUTCHISON

BETWEEN:

(1) CLAYMORE DAIRIES LIMITED

(2) EXPRESS DAIRIES PLC

Applicants

-v.-

DIRECTOR GENERAL OF FAIR TRADING

Respondent

supported by

ROBERT WISEMAN DAIRIES PLC  
ROBERT WISEMAN & SONS LIMITED

Interveners

Mr Nicholas Green QC (instructed by Messrs Ashurst Morris & Crisp) appeared for the applicants.

Mr George Peretz (instructed by the Treasury Solicitor) appeared for the respondent.

Mr James Flynn (instructed by Messrs Herbert Smith) appeared for the interveners.

Heard at New Court, London, on 8 January 2003

**JUDGMENT (Admissibility) (Non-confidential version):**

**18 March 2003**

Note: Excisions in this judgment relate to commercially confidential information: Section 56 and Schedule 8, paragraph 4(3) of the Competition Act 1998.

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## I INTRODUCTION

1. By an application dated 6 November 2002 the applicants, Claymore Dairies Limited (“Claymore”) and Express Dairies plc (“Express”), seek to challenge:
  - (a) the decision of the respondent, the Director General of Fair Trading (“the Director”), evidenced by a letter of 9 August 2002, to close the file on his investigation begun on 26 October 2000 into an alleged abuse of a dominant position, in breach of the Chapter II prohibition imposed by section 18 of the Competition Act 1998 (“the Act”) by Robert Wiseman Dairies plc and Robert Wiseman & Sons Limited (“Wiseman”) in relation to the supply of fresh processed milk in Scotland; and
  - (b) the Director’s decision of 6 September 2002 refusing to withdraw or vary his decision of 9 August 2002 under section 47(4) of the Act.
2. According to Claymore/Express, the Director has made “a decision as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b) of the Act. By letter of 21 August 2002, Claymore/Express invited the Director to withdraw or vary that decision under section 47(1), but the Director declined to do so in his letter of 6 September 2002. In consequence, say Claymore/Express, they are entitled to appeal to the Tribunal by virtue of the combined effect of sections 47(4), 47(6) and 48 of the Act. On the substance, Claymore/Express contend that the Director’s decision, as communicated by the letter of 9 August 2002, is inadequately reasoned and erroneous in law and fact; and that the Director should have found that Wiseman was guilty of abusing a dominant position in the supply of fresh processed milk to “middle ground” retailers in Scotland, contrary to the Chapter II prohibition.
3. The Director, for his part, has taken the preliminary point that his letter of 9 August 2002 is not a decision “as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b). Hence section 47(1) of the Act has no application, and there is no “appealable decision” which can be brought before the Tribunal.
4. A similar contention has been rejected by the Tribunal on two previous occasions, namely in *Bettercare Group Limited v Director General of Fair Trading* [2002] CAT 6, [2002] Comp AR 226 and *Freeserve.com v Director General of Telecommunications* [2002] CAT 8, [2003] CompAR 1. In both those cases, the Tribunal ruled on its jurisdiction as a preliminary issue. There was no appeal from either judgment, and in both cases the Tribunal went on to consider the merits: see *Bettercare Group Limited v Director General of Fair Trading* [2002] CAT 7,

[2002] CompAR 299, and *Freeserve.com v Director General of Telecommunications*, not yet decided, [2003] CAT [4].

5. At a case management conference on 9 December 2002, the Tribunal ordered the question of whether the Director has taken an appealable decision under sections 46(3)(b) and 47 of the Act should be determined as a preliminary issue in the present case. In our view, the determination of that preliminary issue turns largely on the application of the principles set out in the preliminary judgments in *Bettercare* and *Freeserve* cited above.
6. On the same occasion the Tribunal also directed that the question of the “location of the proceedings”, namely whether these are proceedings before a tribunal in England and Wales, or before a tribunal in Scotland, under Rule 16 of the Competition Commission Appeal Tribunal Rules 2000 SI 2000 no. 261 (“the Tribunal Rules”) be dealt with as a preliminary issue. At this stage, that issue is principally relevant to the question whether any appeal from this decision of the Tribunal lies to the Court of Appeal, or to the Court of Session.
7. This decision deals only with those preliminary issues. We set out the background, based on the material before us, only to the extent necessary to place the preliminary issues in their factual context. We are not at this stage to be taken as making any findings on the underlying facts of the case.

## **II BACKGROUND**

### *The Scottish milk market*

8. The volume of the market for fresh processed milk in Scotland is around 565 million litres per annum. Most consumers live in the Central Belt, where the bulk of Scotland’s population resides. Retailers of milk may be divided into three categories: supermarkets, who account for around 48 per cent of household sales; “middle ground” retailers, i.e. the smaller supermarkets, convenience store chains, symbol groups (e.g. Spar) and individually owned stores and corner shops, who account for about 42 per cent of household sales; and “doorstep delivery” sales, which account for the balance of 10 per cent of household sales. In addition, there are non-retail customers, such as hospitals, schools and the armed forces.

### *The parties*

9. Express is one of the leading processors and suppliers of fresh processed milk and other dairy products in the United Kingdom, principally in England. It appears from its published accounts that Express’s turnover in all products was some £889 million for the year ended

31 March 2002. In that year Express's operating profits before interest and tax, but after exceptional items, were £11.6 million. Express's net assets at 31 March 2002 were £31.7 million.

10. Claymore's sole activity is the processing of raw milk into liquid milk at its dairy in Nairn, and the sale of that processed milk, principally in the North of Scotland. Claymore supplies many geographically-isolated and sparsely-populated areas, including the Western Isles.
11. Claymore's dairy at Nairn was opened in 1991 by the then North of Scotland Milk Marketing Board ("the NSMMB"). When the NSMMB, a statutory organisation, was wound up in 1994, the dairy at Nairn was transferred to a voluntary co-operative of dairy farmers, the North of Scotland Milk Co-operative Society Limited ("NSMCSL"). Until 1998 Claymore was the wholly owned liquid milk processing business of NSMCSL.
12. In December 1998, Express acquired a 51 per cent interest in Claymore, this being subsequently increased to 75 per cent. The remaining 25 per cent of Claymore is owned by the North Milk Co-operative, which is the successor to NSMCSL. Most of the dairy farms in the surrounding area belong to the North Milk Co-operative, and supply their raw milk to Claymore's dairy in Nairn.
13. According to its draft accounts for the year ended 31 March 2002 Claymore's turnover was some £16.4 million with an operating loss of £2.5 million.
14. Wiseman is the largest processor of fresh milk in Scotland, and is also active in England. It owns three processing dairies in Scotland, at Glasgow, East Kilbride and Aberdeen, and two in England, at Manchester and Droitwich Spa. Wiseman supplies processed liquid milk to a wide range of retail and non-retail customers. According to its published accounts, Wiseman's total turnover was £371 million for the year ended 30 March 2002. For that year, Wiseman's operating profits before interest and tax were £18.8 million, and its net assets at 30 March 2002 were £77.7 million. We are told that more than half of Wiseman's turnover is in England and Wales, with the remainder in Scotland.

#### *Market shares*

15. According to Claymore/Express, Wiseman has at least 74 per cent, and possibly as much as 85 per cent, of the market for fresh processed milk in Scotland. It has taken over a number of dairies in recent years, including Scottish Pride, which was subject to a reference to the

Monopolies and Mergers Commission (“the MMC”) under the Fair Trading Act 1973 (see Cm 3504, 1996). In 1999 Wiseman acquired Gilmours, which Express had also sought to acquire. Claymore accounts for around 6 per cent of sales of fresh processed milk in Scotland.

*Wiseman’s alleged reaction to the acquisition by Express of a stake in Claymore*

16. Claymore/Express contend that Wiseman reacted to Express’s acquisition of a stake in Claymore in December 1998 by a sustained campaign of anti-competitive practices, targeted against Claymore, and designed to preserve the de facto monopoly enjoyed by Wiseman in the supply of liquid processed milk in Scotland. According to Claymore/Express, Wiseman’s assault was targeted against Claymore’s middle ground customers in Northern Scotland.
17. The anti-competitive practices alleged by Claymore/Express are principally
  - (a) the targeting by Wiseman of Claymore’s existing middle ground customers with various deals designed to ensure that those customers would in future deal exclusively with Wiseman;
  - (b) the offer by Wiseman of below-cost prices to Claymore’s existing middle ground customers; and, in particular
  - (c) the offer by Wiseman of “all of Scotland” deals at low prices to Claymore’s principal middle ground customers such as the Co-operative Wholesale Society Limited (“CWS”), Alldays, Aberness (the supplier for the Mace symbol group), Morning Noon and Night, and C J Lang (Spar).
18. According to Claymore/Express, these tactics began early in 1999, immediately following the acquisition by Express of its stake in Claymore.
19. According to Claymore/Express, by mid-1999 many of Claymore’s middle ground customers – representing a substantial proportion of Claymore’s business – had switched to Wiseman as a result of Wiseman’s anti-competitive practices. In consequence, by mid-1999 Claymore’s business, which had previously been profitable became, and has apparently remained, loss-making. An attempt by Claymore to supply customers in the Central Belt from its dairy in Nairn ended, as we understand it, in 2001.

*The initial complaint in 1999*

20. On 31 March 1999, and again on 6 May 1999, Claymore/Express complained to the Director about Wiseman’s “abusive practices” in Scotland. At that time the Chapter II prohibition

under the Competition Act 1998 was not yet in force. Accordingly, Claymore/Express asked the Director to refer the matter to the Competition Commission, the successor to the MMC, for investigation and report under the Fair Trading Act 1973.

21. On 21 September 1999, we are told, a meeting took place between Claymore/Express and the Director's officials to discuss the complaint further. We are told that Claymore/Express followed this up with a letter to the Director dated 19 October 1999.

*The reference to the Competition Commission, 3 February 2000*

22. On 3 February 2000 the Director, in exercise of his powers under the Fair Trading Act 1973, referred to the Competition Commission "the matter of the existence or possible existence of a monopoly situation in relation to the supply of fresh processed milk to middle ground retailers". "Middle ground retailers" are defined in the reference as retailers who are neither Asda, Marks & Spencer, Safeway, Sainsbury's, Somerfields, or Tesco, nor small retailers delivering direct to households.

23. The effect of that reference was to require the Competition Commission, pursuant to sections 49(1) and 50(1) of the Fair Trading Act 1973, to investigate and report to the Secretary of State on the questions whether a monopoly situation existed and, if so,

- (a) by virtue of which of the provisions of sections 6 to 8 of the said Act that monopoly situation is to be taken to exist;
- (b) in favour of what person or persons that monopoly situation exists;
- (c) whether any steps (by way of uncompetitive practices or otherwise) are being taken by that person or persons for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way;
- (d) whether any action or omission on the part of that person or persons is attributable to the existence of that monopoly situation and, if so, what action or omission and in what way it is so attributable; and
- (e) whether any facts found by the Commission in pursuance of their investigations under the preceding provisions of this paragraph operate or may be expected to operate against the public interest."

The Commission was required to confine its investigation to Scotland and to report within nine months.

24. The group of members of the reporting panel of the Competition Commission who conducted that inquiry were Mrs D P B Kingsmill, a deputy chairman of the Commission and chairman of the inquiry, Professor M Cave, Mr A T Clothier and Mr P Mackay CB.



25. Claymore/Express made lengthy written submissions to the Competition Commission during the course of its investigation, and also attended 3 oral hearings, including one on 27 April 2000 at which both they and Wiseman were present.
26. The Competition Commission completed its report on 23 October 2000. The report runs to 261 pages. The Secretary of State for Trade and Industry published the report on 22 December 2000: see *Scottish Milk* (Cm 5002).

*The Scottish Milk Report*

27. In its report the Competition Commission found that a “monopoly situation”, within the meaning of section 6(1)(b) of the Fair Trading Act 1973, existed in favour of Wiseman because it supplied about two-thirds of fresh processed milk in Scotland (paragraph 2.68). However, the group conducting the inquiry were divided in their assessment of Wiseman’s actions, and as to whether any of the facts found operated, or were likely to operate, against the public interest.
28. In brief, and as far as now relevant, Mrs Kingsmill and Professor Cave considered
  - (i) that the supply of fresh processed milk to middle-ground retailers in Scotland constituted a separate market (paragraph 2.57);
  - (ii) that Wiseman had sought an exclusive supply arrangement with Aberness, a large retailer based in Aberdeen supplying “Mace” stores (paragraph 2.107);
  - (iii) that Wiseman had entered into “all of Scotland” contracts with Claymore’s former customers (particularly CWS) at prices which did not cover Wiseman’s average total costs (“ATCs”), and on some assumptions their average variable costs (“AVCs”), for the purpose of undermining Claymore/Express’s continued presence in Scotland (paragraphs 2.118 to 2.126, 2.138); and
  - (iv) that the facts found in the inquiry operated, and may be expected to operate, against the public interest (paragraphs 2.140 to 2.145).
29. On the other hand, Mr Clothier and Mr Mackay considered
  - (i) that there was no separate market for middle-ground retailers in Scotland but a single “Great Britain” market, consisting of larger and smaller supermarkets and other large middle-ground retail chains and symbol groups, although smaller independent stores constituted a separate market in Scotland (paragraph 2.56);

- (ii) that, although the CWS stores that Claymore previously serviced were gained by Wiseman at a price below ATCs, and possibly below AVCs, the contract should be viewed on the basis that it was for all CWS's stores in Scotland. On that basis, the price offered was above AVCs and could not, in itself, be viewed as anti-competitive (paragraphs 2.129 to 2.131);
  - (iii) that Wiseman's pricing was a "defensive and matching response" to an aggressive sales campaign by Claymore/Express offering prices that were likely to cause Wiseman to make losses (paragraphs 2.132 to 2.137);
  - (iv) that the matter should be seen as part of a wider rivalry between the United Kingdom's largest processor (Express) and a rapidly growing dairy (Wiseman), in which Wiseman was competing "head-to-head" with Express in England; in such circumstances Wiseman's reaction was "a legitimate response to the arrival of a major and deep-pocketed competitor" (paragraphs 2.146 to 2.152); and
  - (v) that, in consequence, the facts found in the inquiry did not operate, nor would be expected to operate, against the public interest (paragraphs 2.153 to 2.160).
30. Since Mrs Kingsmill cast her chairman's casting vote in favour of the conclusion that the facts found by the Commission operated, and may be expected to operate, against the public interest that was, formally speaking, the Commission's conclusion in its report (paragraph 2.161). However, no action could be taken on the Commission's report because the conclusion was not that of at least two-thirds of the members of the group conducting the inquiry: see Schedule 7, paragraph 20 of the Competition Act 1998, replacing Schedule 3, paragraph 16(2) of the Fair Trading Act 1973.
31. However, at paragraph 2.163 of the Competition Commission report, the group noted:
- "that the Competition Act 1998 has been in force since March 2000; that it prohibits anti-competitive agreements and abuses of a dominant position; and that in the event of a breach of either prohibition measures may be taken, including the imposition of a fine. The Group has no locus to consider, and has consequently reached no view on, whether either prohibition has been breached by any of the companies mentioned in this report."
32. The press release issued on behalf of the Secretary of State on 22 December 2000, the day of the publication of the Commission's report, states that:
- "The Secretary of State has asked the [Director] to keep the market under close review with regard to potential infringements of the prohibitions in the [Competition Act]."

*The opening of the Chapter II investigation*

33. The Chapter II prohibition imposed by section 18 of the Competition Act 1998 came into force on 1 March 2000, while the Competition Commission’s investigation was in progress. Section 18 of the Act provides:

“18.–(1) ... [Any] conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

- (2) Conduct may, in particular, constitute such an abuse if it consists in–
- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
  - (b) limiting production, markets or technical development to the prejudice of consumers;
  - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

- (3) In this section–

“dominant position” means a dominant position within the United Kingdom; and

“the United Kingdom” means the United Kingdom or any part of it.

- (4) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter II prohibition”.”

34. In a 13-page letter of 5 April 2000 – i.e. while the Competition Commission investigation was in progress – Claymore/Express requested the Director to adopt interim measures, under section 35 of the Act, to protect Claymore from irreparable damage, pending an investigation by the Director of an infringement by Wiseman of the Chapter II prohibition. As far as we know, the Director did not take any action on that request.

35. However, on 26 October 2000 – that is to say, almost immediately on receiving a copy of the Competition Commission’s report and before its publication – the Director opened an investigation into whether the activities of Wiseman infringed the Chapter II prohibition. Under section 25(b) of the Act, the Director may conduct such an investigation if there are reasonable grounds for suspecting that the Chapter II prohibition has been infringed.

*The opening of the Chapter I investigation*

36. Meanwhile, in June 2000 the Director had also opened an investigation, following a complaint, into whether price fixing and market sharing had taken place between Wiseman and other

dairies situated in the Central Belt of Scotland, contrary to the Chapter I prohibition imposed by section 2 of the Act. Section 2 of the Act provides:

“2.–(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which–

- (a) may affect trade within the United Kingdom, and
- (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which–

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

...

(8) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter I prohibition”.”

It appears that Claymore and Express furnished the Director with considerable information relevant to the Chapter I investigation.

#### *The request for interim measures in March 2001*

37. On 30 March 2001, Claymore/Express made a further, detailed, application to the Director to adopt an interim measures direction under section 35 of the Act, pending the completion of the Chapter II investigation. Under section 35, the Director may adopt interim measures if he has a reasonable suspicion that the Chapter II prohibition has been infringed (section 35(1)(b)) and that he considers it necessary to act, as a matter of urgency, for the purpose (a) of preventing serious, irreparable damage to a particular person or category of person, or (b) of protecting the public interest (section 35(2)). Notice of the Director’s intention to make an interim measures direction must be given to the person affected under section 35(3)(a) of the Act.

38. The grounds of Claymore/Express's application for interim measures were that Wiseman had a dominant position in the supply of fresh processed milk to Scottish middle-ground customers; that Wiseman was abusing that dominant position, by making exclusive arrangements, selling below cost, and entering into "all of Scotland" deals; that Claymore was suffering serious, irreparable damage; and that, in any event, the public interest required the adoption of interim measures.
39. On 25 June 2001 the Director announced in a press release that:
- "The OFT today gave written notice to Robert Wiseman Dairies plc and its subsidiary Robert Wiseman & Sons Limited, under section 35(3)(a) of the Competition Act 1998, that the Director General proposes to give an interim measures direction under section 35(2) of the Act for the purposes of preventing serious, irreparable damage to Claymore Dairies Limited, preventing serious, irreparable damage to Express Dairies plc, and protecting the public interest.
- The proposed direction would have the effect of limiting the extent to which Wiseman's maximum price in Scotland for fresh, processed milk to middle-ground customers, could exceed its minimum price in the Highlands."
40. On 14 September 2001 the Director announced in a press release that:
- "The OFT has accepted informal interim assurances from Robert Wiseman & Sons Ltd and Robert Wiseman Dairies PLC relating to milk sales in the Highlands of Scotland.
- Wiseman has agreed to cover its cost of supply to each middle-ground customer it sells to in the Highlands of Scotland. (Middle-ground customers are those customers who are not supermarkets or supplied by doorstep deliveries.) This will ensure that competition for those customers is protected while the OFT carries out its current investigation under the Competition Act. In order that Wiseman's competitors can bid for each customer's Highlands outlets, the interim assurances mean that some national contracts may have to be split."
41. As we understand it, the last sentence of the press release of 14 September 2001 was intended to imply that, as a result of Wiseman's assurances, some of the "all of Scotland contracts" might have to be changed so that they were no longer on an "all of Scotland" basis.
42. The text of the assurances is before the Tribunal. In paragraph 1, Wiseman gave, on a without prejudice basis, an assurance that, as from 30 September 2001 onwards, the Net Revenue which it derived from all of the Highland Outlets of each of its Middle-ground Customers in any month should not be lower than the Aggregate Cost to Wiseman of supplying those Outlets of that Middle-ground customer for that month. The expressions "Net Revenue", "Highland Outlets", "Middle-ground Customers" and "Aggregate Cost", among others, are defined in the assurances (paragraph 13).

43. As we understand it, the intention behind paragraph 1 of the assurances was that Wiseman would not supply the Highland Outlets of each Middle-ground customer at a price below the cost of supplying that customer's Highland Outlets, the relevant cost being "the Aggregate Cost", as defined in the assurances.
44. In addition, Wiseman undertook that any change in the terms of supply to a Middle-ground customer who had both Highland Outlets and other outlets should not make the terms of supply to the other outlets dependent on supplies to the Highland Outlets of that Middle-ground customer (paragraph 4). As we understand it, the effect of this assurance is to limit Wiseman's ability to introduce any further "all of Scotland" contracts. The existing "all of Scotland" contracts were not subject to paragraph 4, but became subject to the assurance in paragraph 1 not to sell "below cost", as defined.
45. By paragraph 9 of the assurances it was provided:
- "9. These assurances shall come into effect on the date on which they are signed by Wiseman and shall continue to have effect during the period in which the Director has a reasonable suspicion that Wiseman has infringed the prohibition imposed by section 18 of the Act and ending on the earlier of:
    - 9.1 the date on which the Director has completed his investigation into the matter; or
    - 9.2 the date on which they are varied, superseded or replaced."
46. After the interim assurances were given in September 2001, the Director's investigation proceeded. By April 2002 that investigation was, apparently, nearing completion.
47. At a meeting with Claymore/Express on 22 April 2002, the Director's officials expressed doubts as to whether they would be able to establish a breach of the Chapter II prohibition by Wiseman.

*The submissions by Claymore/Express of 19 June 2002*

48. On 19 June 2002 Claymore/Express and their advisers made a detailed presentation to the Director's officials entitled "The assurances and Wiseman's abusive conduct". That presentation was accompanied by a 32-page submission entitled "An analysis of Wiseman's abusive conduct in the Scottish Milk Market", and supported by a memorandum by Messrs Ernst & Young dated 17 June 2002. Claymore/Express submitted, first, that the assurances accepted by the Director did not, in fact, preclude pricing below cost by Wiseman, notably

because of the treatment of cost allocations. According to Ernst & Young, the cost allocation methodology of the assurances, applied to Claymore's own business, would show the latter to be profitable, whereas the reality was that Claymore was heavily loss-making. Secondly, it was illogical, according to Claymore/Express, to prohibit new "all of Scotland" deals in paragraph 4 of the assurances, while leaving in place those that already existed. In any event, so Claymore/Express submitted, the "all of Scotland" deals offered by Wiseman were exclusionary in purpose and effect, and amounted to an abuse of dominant position under Community law: see, notably, Case 322/81 *Michelin v Commission* [1983] ECR 3461; Case C-62/86 *Akzo v Commission* [1991] ECR I-3359; Case T83/91 *Tetra Pak v Commission* [1994] ECR II-755; Case C-310/93 *BPB Industries v Commission* [1995] ECR I-865; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969; and Cases 395/96P and 396/96P *Compagnie Maritime Belge v Commission* [2000] ECR I-1365.

49. Claymore/Express relied, in addition, on the allegation that Wiseman and other dairies in the Central Belt of Scotland were parties to a cartel in breach of the Chapter I prohibition. According to Claymore/Express, the Director could not properly evaluate the Chapter II allegations without taking into account his Chapter I investigation as well.
50. Following that presentation by Claymore/Express, a discussion took place at the meeting of 19 June 2002 between the Director's officials and the representatives of Claymore. According to the applicants' solicitors' note, towards the end of the discussion Dr Mason, a senior official of the Office of Fair Trading who was in charge of the investigation, said:

"We have been conducting an investigation since the autumn at least. This has been an independent exercise begun from scratch. We have required information from Wiseman and others, that is independent from the Assurances. Our task has been to report if there has been a breach of the Competition Act on the basis of the data collected. ... We have also considered how the law applies to what we find. I do not think that you can doubt that most of what we do is to try and establish breaches of the Competition Act.

...

If it is the case that we conclude that we do not see a realistic possibility of a breach of the Competition Act to the level of proof set out in Napp, then we are currently minded that, if we remain unconvinced, that the only fair thing we could do would be to make a non-infringement decision. Then you could appeal. I am not sure exactly what would go into the decision. It would include an exhaustive description of our methodology, the data collected, what we were looking for, how it had been analysed and would also talk about market definition.

The sub-text of what I am saying is that we feel that the only useful next step is for us to decide what we are going to do. If you should object then the context for that would be an appeal to the Competition Appeals Tribunal. We are of the view that we should now bite the bullet and now make a non-infringement decision.

...

I think we should take a decision one way or the other and take it to the next stage.

...

... We will cover all of Scotland deals in our decision and will consider any paper you want to send. ...

The proper analysis will be in a decision. You can send us whatever you want to send us. ...”

51. On 20 June 2002 the Chief Executive of Express, Mr N Davidson, wrote to the Director, appealing to him not to terminate the Chapter II investigation, and advancing a number of arguments. Mr Davidson submitted, in particular, that the Director’s officials had not explained why Wiseman’s “all of Scotland” contracts were not anti-competitive; that the Director had not sought information from Claymore’s ex-customers that had been targeted by Wiseman; that no link had been made by the Director between the Chapter II investigation and the Chapter I investigation, even though the alleged cartel in the Central Belt had “led to Express/Claymore withdrawing from the central-belt middle-ground market”; that evidence about the Chapter I infringement had not been followed up; that retail milk prices in the Central Belt were rising, as forecast by Mrs Kingsmill and Professor Cave in the *Scottish Milk* report; and that if Wiseman was cleared by the Director “[quotation excised on grounds of confidentiality]”.
52. On 21 June 2002, the solicitors for Claymore/Express wrote to Mrs Bloom, Director of Competition Policy at the OFT to express their concern that the Office “was presently minded to adopt a non-infringement decision” and advancing a number of legal arguments. That letter concluded by saying “Express/Claymore would, of course, have an opportunity to appeal such a [non-infringement] decision to the Appeals Tribunal. [Rest of quotation excised on grounds of confidentiality.]”
53. By a further letter of 21 June 2002 the solicitors acting for Claymore/Express also submitted further legal arguments to Dr Mason, on the basis that “the overriding impression given was that [the decision] would be a non-infringement decision”.
54. By letter of 25 June 2002 the solicitors acting for Claymore/Express forwarded a memorandum on behalf of Claymore/Express prepared by Law & Business Economics Limited setting out economic arguments as to why Wiseman’s “all of Scotland contracts” constituted an abuse of a dominant position.
55. Further material was submitted to the Director by Claymore/Express on 15 July 2002 and 5 August 2002.



### **III THE DECISION OF 9 AUGUST 2002**

56. On 9 August 2002, Mrs Bloom wrote to Claymore/Express in the following terms:

“I am writing to let you know the position on the Office of Fair Trading investigation into Robert Wiseman and Sons Ltd and Robert Wiseman Dairies PLC (“Wiseman”) in respect of the Competition Act 1998 Chapter II case. We are taking the administrative decision to close our files on the Chapter II case on the basis that it is not sufficiently promising in terms of a likely decision of infringement to warrant the commitment of further resources. This decision is taken in the light of the considerable effort the OFT has already devoted to this investigation, which has not yielded evidence sufficient to support a conclusive finding. We have therefore decided not to proceed to the rule 14 stage of giving notice of a proposed infringement decision.

In coming to this conclusion, the Director has not made a decision as to whether or not the Chapter II prohibition has been infringed. This is because the evidence gathered during the investigation is not sufficiently persuasive as to the existence or absence of an infringement.

The investigation in respect of the Chapter I case remains open and is continuing to be handled by Competition Enforcement Branch 3.

#### **Express’s submissions to the OFT**

We have studied your voluntary submission carefully, in particular in relation to the [customer name excised on grounds of confidentiality] contract, for which we sent several Section 26 notices to interested parties. The outcome of this was, as you know, not conclusive, since Express kept that contract.

We also took careful study of the memorandum you submitted on 19 June 2002. However, we did not find in it evidence that would help to support a conclusive finding of abuse of a dominant position by Wiseman.

We carefully reviewed your legal and economic analysis and we took account of the data you provided about your own prices and costs in our investigation of the case. However, despite this effort, we did not find evidence to help us in reaching a definitive conclusion. We explain briefly why below.

The price and cost information submitted by Express/Claymore was helpful in providing a benchmark against which we have been able to verify the accuracy of the information in our hands. It also enabled us to test some of our hypotheses. We regret, however, that the submission did not contain any new information regarding the alleged behaviour of Wiseman and did not therefore assist us in reaching any firm conclusions.

#### **Voluntary Assurances**

We note your reservations regarding the interim assurances we accepted from Wiseman (in lieu of an interim measures direction). As we have already indicated to you, Wiseman fully complied with them, as monitored by Arthur Andersen LLP.

One implication of our decision not to proceed with the case is that the assurances will now lapse. Clause 9 of the assurances states that they will cease to have effect on the date the Director has completed his investigation into the matter – that is the date of this letter 9 August 2002.

We set out below a summary of our investigation to date in relation to the alleged abuse by Wiseman.

## **Chapter II case**

### **History of the case**

On 3 February 2000, the Director referred the supply of fresh processed milk, to middle-ground retailers in Scotland to the Competition Commission for investigation and report under the Fair Trading Act 1973. In December 2000, the Competition Commission issued its report.

The Competition Commission examined whether Wiseman had taken steps to exploit or maintain its monopoly, by way of charging excess prices, acquiring competitors and subsequently closing down their processing capacity, by entering into exclusive supply agreements, and by entering into contracts with former Express/Claymore customers at prices that did not cover costs.

Wiseman behaviour was found to operate against the public interest, but as less than two-thirds of the members of the Commission Group charged with conducting the inquiry supported this conclusion, it did not form a basis upon which remedies could be imposed.

Moreover, the report noted that (para. 2.163): "...the Competition Act 1998 has been in force since March 2000; that it prohibits anti-competitive agreements and abuses of a dominant position; and that in the event of a breach of either prohibition measures may be taken, including the imposition of fines".

Following the Competition Commission report, the OFT, finding that there were reasonable grounds for suspecting that the Chapter II prohibition had been infringed, decided to open on 26 October 2000 an investigation under Chapter II regarding the behaviour of Wiseman.

### **Investigation on suspected Chapter II infringement**

Substantial efforts and resources have been devoted to the investigation. It focused on the following alleged behaviours:

- 1) predatory behaviour;
- 2) price discrimination (involving exclusionary or excessive pricing);
- 3) exclusive dealing.

We asked Wiseman to provide a substantial amount of information under several section 26 requests. We analysed data on the monthly prices charged, since November 1998, for a selection of 10 products, to 800 customers across Scotland. We also looked at costs and other information for the same products and customers covering over 1000 individual outlets for three different months (May 2000, November 2000, and May 2001).

The sample for this data was carefully selected from a complete set of Wiseman's customers (including postcodes of individual outlets and details of products and volumes delivered). This was to ensure we had sufficient information to obtain statistically valid results, and as far as possible to minimise the burden on Wiseman.

Evidence was also collected during a section 28 on site investigation on the premises of Wiseman and section 26 notices were sent to farmers in the Highlands.

As well as the extensive information collected from Wiseman, we also used other independent sources of information, when available, to compare the results of the analysis of the data.

The analysis of the information collected for the investigation required us to allocate an additional Principal Case Officer to the case from January. Specialised software was also bought to carry out the quantitative analysis. Consultations inside and outside the OFT with expert practitioners have been held at different stages of the investigation to assess the quality of the information and of its analysis.

We investigated several dimensions of price patterns:

- price evolution over the period November 1998 – September 2001, factoring for raw milk input price, by customer and by product type;
- geographical pattern of prices in Scotland, by customer outlet for May and November 2000 and May 2001;
- price differentials between customers and according to volume;
- comparison of price policy with other milk suppliers;

We also investigated total and variable costs for each outlet served:

- comparison of costs to selected measures of cost for other producers;
- the schedule of price-cost margins in relation to volumes, by product type and on aggregate;
- the price-cost margin differentials by customer/outlet;
- the geographical pattern of outlets' price-cost margins in Scotland and in selected areas (by product type and on aggregate);
- regression analysis of price-cost margins on volume, customer types, product type, and other factors.

### **Market Definition**

We did find persuasive evidence that the middle ground market in Scotland is a distinct market. On the basis of the information provided in the Competition Commission's Scottish Milk Report, of interviews with competitors, and price patterns, we would have been likely to conclude that Wiseman had a dominant position on this market.

### **Alleged Abuse**

Our investigation into Wiseman's alleged infringement of the Chapter II prohibition looked for sufficiently persuasive evidence of the alleged abusive behaviours.

We are not however reaching any final view on these points because the evidence gathered during the investigation is not sufficiently persuasive as to the existence or absence of an infringement.

#### Predation

We found instances of pricing below total cost, for example in the health care/hospital sector, which appeared to diverge from regular pricing behaviour, but we do not think these instances could support a conclusion that Wiseman had engaged in predatory behaviour. Furthermore, the investigation did not uncover sufficiently persuasive evidence either way of intent to exclude competitors.

#### Price discrimination (involving exclusionary or excessive pricing)

We also found evidence of price discrimination. However, there is insufficient evidence to come to the conclusion as to whether or not it departs significantly

from normal competitive behaviour, it constitutes targeted pricing or has exploitative or exclusionary effects.

Exclusive supply contracts

As you know these were covered in detail by the Competition Commission and we studied its report and conclusions carefully. We also looked closely at the material you provided in your letter of 5 August in relation to Aberness.

We looked at whether the all Scotland deals entered into by Wiseman were in fact based on exclusive supply either explicitly or by offering additional incentives for exclusivity. However, the evidence available was not sufficiently persuasive to lead us to think that we would be able to make a finding as to whether or not the contracts in question amounted to abuse.

I hope you find the above constructive and helpful. I shall be on leave for the next three weeks. If you have any queries please feel free to call Donald Mason or any of the case officers in my absence or get back to me on my return.”

57. A similar letter was sent to Wiseman on 9 August 2002. On the same date the OFT issued a press notice in the following terms:

**“OFT CLOSES INVESTIGATION INTO WISEMAN DAIRIES  
ALLEGED ABUSE OF DOMINANT POSITION**

The OFT has closed its investigation into whether Wiseman Dairies abused a dominant position in the supply of fresh-processed milk to middle-ground retailers in Scotland.

The OFT found that it is probable that the middle-ground market in Scotland is separate from that in England and that it was likely that Wiseman has a dominant position in the market. Middle-ground customers are those customers who are not supermarkets or supplied by doorstep deliveries.

However, after an extensive and thorough investigation, the OFT takes the view that further investigation is unlikely to lead to a finding of abuse. In these circumstances, the OFT cannot justify proceeding with the case.

As a result, the voluntary assurances given by Wiseman [OFT Press Release 39/01] on milk sales beginning on 30 September 2001, will lapse from the date of the closure of the investigation, on 9 August 2002.”

58. On 14 August 2002 the solicitors for Claymore/Express wrote to Mrs Bloom expressing the fear that, following media comment on the OFT’s press release of 9 August, Wiseman would further target Claymore’s existing customers. They requested that the OFT would review very carefully any further evidence of abuse by Wiseman in the Scottish middle-ground market.
59. On 15 August 2002 Mr Lawrie, the Principal Case Officer on the investigation, replied to the applicants by letter of 14 August 2002 in the following terms:

“I have discussed with colleagues and we have given careful thought to the points you make. You raise one issue in particular about whether we will review evidence of abuse by Wiseman. [...] I think that it must go without saying that the OFT will consider all complaints about and evidence of abuse under the Competition Act

1998 that is submitted to us. However, I think it only right to express my view that in this case, given its history over the last three to four years, we would need to have persuasive if not compelling evidence of abuse before we would be likely to devote significant administrative resources to further investigation of Wiseman's behaviour in the market."

#### **IV THE SECTION 47 APPLICATION AND SUBSEQUENT DEVELOPMENTS**

##### *The application under section 47(1)*

60. On 21 August 2002 the applicants submitted a detailed application under section 47(1) of the Act to the Director requesting him to withdraw or vary his decision of 9 August 2002.
61. In brief, in that application Claymore/Express submitted that:
- (i) the Director had taken an appealable decision;
  - (ii) as regards predatory pricing, the Director had applied an erroneous methodology in assessing costs and had misapplied the requirement of "intent";
  - (iii) as regards targeting of Claymore's customers and price discrimination, the Director had failed to apply the correct legal standards, had failed to investigate the matter properly and had failed to take into account the evidence before him;
  - (iv) as regards the "all of Scotland" contracts, had failed to advance any reason to show why such contracts are not abusive, nor replied to the applicants' arguments on this aspect;
  - (v) had failed to apply the case law of the Court of Justice on the special responsibility of dominant undertakings, or the criteria laid by that case law for finding an abuse.

##### *The Director's letter of 6 September 2002*

62. On 6 September Mrs Bloom wrote to the applicants:

"I write on behalf of the Director General of Fair Trading in response to your application under section 47 of the Competition Act 1998 ("the Act") on behalf of Express Dairies plc and Claymore Dairies Limited to request the withdrawal or variation of the Director General's decision in connection with the investigation into whether Wiseman Dairies abused a dominant position in the supply of fresh processed milk to middle ground retailers in Scotland.

We do not consider that section 47 of the Act applies in this case. The Director General took the administrative decision to close the file on the investigation into whether Wiseman Dairies had infringed the Chapter II prohibition in the Act on the grounds that it was not sufficiently promising in terms of a likely decision of infringement to warrant the commitment of further resources. The decision was communicated to you by letter dated 9 August 2002. It is the Director's view that

this decision does not constitute a decision as to whether the Chapter II prohibition has been infringed within the meaning of section 46 of the Act.

We have however considered the content of your application in the context of the administrative decision taken. It is our view that it does not provide sufficient reason for the Director General to change his decision to close the file. The Chapter II investigation into the activities of Wiseman Dairies will therefore remain closed.”

*The judicial review proceedings*

63. On 7 October 2002 the solicitors for Claymore/Express wrote to the Director, informing him that they were intending to file a claim for judicial review in the High Court of Justice in England and Wales in respect of his closure of the file in respect of the Chapter II investigation and/or his refusal to issue a decision under sections 46 and 47 of the Act. The letter of 7 October 2002 made it clear that the applicants intended to appeal to the Tribunal, and that the claim for judicial review was being made in the alternative, on a precautionary basis, in view of the time limits under Part 54 of the Civil Procedure Rules. The applicants intimated that they would seek an order that the claim for judicial review be stayed pending the determination of the admissibility of their appeal to the Tribunal.
64. On 18 October 2002 the Treasury Solicitor replied on the Director’s behalf contesting the claim for judicial review. That claim was lodged in the High Court of England and Wales on 6 November 2002. Those proceedings are currently stayed by consent, pending the determination of this appeal by the Tribunal.

*The Chapter I proceedings*

65. By letter of 9 October 2002 Claymore/Express were informed that the Director had decided to close his file on the Chapter I investigation.
66. On 7 November 2002 Claymore/Express asked the Director to withdraw or vary that decision, but the Director declined to do so by letter of 4 December 2002. On 3 February 2003 Claymore/Express appealed the decisions of 9 October 2002 and 4 December 2002 to the Tribunal (Case 1011/2/1/03). Those proceedings have not progressed further, pending this judgment. We understand that Claymore/Express have also lodged a precautionary application for judicial review in the High Court of Justice in England and Wales of the Chapter I decision. We understand that those proceedings too are stayed, pending this judgment.

## V THE APPLICATION

### *The notice of application of 6 November 2002*

67. The notice of application, numbering 116 pages and supplemented by three lever arch files of confidential annexes, was lodged in the Registry on 6 November 2002 in accordance with Rule 6(2) of the Tribunal Rules.
68. The grounds of appeal are summarised at paragraph 1.4 of the application as follows:
- (a) that the decision of 9 August 2002 constitutes an appealable decision within the meaning of section 46 of the Act on the grounds that:
    - (i) as a matter of substance the Director both rejected the applicants' complaint and decided that Wiseman was not in breach of the Chapter II prohibition; and
    - (ii) the Director incorrectly failed to withdraw or vary the decision of 9 August 2002 under section 47 of the Act.
  - (b) The Director has failed to produce a decision which is properly or adequately reasoned in that, notably:
    - (i) there are material discrepancies between the reasoning in the letter of 9 August 2002 and the position which, in reality, the Director has adopted;
    - (ii) the Director's reasoning is deficient in material respects; and
    - (iii) there are inherent inconsistencies in the Director's reasoning on the face of the letter of 9 August 2002 and with regard to the circumstances of the case.
  - (c) In any event, the Director is in error as regards his findings in respect of predation, targeting/discriminatory pricing, "all of Scotland" contracts, and abusive conduct arising from price fixing and customer sharing, in that the Director:
    - (i) misapplied the Chapter II prohibition and failed to attribute proper weight to the evidence;
    - (ii) failed to provide any adequate reasons for his specific findings; and
    - (iii) adopted a flawed methodological and legal approach.
69. In the application, Claymore/Express requests the Tribunal to set aside the decision, and either to remit the matter to the Director for a proper decision to be adopted, or to adopt its own decision to the effect that Wiseman was in breach of the Chapter II prohibition.

70. Since the Tribunal is dealing with the preliminary issue of admissibility, the Director has not yet filed a defence on the substance. The Tribunal heard the preliminary issue on 8 January 2003, all parties having filed skeleton arguments.

## **VI THE STATUTORY FRAMEWORK**

71. Before setting out the parties' arguments on the preliminary issue it is convenient to summarise the statutory framework, and the Tribunal's previous decisions in *Bettercare* and *Freeserve*.

### *The substantive provisions*

72. As already indicated, section 18 of the Act provides that "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom": section 18(1). This prohibition is known as the Chapter II prohibition: section 18(4). Examples of prohibited conduct are set out in section 18(2). By virtue of section 60 of the Act, questions arising under Part I of the Act in relation to competition within the United Kingdom are to be dealt with, so far as possible, and having regard to any relevant differences, in a manner consistent with Community law: see sections 60(1) and (2).
73. Under the Act the Director has power to conduct investigations (section 25), obtain documents and information (section 26) and enter premises with or without a warrant (sections 27 to 29). The Director may also make directions with a view to bringing infringements of the Chapter I or Chapter II prohibitions to an end (sections 32 to 34), adopt interim measures (section 35) and impose penalties (section 36).
74. Under section 58 of the Act findings by the Director are in certain circumstances binding on the parties in civil proceedings.
75. Under section 22 of the Act a party may notify conduct to the Director. Under section 24 the Director may decide that the notified conduct has not infringed the Chapter II prohibition. Such a decision protects the undertaking concerned from penalties and limits the further action the Director may take. No such notification has been made in the present case.
76. It is common ground that the Director has jurisdiction under the Act to consider a complaint made in relation to an alleged breach of the Chapter II prohibition such as the applicants' complaint about Wiseman's activities.



77. As regards appeals from decisions of the Director, section 46 of the Act provides:

“46.(1) Any party to an agreement in respect of which the Director has made a decision may appeal to the Competition Commission against, or with respect to, the decision.

(2) Any person in respect of whose conduct the Director has made a decision may appeal to the Competition Commission against, or with respect to, the decision.

(3) In this section “decision” means a decision of the Director –

- (a) as to whether the Chapter I prohibition has been infringed,
- (b) as to whether the Chapter II prohibition has been infringed,
- (c) as to whether to grant an individual exemption,
- (d) in respect of an individual exemption –
  - (i) as to whether to impose any condition or obligation under section 4(3)(a) or 5(1)(c),
  - (ii) where such a condition or obligation has been imposed, as to the condition or obligation,
  - (iii) as to the period fixed under section 4(3)(b), or
  - (iv) as to the date fixed under section 4(5),
- (e) as to –
  - (i) whether to extend the period for which an individual exemption has effect, or
  - (ii) the period of any such extension,
- (f) cancelling an exemption,
- (g) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,
- (h) withdrawing or varying any of the decisions in paragraphs (a) to (f) following an application under section 47(1),

and includes a direction given under section 32, 33 or 35 and such other decision as may be prescribed.

...”

78. Section 46 is thus directed to appeals by a person who is either a party to a relevant agreement, or a person in respect of whose conduct the Director has made the contested decision. Section 47 of the Act, however, creates a mechanism for appeals by a third party. That section provides:

“47.(1) A person who does not fall within section 46(1) or (2) may apply to the Director asking him to withdraw or vary a decision (“the relevant decision”) falling within paragraphs (a) to (f) of section 46(3) or such other decision as may be prescribed.

- (2) The application must –
  - (a) be made in writing, within such period as the Director may specify in rules under section 51; and
  - (b) give the applicant's reasons for considering that the relevant decision should be withdrawn or (as the case may be) varied.
- (3) If the Director decides –
  - (a) that the applicant does not have a sufficient interest in the relevant decision,
  - (b) that, in the case of an applicant claiming to represent persons who have such an interest, the applicant does not represent such persons, or
  - (c) that the persons represented by the applicant do not have such an interest,
 he must notify the applicant of his decision.
- (4) If the Director, having considered the application, decides that it does not show sufficient reason why he should withdraw or vary the relevant decision, he must notify the applicant of his decision.
- (5) Otherwise, the Director must deal with the application in accordance with such procedure as may be specified in rules under section 51.
- (6) The applicant may appeal to the Competition Commission against a decision of the Director notified under subsection (3) or (4).
- (7) The making of an application does not suspend the effect of the relevant decision.”

79. By virtue of section 48 of the Act, the appeal to the Competition Commission referred to in sections 46(2) and 47(6) lies to this Tribunal: section 48(1). A further appeal from this Tribunal lies, on a point of law or the amount of any penalty, to the Court of Appeal, Court of Session or Court of Appeal in Northern Ireland, as the case may be.

80. Appeals to the Tribunal are governed by the provisions of Schedule 8, Part I of the Act. Paragraph 3 of Schedule 8 to the Act provides:

“3.(1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

(2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –

- (a) remit the matter to the Director,
- (b) impose or revoke, or vary the amount of, a penalty,
- (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the Director,
- (d) give such directions, or take such other steps, as the Director could himself have given or taken, or
- (e) make any other decision which the Director could himself have made.

(3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.

(4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.”

81. It is to be noted that a decision rejecting a complaint is not as such included in the list of “relevant decisions” under section 46(3). A complainant who wishes to bring an appeal before the Tribunal against the rejection of a complaint must therefore establish, first, that the Director has taken a “relevant decision”, that is to say a decision of the type listed in section 46(3)(a) to (f) of the Act. He must then establish that he has requested that decision to be withdrawn or varied in accordance with sections 47(1) and (2). Finally he must establish that he has been notified of the Director’s refusal to do so, either under section 47(3) or under section 47(4).
82. If all those requirements are fulfilled, the complainant has a right to appeal to the Tribunal pursuant to section 47(6). Although, technically speaking, the appeal is against the Director’s decision to refuse to withdraw or vary his earlier “relevant decision”, the effect of the appeal is to seize the Tribunal of both decisions: see generally *Institute of Independent Insurance Brokers and Association of British Travel Agents v Director General of Fair Trading* [2001] CAT 4, [2001] CompAR 62, especially [23].
83. The Enterprise Act 2002 replaces this Tribunal with the Competition Appeal Tribunal: see Part 2 of that Act and Schedule 2. The provisions establishing the Competition Appeal Tribunal are expected to come into force shortly, the intention being that the members of the Tribunal will continue as members of the Competition Appeal Tribunal. These changes do not affect the questions that arise in the present case.

#### *Bettercare and Freeserve*

84. The issue of when a letter written on behalf of a Director rejecting a complaint under the Act constitutes an appealable decision has been previously considered by the Tribunal, in its judgments on admissibility in the *Bettercare* and *Freeserve* cases, cited at paragraph 4 above.

#### *Bettercare*

85. In *Bettercare*, the Director had rejected a complaint in the course of correspondence on the grounds that the entity complained against, the North & West Belfast Health and Social Services Trust, was not an “undertaking” for the purposes of the Chapter II prohibition. At paragraph 24 of that judgment the Tribunal said:

“In our view the question whether the Director has taken “a decision as to whether the Chapter II prohibition is infringed” within the meaning of section 46(3)(b) of the Act is primarily a question of fact to be decided in accordance with the particular circumstances of this case. Accordingly we set out the relevant correspondence in some detail.”

86. At paragraph 61 of that judgment the Tribunal identified the relevant questions:

- “(i) Does the correspondence between the Director and Bettercare contain “a decision”?
- (ii) If so, does any such decision constitute an “appealable decision” as to whether the Chapter II prohibition has been infringed?
- (iii) If so, has the procedure envisaged by section 47 been observed?”

87. In relation to the first question, the Tribunal stated at paragraph 62:

“There is no definition in the Act of what constitutes “a decision”. On the ordinary meaning of words, to take “a decision” in a legal context means simply to decide or determine a question or issue. Whether such a decision has been taken for the purposes of the Act is, in our view, a question of substance, not form, to be determined objectively. If there is, in substance, a decision, it is immaterial whether it is formally entitled “a decision”: otherwise the decision-maker could avoid his act being characterised as a decision simply by failing to affix the appropriate label.”

88. At paragraph 73, having analysed the exchange of correspondence in question, the Tribunal concluded:

“Accordingly it seems to us that a “decision” has been adopted by the Director in this case. That conclusion, as we understand it, is not seriously disputed by the Director, whose position was that he had adopted an act of a sufficiently determinative character to be subject to judicial review. Whether such an act was to be described as a decision was, submitted counsel for the Director, “a matter of semantics”

89. On the second question, namely whether the decision constituted a “relevant decision” for the purposes of section 47(1), the Tribunal stated at paragraphs 80 to 89 of *Bettercare*:

“80. Thirdly, and correctly in our view, Bettercare does not challenge in any way the Director’s main submission that he has a discretion under the Act whether or not to conduct an investigation, and whether or not to proceed to a decision, whether on an application under section 14 or section 22, or otherwise. It may possibly be (we express no view as to the position in Northern Ireland, England & Wales or Scotland, respectively) that the exercise of the Director’s discretion not to proceed to a decision, or even conduct an investigation, could be susceptible to judicial review on the basis of such cases as *R v General Council of the Bar ex parte Percival* [1990] 3 WLR 323. Subject to that possibility, we for our part would accept that the Director has a discretion under the Act whether to (i) open an investigation under section 25, or (ii) proceed to a decision as to whether or not there has been an infringement. In particular, in our view, a complainant has no right

to compel the Director to proceed to take a decision that there *has* been an infringement, subject only to the as yet unexplored possibility of judicial review of the exercise of his discretion.

81. These matters are, however, not in issue in the present case. The issue in this case is not whether the Director has a discretion to take a decision as to whether or not the Chapter II prohibition is infringed, but whether he has in fact done so.
82. That takes us on to the main question, which is how the Director's decision to reject Bettercare's complaint in this case is to be analysed. Is it, as the Director submits, to be analysed merely as the exercise of the Director's discretion not to conduct an investigation under section 25 for lack of reasonable grounds to suspect an infringement? Or is it, as Bettercare submits, a decision that the Chapter II prohibition is not infringed because North & West is not acting as an undertaking when purchasing social care?
83. In addressing this central issue, it is not in our view helpful to use the concept of a "decision to reject a complaint" because such a term is ambiguous. The Director may decide to "reject a complaint" for many reasons. For example, he may have other cases that he wishes to pursue in priority (compare Case T-24 and 28/90 *Automec v Commission* [1992] ECR II-2223); he may have insufficient information to decide whether there is an infringement or not; he may suspect that there may be an infringement, but the case does not appear sufficiently promising, or the economic activity concerned sufficiently important, to warrant the commitment of further resources. None of these cases necessarily give rise to a decision by the Director as to whether a relevant prohibition is infringed.
84. On the other hand, the Director may, in fact, decide to reject a complaint on the ground that there is no infringement. Nothing in the Act prevents the Director from taking a decision, following a complaint, that there has been no infringement. The Director has already done so in a number of decisions which seem to be plainly decisions, within the meaning of section 46(3)(a) or (b), to the effect that the Chapter I or Chapter II prohibitions has not been infringed, for example because there is no dominant position: (see e.g. *Dixon Stores Group Limited/Compaq Computer Limited/Packard Bell NEC Limited* [2001] UKCLR 670; *Consignia plc and Postal Preference Service Limited* [2001] UKCLR 846; *ICL/ Synstar* [2001] UKCLR 902.
85. It is true that the decisions of this kind so far taken have a more formal appearance, have apparently been more fully investigated and are more fully reasoned than in the present case. However, we see nothing in the Act to exclude the possibility that the Director may legitimately decide that there is no infringement without conducting a formal investigation, and giving only brief reasons, because in his view the matter is sufficiently clear to enable him to reach a decision without further ado.
86. In our view that is the reality of the situation in this case. As already indicated, in our opinion the correspondence viewed objectively does disclose a decision by or on behalf of the Director to the effect that North & West is not an undertaking within the meaning of section 18 of the Act when acting as a purchaser of social care. As Bettercare submits, the question whether the conduct in question is that of "an undertaking" within the meaning of section 18 is one of the essential ingredients in establishing an infringement of the Chapter II prohibition. We therefore accept Bettercare's submission that, in deciding that North & West is not acting as an

undertaking in the relevant respect, the Director has necessarily decided that the Chapter II prohibition is not infringed as regards the subject matter of Bettercare's complaint. It follows that, in our respectful view, the Director, in this case, has taken a decision as to whether or not the Chapter II prohibition has been infringed, within the meaning of section 46(3)(b) of the Act.

87. It is true that, on the contested view of the facts and the law he takes, the Director's decision that North & West is not an undertaking also precludes him from launching an investigation under section 25 of the Act since, on the Director's view, it necessarily follows that he has "no reasonable grounds for suspecting" an infringement. However, in our view, one cannot convert what is in substance an appealable decision into an unappealable decision by the simple device of describing it as the exercise of the Director's administrative discretion not to proceed further on the basis of lack of reasonable grounds for suspecting an infringement. It all depends on the substance. In our view, if, as a matter of substance, the Director's statement that he has no reasonable grounds for suspecting an infringement in fact masks a decision by the Director that the Chapter II prohibition is not infringed, there is still a "relevant decision" for the purposes of section 47(1). In the present case, in our view, the Director has, in effect, decided that the conduct in question does not infringe the Chapter II prohibition, *with the consequence* that he cannot proceed under section 25. But that consequence, in our view, is merely the secondary result of the primary decision that there has been no infringement.
88. We thus reject the Director's submission that the decision in this case should be characterised merely as an unappealable exercise of his discretion not to proceed further on the ground that the Director "has no reasonable grounds for suspecting an infringement" under section 25. There may well be cases where the Director feels he has insufficient material in his possession to conduct an investigation under section 25, without being in a position to decide whether or not there is, in fact, an infringement. But in this case, it seems to us, the statements in the letters of 25 September and 2 November 2001, that the Director has "no reasonable grounds for suspecting an infringement", while correct as far as they go, should not be allowed to conceal the fact that the Director has, in reality, decided that there is no infringement.
89. It is also plain on the facts of this case that the Director considered that he has sufficient information before him to decide that, as a matter of law, North & West is not acting as an undertaking in the relevant respect. As we see it, the Director had no statutory obligation, either to launch an investigation under section 25, or to inform North & West, before coming to that conclusion. It is true that the decision taken by the Director is taken on the basis of the facts known to him at the time, but that is true of all decisions taken by the Director. The question whether the factual basis for the Director's decision was satisfactory is a different issue. In our view it is clear from his letters of 25 July, 21 September and 2 November 2001, that the Director considered himself sufficiently informed to take a decision on the question whether North & West was acting as "an undertaking".
90. In relation to submissions by the Director regarding the availability of judicial review as a remedy for a complainant whose complaint has been rejected, the Tribunal said, at paragraphs 90 to 94 of *Bettercare*:

- “90. As to the various arguments concerning the availability of judicial review to Bettercare in the circumstances of this case, it seems to us, respectfully, that the position is relatively straightforward. If there is a relevant decision for the purposes of section 47(1), then a disappointed complainant has an appeal to this tribunal. If, on a true analysis, there is no relevant decision, but only an exercise of discretion not involving a decision whether the Chapter I or II prohibition has been infringed, then a disappointed complainant may have a remedy, if at all, by way of judicial review at common law. Which route applies depends solely on whether there is a “relevant decision” or not.
91. As we see it, possible complications arise only if too narrow a view is taken of what constitutes a “relevant decision” for the purposes of section 47(1). On the Director’s approach, so it seems to us, quite a lot of substantive issues under the Act could arise in judicial review proceedings. In the present case, it is true, the issue is limited to whether North & West is an undertaking, albeit that that question is not a particularly straightforward matter in a competition law context. In other cases, however, the issue could be whether there was a dominant position, or an abuse, or, in respect to the Chapter I prohibition, whether there was an agreement, or a restriction or distortion of competition. Those are legal and/or economic issues, or questions of mixed law or fact, which this Tribunal is supposed to be equipped to deal with, notably by virtue of the requirements governing the appointment of chairmen (Schedule 7, paragraphs 4(3) and 26(2)), the process of appointment of appeal panel members, and the training of appeal panel members (Schedule 7, paragraph 24). The Tribunal is also a single tribunal for the United Kingdom.
92. In those circumstances, we are not ourselves convinced that acts of the Director which go beyond the mere exercise of a discretion, and constitute a decision on the substance, were intended by Parliament to be susceptible to judicial review in whichever of the three domestic jurisdictions is appropriate, rather than “funnelled”, as it were, through the Tribunal.
93. There will, no doubt, be borderline cases where it is debatable whether the Director has “taken a decision that there is no infringement” or merely “exercised a discretion not to proceed”. That question, so it seems to us, has to be decided by the Tribunal on the facts of each case. If the matter is disputed, it must be decided by the Tribunal at the outset: *R (Commissioners of Customs & Excise) v VAT Tribunal (Belfast)* [1977] NILR 58. While the fact that the Director has not labelled the act in question as “a decision” may be relevant, the absence of such a label is not in our view determinative of the issue whether there is a decision: it all depends on the facts, viewed objectively.
94. As to the Director’s submission that, if Bettercare is right, “the effective operation of the Act would become almost impossible”, his argument in this case is not whether Bettercare has *any* remedy; the argument is about *which* remedy is available to Bettercare, namely an appeal to the Tribunal, or judicial review. Indeed, the Director rests a large part of his argument on the submission that Bettercare could have sought judicial review, presumably under Order 53 of the Rules of the Supreme Court of Northern Ireland. In those circumstances, we do not quite see why the Act would be workable had Bettercare sought judicial review, but becomes unworkable if Bettercare can appeal to the Tribunal. In either case there would be proceedings, both sets of proceedings would involve resources, and there would, presumably, be a determination of “the undertaking” issue, in one form or another. On the

facts of this case, we do not therefore accept the argument that, if Bettercare is right, there would be a material effect on the efficient use of the Director's resources, nor the argument that his administrative priorities may in some way become "skewed".

*Freeserve*

91. In *Freeserve* the Director General of Telecommunications, who exercises concurrent jurisdiction with the Director as regards the application of the Act in the telecommunications sector, rejected a complaint by Freeserve regarding an alleged abuse of a dominant position by companies forming part of BT, contrary to the Chapter II prohibition. On Freeserve's appeal the Director argued that his decision to close the file on Freeserve's complaint by way of a "case closure" letter did not give rise to an appealable decision. The Tribunal held:

"82. On the analysis thus far, it is common ground that the case closure letter constitutes a decision under the 1998 Act. However, it is still necessary for us to address the further question as to whether that decision constitutes a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b) of the 1998 Act. If it does so, it is a "relevant decision" which Freeserve was entitled to ask the Director to withdraw or vary under section 47(1).

83. In the letter of 8 July 2002 the Director stated "the closure documents do not offer any opinion of the Director General 'as to whether the Competition Act has been infringed' as set out in S.46(3)".

84. However, in his skeleton argument and at the hearing on 22 October 2002 counsel for the Director – quite rightly in our view – further conceded that part of the case closure summary, namely paragraphs 18 to 21 under the heading "BT's Telephone Census", did constitute or contain a "decision as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b) of the 1998 Act.

85. Despite that concession, the Director maintains that the remainder of the case closure summary does not constitute or contain any such "appealable decision". In particular, the Director invites us to examine in detail each of the other three aspects of the complaint, by reference to the context of Freeserve's original complaint, the wording used by the Director, and Freeserve's notice of appeal, with a view to finding that the Director did not, in fact, reach a relevant decision "as to whether the Chapter II prohibition had been infringed" as regards these other three matters in issue.

86. We observe, first, that once again the letter of 8 July 2002 has turned out to be incorrect. Despite the fact that that letter asserted that the case closure documents "did not offer any opinion" as to whether the Competition Act was infringed, it is now conceded that the case closure summary did, in fact, constitute not merely "an opinion", but a "decision" as to whether the Chapter II prohibition had been infringed as regards BT's telephone census. In this further respect, the letter of 8 July 2002 is, in our view, flawed.

87. In this case, in our view, the Director was dealing with one overall complaint that was particularised under four aspects, the whole allegedly forming part of "an orchestrated campaign of anti-competitive behaviour, aimed at achieving dominance" (Freeserve's letter of 26 March 2002). In relation to



that single complaint, the Director dealt with the various arguments advanced in a single document and arrived at a single overall conclusion, namely that “the information supplied by Freeserve for the complaint does not provide evidence of anti-competitive conduct by BT” and that “the Director does not consider these issues warrant further investigation” (paragraph 22 of the case closure summary). In arriving at that conclusion, the Director gives his reasons over 5 pages, under the general heading “Of tel’s findings”. In each case he sets out what he understands Freeserve’s contentions to be, and what his response is. Albeit for different reasons, each individual aspect of the complaint is ultimately rejected on an identical basis, namely that the information supplied “does not provide evidence of anti-competitive behaviour by BT”, and that the Director does not consider that the matter warrants further investigation (see paragraphs 7, 13 (last sentence), 17 (last sentence), 21 and 22 of the case closure summary).

88. In our view it would be highly surprising if, in one and the same document, a conclusion to the effect that the material before the Director “does not provide evidence of anti-competitive behaviour” signifies, in one part of the document, that the Director has taken an appealable decision, but means something different in another part of the document. That result respectfully seems to us to be contrary to common sense.
89. In particular, as regards the telephone census issue the Director has conceded that there is an “appealable decision” resulting from his conclusion, in paragraph 21 of the case closure summary, that “the information supplied by Freeserve for this portion of the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that this issue warrants further investigation”.
90. We would need a lot of persuading that exactly the same words, used in paragraphs 7, 13, 17 and 22 of the case closure summary, do not have the same effect.
91. More generally, in our view the test for what is an “appealable decision” should be as straightforward as possible, notably so that complainants, in particular, may know what their rights are and interlocutory skirmishes on whether there is “an appealable decision” or not are avoided. However, if the Director’s approach were correct, it would be very difficult for a complainant to know whether, in a given case, a closure letter was appealable or not, since, on the Director’s approach, everything turns on a close textual analysis of different parts of the same document. The Director’s approach also involves the Tribunal going a considerable way into the substance of the case in order to determine whether, in different parts of the same document, the shades of meaning behind the Director’s conclusion are sufficiently “definitive” to constitute an appealable decision. Such an exercise would greatly complicate the appeal process. Moreover, in our view, the Director’s approach would mean that an appellant wishing to challenge the decision in its entirety would risk having to bring two sets of proceedings, namely an appeal before the Tribunal on those parts of the document which are judged sufficiently definitive to be an “appealable decision”, and an application to the High Court for judicial review of other parts of the document judged insufficiently definitive to be appealable to the Tribunal but sufficiently “decisional” to be susceptible to judicial review. We think it unlikely that Parliament would have intended such a result.
92. In our view the correct starting point is to begin by looking at the case closure summary and the covering letter of 21 May 2002 as a whole. Those

documents indicate that what the Director did in the present case was to conduct a preliminary investigation. According to the Director's letter to Freeserve of 17 April 2002, the procedure at the time was to conduct an investigation in two stages. The first stage was to conduct a preliminary investigation "to decide whether there is a case to answer which requires further investigation". If the Director decided there was "no case to answer" that, it seems, was the end of the matter. If, however, the Director considered that the matter required further investigation, the investigation then moved to the second stage, namely what is described in the letter of 17 April 2002 as "the full investigation phase".

93. In the present case the Director decided, in effect, that there was "no case to answer", so the matter never progressed beyond the first, or preliminary, stage of investigation. The Director's overall conclusion is in these terms:

"In conclusion, the information supplied by Freeserve for the complaint does not provide evidence of anti-competitive behaviour by BT and the Director does not consider that these issues warrant further investigation."

(paragraph 22 of the case closure summary).

As we have just pointed out, the Director also reached the same conclusion, in the same terms, as regards each individual head of complaint.

94. In those circumstances, it seems to us, the question that arises is relatively straightforward: does this decision by the Director under the 1998 Act to the effect that the information before him "does not provide evidence of anti-competitive conduct" amount to a decision as to "whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b)?
95. It seems to us that, in answering that question, we should follow the approach set out in the Tribunal's judgment in *Bettercare*, cited above. Counsel for the Director did not submit that *Bettercare* was wrongly decided. The respondent in *Bettercare*, the Director General of Fair Trading, who is the "lead regulator" for the purposes of the 1998 Act, did not appeal the Tribunal's judgment in *Bettercare*. The transcript of the public hearing in *Bettercare* implies that other regulators would be consulted before a decision was reached on whether to appeal (hearing of 26 March 2002, at page 2 of the transcript). Following *Bettercare*, the Director General of Fair Trading has published at least one other decision of a similar type, rejecting a complaint on the grounds that the evidence did not establish a relevant dominant position (see *Harwood Park Crematorium Limited*, published on 6 August 2002).
96. In our view the test which emerges from *Bettercare* is this: if, when rejecting, or closing the file on a complaint, the substance of the matter, judged objectively, is that the Director has decided, either expressly or by necessary implication, that on the material before him there is no infringement of the Chapter II prohibition, then he has taken a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b) of the Act: see *Bettercare*, cited above, at paragraphs 84 to 87 of the judgment.
97. In the present case, the documents concerned state that Oftel has taken a decision. That decision is set out under the heading "Oftel's findings". Under each head of complaint, Oftel sets out Freeserve's arguments and proceeds to reject them. In our view, the language used, cited at paragraph

29 above, is not provisional, uncertain, or even particularly informal, but definite in nature. Despite the Director's argument to the contrary, we can detect no real distinction between the language used regarding the "telephone census" issue – where a decision is conceded – and that used in the remainder of the complaint. Each part of the decision reaches a conclusion, which is expressed to be "In conclusion". The reasoning given for the conclusions is clearly set out over 5 pages and is fairly full. That reasoning amounts, in our view, in substance to a finding that the evidence does not establish "an abuse", as can also be seen from our detailed analysis of each part of the decision set out below. Since the existence of "an abuse" is one of the essential ingredients of an infringement of the Chapter II prohibition, it seems to us to follow that the Director has, by necessary implication, found that that prohibition is not infringed on the material before him. In addition, unlike the situation in *Bettercare*, the decision in this case has been communicated to the undertaking complained against, BT, and published by Of tel in its Competition Bulletin.

98. Moreover as *Bettercare* itself establishes, there is no reason why the Director should not take a non-infringement decision at a preliminary stage if he considers that he has sufficient information to do so (see *Bettercare*, at paragraph 89.) In the present case it is expressly conceded that the Director took such a decision at the end of the first stage of his investigation as regards the "telephone census" issue. In our view, it follows from the language used that he also did so in respect of the other aspects of the complaint.
99. It is true that the Director's decision is taken on the evidence available to him, but that is true of all decisions he takes under the 1998 Act. We understand the Director's concern that, in a case such as the present, he does not wish to preclude himself from reviewing his position if new material or further circumstances come to his attention. In our view, the fact that the case closure documents give rise to a "relevant decision" within the meaning of section 47(1) of the 1998 Act does not prevent the Director from reopening or further pursuing the matter if further material comes to his attention. Indeed, in fast changing circumstances in a developing market of high importance to the economy, the Director may well need to intervene again if he has good reason for doing so. But that future possibility does not, in our view, mean that the decision of 21 May 2002 was not a decision to the effect that, on the evidence provided, there was no infringement of the Chapter II prohibition.
100. We therefore reject the Director's argument that there are subtle "grades" of decision in which some decisions on the substance are insufficiently "final" or "definitive" to constitute "appealable" decisions. In our view, there is either a decision on the substance or there is not. It may be that some non-infringement decisions are more fully reasoned than the present decision, particularly where there is a non-infringement decision at the end of the second, rather than the first, stage of investigation. But in our view the matter cannot depend on how thorough the Director's investigation has been up to that point, how the Director describes the document, or how far he chooses to go into detail: any such approach would effectively give the Director himself the right to decide whether his decision was to be appealable.
101. As regards paragraph 83 of the *Bettercare* judgment, (cited at paragraph 70 above) it seems to us that there will be cases where the Director, or his

colleague the Director General of Fair Trading, has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition. For example, the Director General of Fair Trading may receive a badly organised complaint. He might be tempted to write back to the effect “The material you have sent me does not enable me to form a view on whether or not the Act may have been infringed. Unfortunately the resources of this Office are limited. I regret that I am not able to take the matter any further.” It is unlikely that such a letter would be a “decision as to whether the Chapter II prohibition has been infringed”. Similarly, a reply by the Director to the effect “I am conducting a market investigation into the industry you mention, and do not propose to take a position on your complaint until that inquiry is completed”, would not be an appealable decision either.

102. It is not in our view useful at this stage to speculate on any possible grey areas that may or may not arise in other cases. What we have to do is to decide the matter on the facts of the present case. Our conclusion on the documents before us is that the Director did, in substance, decide that the Chapter II prohibition was not infringed in respect of the allegations made by Freeserve in its complaint. The fact that the Director was prepared to publish the decision in his Competition Bulletin confirms that the Director was confident in the conclusion that he had reached.
103. Finally, the Director’s argument that the correct analysis in this case (apart from the telephone census part of the decision) is that he has merely exercised an administrative discretion not to proceed further because, to use the words from paragraph 83 of *Bettercare* “the case does not appear sufficiently promising ... to warrant the commitment of further resources”, is, in our view, unfounded. In our view, the situation is similar to that considered by the Tribunal in *Bettercare*, where the Director argued that he had merely exercised an administrative discretion not to proceed further with an investigation of the case. In *Bettercare* the Tribunal rejected that argument on the ground that it was not merely a question of exercising an administrative discretion: the Director’s decision not to proceed further was merely the corollary of the decision that he had come to on the substance of the case.
104. It is true that the “undertaking” issue in *Bettercare* was an issue of law as well as fact, but in the present case there are also issues of law as well as fact. It seems to us that the same principle applies. The Director’s statement in the case closure summary that “the Director does not consider that these issues merit further investigation” is the corollary of his conclusion, in his decision, that there is no evidence of anti-competitive behaviour. That conclusion, in turn, amounts, in our view, to a decision that the Chapter II prohibition has not been infringed within the meaning of section 46(3)(b) of the 1998 Act.”

## VII THE ARGUMENTS OF THE PARTIES ON THE ADMISSIBILITY ISSUE

### *The submissions of Claymore/Express*

92. Claymore/Express submit that the words in section 46(3)(b) “a decision ... as to whether the Chapter II prohibition has been infringed”, include a decision that the Chapter II prohibition has *not* been infringed, as the Tribunal held in *Bettercare* and *Freeserve*. The question in the

present case is whether the letter of 9 August 2002 shows that the Director has taken such a decision. That is a question of fact: see *Bettercare*, [24].

93. According to Claymore/Express, the facts of the present case point overwhelmingly to the conclusion that the letter of 9 August 2002 constitutes a decision on the substance, and not merely the exercise by the Director of an administrative discretion: see *Bettercare*, [92]. Claymore/Express rely on the wording of the letter of 9 August 2002, construed in the light of the surrounding circumstances. According to Claymore/Express, after an extremely detailed and lengthy investigation, which was itself preceded by the Competition Commission report, and the Secretary of State's request to the Director to investigate, the Director was plainly intending to bring the matter to a conclusion on the substance, as confirmed by the OFT's letter of 15 August 2002. The conclusion that the Director came to was that there was insufficient evidence to establish an infringement of the Chapter II prohibition. There was nothing preliminary or tentative about that conclusion: see notably the finding "we do not think these instances could support a conclusion that Wiseman had engaged in predatory behaviour" under the heading "Predation". That finding governs equally the Director's findings about price discrimination and exclusive supply contracts.
94. In the circumstances of this case, the Director's letter of 9 August 2002, viewed objectively, amounts to a decision of non-infringement: see also *Freeserve* at [96]. That conclusion is supported by the OFT's press release of 9 August 2002 and by Dr Mason's statements at the meeting of 19 June 2002. The fact that Wiseman's assurances lapsed on 9 August 2002 also supports the same conclusion: see paragraph 9 of the assurances.
95. The references in the letter of 9 August 2002 to an "administrative decision" to close the file on the grounds that the case was "not sufficiently promising in terms of a likely decision of infringement to warrant the commitment of further resources" cannot disguise the true nature of the Director's decision, which is a decision on the substance: see *Bettercare* at [87]. The various references to the evidence being insufficiently persuasive as to "the existence or absence" of an abuse, or the Director being unable to conclude "whether or not" there was an abuse, constitute "an unfortunate attempt at felicitous drafting", aimed at preventing an appeal to the Tribunal by reliance on paragraph 83 of the judgment in *Bettercare*. But that paragraph of the *Bettercare* judgment was referring to a quite different situation, namely the Director's administrative priorities, and was based on Case T 24/90 *Automec v Commission* [1992] ECR II-2223. Although there may be many cases where the Director has not, in fact, taken a decision on the substance, in this case it is clear that the Director considered that there was no

infringement, or at least no infringement that could be proved to the requisite legal standard. That being the substance of the Director's decision, i.e. that no breach could be established, it follows that there was a decision as to whether the Chapter II prohibition had been infringed within the meaning of section 46(3)(b). The Director's contrary argument amounts to saying that he could never take a non-infringement decision unless he had "absolute proof" of the absence of an infringement. That, according to Claymore/Express, is an artificial and erroneous approach.

96. Claymore/Express also invite the Tribunal to take account of the fact that judicial review, as an alternative remedy, may not be either sufficient or apt in cases such as the present: see e.g. *R v Secretary of State for Health, ex parte Association of Pharmaceutical Importers and Dowelhurst Limited* [2001] EuLR 464 (High Court); [2001] EWCA Civ 1986 [2002] EuLR 197 (CA); that the Director's argument would reduce the Tribunal's supervisory role, and lead to an undesirable 'split' jurisdiction as between the Courts and the Tribunal, with the risk of duplication of proceedings; that the applicants' arguments are consistent with the procedures available to complainants in EC proceedings; and that, as the EC experience shows, there is no risk of "opening the floodgates". Claymore/Express also submit that, in view of the lengthy investigation undertaken and the remarks of Dr Mason, they had a legitimate expectation that an appealable decision would be adopted.
97. Claymore/Express submit, further, that if they are unable to appeal to the Tribunal, they would be in difficulties in later pursuing a civil claim for damages, either because of the effect of section 58 of the Act or because of the likely reluctance of the Court to entertain proceedings where the Director had already reached an adverse conclusion after a lengthy investigation. In practice, therefore, the rights of Claymore/Express under Article 6(1) of the ECHR would be infringed.
98. Finally, Claymore/Express submit, in the alternative, that the wording of section 46(3)(b) of the Act ("a decision ... as to whether") is wide enough to include a case where the Director takes a decision which is neutral on the question whether the Chapter II prohibition has been infringed. On this argument, if the correct analysis of the letter of 9 August 2002 is that the Director has decided that the Chapter II prohibition "may be/ may be not" infringed that is still a decision as to "whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b).

*The Director's submissions*

99. It is submitted on behalf of the Director that the Tribunal's judgments in *Bettercare* and *Freeserve* establish that the Director has a discretion not only as to whether or not to conduct an investigation into a complaint but also as to whether or not to proceed to a decision on the question of infringement: see *Bettercare*, [80]. Insofar as that discretion is open to challenge the correct mode of challenge is by way of a claim for judicial review, not an appeal to the Tribunal.
100. The Director argues that it is necessary to draw a distinction on the one hand between those cases where the Director has taken a decision as to whether or not one of the prohibitions imposed by the Act has been infringed and, on the other hand, those cases where the Director has genuinely abstained on the question of whether there has been an infringement of the relevant prohibition: see *Freeserve* at [101]. In essence, states the Director, the question of which side of that line a particular case falls turns on an objective analysis of the correspondence recording the decision, avoiding "too close a textual analysis" and "without going a considerable way into the substance of the case": see *Freeserve*, at [91].
101. The Director submits that it is clear on an objective reading of the letter of 9 August 2002, the surrounding correspondence, and press release of that date, that the decision taken was to close the investigation without finding either that Wiseman had infringed the Chapter II prohibition, or that it had not. The contested decision was not a decision "as to whether the Chapter II prohibition has been infringed" under section 46(3)(b) of the Act.
102. The Director remains neutral on the question whether, as a matter of policy, it is preferable that decisions of the kind in issue here should be challenged before the Tribunal or on a claim for judicial review. He notes, however, that Parliament has provided a mechanism in the last phrase of section 46(3) of the Act, and in section 47(1), by which further appealable decisions may be prescribed by order. The issue here is whether the decision of 9 August 2002 falls within the existing category of appealable decisions. The relevant policy consideration, argues the Director, is that the interpretation of section 46(3)(a) and (b) should produce a clear and easily applicable test as to whether a decision is or is not appealable.
103. In the Director's submission, a finding that there is not sufficient evidence to prove that a person has infringed one of the Act's prohibitions is not the same as, and should not be equated with, a decision that he has not in fact done so. According to the Director a statement that there is insufficient evidence to prove that there is life on other planets is not the same as a

statement that there is no life on other planets. Thus, says the Director, if an astronomer decides to stop looking for life on other planets because the means available do not enable him to establish whether or not life exists, it is bizarre to describe that as a “decision” as to whether or not such life exists.

104. According to the Director, the Tribunal’s judgments in *Bettercare* and *Freeserve* show that decisions taken on the basis that the Director is genuinely undecided as to the existence of an infringement are not appealable decisions. The conclusion that a decision to close the file for lack of proof is not an appealable decision is also supported by the scheme of the Act. If it were otherwise, section 24 of the Act might prevent the Director from imposing penalties on an undertaking which had notified conduct under section 22, if evidence of an infringement emerged at a later date.
105. The Director argues that the test for what is an appealable decision should not turn, as the applicants appear to suggest, on the length or thoroughness of his investigation: see *Freeserve* at [100]. Even after a lengthy investigation it is quite possible for the Director to remain genuinely undecided as to whether the Chapter II prohibition has been infringed. Nor does the publication of the press release of 9 August 2002 affect the position.
106. The relevant test as set out by the Tribunal in *Bettercare* and *Freeserve* does not turn simply on whether the decision in question was based on “the substance” of the case: most decisions that he takes are to some extent based on the substance of the case. According to the Director, the proper test is whether, viewed objectively, the Director has taken a decision that there is no infringement or whether he has merely exercised a discretion not to proceed: see *Bettercare* at [93]. Claymore/Express have not alleged that the letter of 9 August 2002 was written in bad faith.
107. At the oral hearing, the Director submitted that the letter of 9 August 2002 is intended to reflect the Director’s view that, while there was evidence before him tending to establish an infringement by Wiseman of the Chapter II prohibition, the evidence was insufficient to establish such an infringement to the high standard of proof understood by the Director to result from the Tribunal’s judgment in *Napp Pharmaceuticals Limited v Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 13 at [106] to [109] (transcript pp 33, 36). Such a conclusion by the Director is to be contrasted with the situation where he has made a “positive assessment” that there is no infringement (transcript, p 37). According to the Director, it is perfectly possible for him to find, in the same decision, that certain conduct did not amount to an infringement and that, as regards other conduct, the evidence was insufficient



to establish an infringement. In such circumstances the finding of “no infringement” would be appealable to the Tribunal, but the finding of “insufficient evidence of infringement” would be challengeable only by way of judicial review (transcript, pp 38 to 39).

108. The applicants’ submissions regarding the Director’s conclusions on the alleged abuses are based on a misreading of the letter of 9 August, which simply stated that there was insufficient evidence to support the applicants’ contentions. That conclusion does not amount to a finding of non-infringement. Any view to the contrary would erroneously amount to saying that any decision, other than one finding an infringement, should be categorised as a non-infringement decision.
109. Insofar as the applicants base their case on the views expressed by Dr Mason, the question is whether the decision actually taken is appealable, rather than whether the decision the Director’s officials may have had in mind at some point during the investigation would have been appealable. The views of officials are irrelevant to whether in law the actual decision taken is appealable.
110. According to the Director, the arguments of Claymore/Express based on legitimate expectations are unfounded. First of all, judicial review provides an avenue of challenge to the decision in issue. Secondly, the question in this case is not whether the Director should have honoured some legitimate expectation, but whether he has taken an appealable decision. Similarly, other decisions taken by the Director do not throw light on whether there is a decision in this case. Nor is there a breach of Article 6(1) of the ECHR: the applicant’s ability to bring civil proceedings for damages is unaffected, either by section 58 of the Act or otherwise.
111. As to the applicants’ alternative contention that a decision that the Chapter II prohibition “may/may not have been infringed” is appealable, the Director submits that this is wrong both as a matter of language and of law.

*Wiseman’s submissions*

112. Wiseman, in support of the Director, argues additionally that in *Bettercare* and *Freeserve* the Tribunal recognised that the Director has a discretion whether or not to proceed to a decision as to whether or not there has been an infringement of the Act: see *Bettercare* at [80]. That discretion exists whether he has carried out little or no investigation or where, as here, he has conducted a lengthy and detailed investigation. In this case it is that discretion that the

Director has expressly exercised. Such a discretion is typically conferred on bodies with investigatory or prosecutorial powers. It could not, for example, be suggested that a decision not to prosecute is an acquittal of the accused. This highlights the fact that what is in issue is an exercise of a discretion not dissimilar to that of a prosecutor. The appropriate mode of challenge to such a decision is judicial review and not an appeal to the Tribunal.

113. The terms of the letter of 9 August 2002 distinguish the decision in this case from those at issue in *Bettercare* and *Freeserve*. According to Wiseman, an examination of the letters in those cases clearly indicates that a decision of non-infringement had been reached, whereas the letter of 9 August expressly states that the decision to close the file was not based on a concluded view as to infringement. In those circumstances it is inconceivable that, following *Freeserve* at paragraph 96, the Tribunal could find that the Director has taken a non-infringement decision by “necessary implication”. Rather, the decision appears to come within the example given in paragraph 83 of *Bettercare*, namely one where the Director “may suspect that there is an infringement, but the case does not appear sufficiently promising ... to warrant the commitment of further resources.” The CFI has recognised that the EC Commission has a similar discretion to reject complaints on the basis that further investigation is not in the Community interest: *Case T-5/93 Tremblay v Commission* [1995] ECR II-185.
114. If the applicants were correct, Wiseman would now be able to notify its conduct to the Director under section 22 of the Act in the sure knowledge that the Director would willingly issue a clearance decision under section 24. To Wiseman’s regret, that is not a plausible scenario.
115. Wiseman also points out that if the Director had taken a non-infringement decision, this would make it considerably harder for persons in the applicants’ position to gain redress in the civil courts, since the latter would be reluctant to reach a decision contrary to that of the Director.

## VIII ANALYSIS

### *General approach*

116. The question in this case is whether the Director has made a decision “as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b). It is common ground that the wording of that section is wide enough to cover a decision that the Chapter II prohibition has *not* been infringed, and that such a decision may be challenged by a third party under section 47. Such a decision of “non-infringement” may be relatively formal

and detailed (see e.g. *Dixon Stores Group Limited/Compaq Computer Limited/Packard Bell NEC Limited* [2001] UKCLR 670 (no dominance); *Consignia plc and Postal Preference Service Limited* [2001] UKCLR 846 (no abuse); *ICL/Synstar* [2001] UKCLR 902 (no dominance), or may be simply contained in one or more letters: see e.g. *Bettercare* (entity complained about was not “an undertaking”); *Freeserve* (no evidence of abuse); *Harwood Park Crematorium*, 6 August 2002, (no dominance); and *Elite Greenhouses Ltd*, 16 September 2002 (no agreement). There are other, more recent, decisions of non-infringement by the Director: see e.g. *Companies House*, 25 October 2002, *ABTA and British Airways plc*, 11 December 2002, and *BSkyB*, 17 December 2002.

117. It appears that in the *BSkyB* case, the Director rejected certain allegations on the basis that there were “insufficient grounds” to prove an infringement, while he rejected other allegations on the ground that there was “no infringement”. The *BSkyB* case is not before the Tribunal, and we make no findings about it. However, the parties have drawn analogies with that case in order to illustrate their arguments.
118. In determining whether a letter rejecting a complaint is an “appealable decision” the Tribunal in *Bettercare* at [61] posed three questions:
- (a) Has a “decision” been taken?
  - (b) If so, is that decision an “appealable decision” falling within section 46(3)(a) to (f) of the Act? and
  - (c) If so, has the procedure in section 47 of the Act been followed, so that the applicants are entitled to appeal to the Tribunal under section 47(1) of the Act?
119. As regards question (a), it is common ground in the present case that the Director has taken a “decision” evidenced by the letter of 9 August 2002. Similarly as regards question (c), it is common ground that the procedure set out in section 47 of the Act has been followed.
120. The only issue before the Tribunal, therefore, is question (b): has the Director “made a decision ... as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b)?
121. The principles to be applied in answering that question have already been exhaustively discussed in *Bettercare* and *Freeserve*. Neither of those decisions was appealed by the relevant Director, nor was permission to appeal even sought. It has not been suggested in

argument that *Bettercare* or *Freeserve* was wrongly decided. We therefore take, as our starting point, the principles set out in those two judgments.

122. In our view the main principles to be derived from *Bettercare* and *Freeserve* are:
- (i) The question whether the Director has “made a decision as to whether the Chapter II prohibition is infringed” is primarily a question of fact to be decided in accordance with the particular circumstances of each case (*Bettercare*, [24]).
  - (ii) Whether such a decision has been taken is a question of substance, not form, to be determined objectively, taking into account all the circumstances (*Bettercare*, [62], [84] to [87], and [93]). The issue is: has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before him? (*Freeserve*, [96]).
  - (iii) There is a distinction between a situation where the Director has merely exercised an administrative discretion without proceeding to a decision on the question of infringement (for example, where the Director decides not to investigate a complaint pending the conclusion of a parallel investigation by the European Commission), and a situation where the Director has, in fact, reached a decision on the question of infringement, (*Bettercare*, [80], [87], [88], [93]; *Freeserve*, [101] to [105]). The test, as formulated by the Tribunal in *Freeserve*, is whether the Director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition (*Freeserve*, [101] and [102]).
123. In the light of those principles, we turn to consider the letter of 9 August 2002, read with the letter of 6 September 2002, and the surrounding context.

*Some difficulties with the drafting of the letter of 9 August 2002*

124. We begin by pointing out that the letter of 9 August 2002 is evidence that the Director has taken a decision. However, in the case of ambiguity or doubt as to the meaning of that letter, the Tribunal is in our view entitled to take into account the surrounding circumstances in order to establish what the Director’s decision actually was.

– “*insufficiently promising to warrant the commitment of further resources*”

125. The first difficulty we have relates to the language used in the letter of 9 August 2002 to describe the Director’s reason for closing the file. That letter states, in the second sentence:

“We are taking the administrative decision to close our files on the Chapter II case on the basis that it is not sufficiently promising in terms of a likely decision of infringement to warrant the commitment of further resources. ...

In coming to this conclusion the Director has not made a decision as to whether or not the Chapter II prohibition has been infringed.”

(See paragraph 56 above.)

126. That reasoning is repeated in the second paragraph of the Director’s letter of 6 September 2002:

“We do not consider that section 47 of the Act applies in this case. The Director General took the administrative decision to close the file into whether Wiseman Dairies had infringed the Chapter II prohibition in the Act on the grounds that it was not sufficiently promising in terms of a likely decision of infringement to warrant the commitment of further resources ... It is the Director’s view that this decision does not constitute a decision as to whether the Chapter II prohibition has been infringed within the meaning of section 46 of the Act.”

(See paragraph 62 above.)

127. In paragraph 83 of *Bettercare*, cited above, the Tribunal was addressing the question whether the decision there in issue was to be analysed as the exercise of an administrative discretion not to conduct an investigation under section 25 of the Act, or as a decision that the Chapter II prohibition was not infringed. The Tribunal said:

“In addressing this central issue, it is not in our view helpful to use the concept of a “decision to reject a complaint” because such a term is ambiguous. The Director may decide to “reject a complaint” for many reasons. For example, he may have other cases that he wishes to pursue in priority (compare Case T-24 and 28/90 *Automec v Commission* [1992] ECR II-2223); he may have insufficient information to decide whether there is an infringement or not; he may suspect that there may be an infringement, but the case does not appear sufficiently promising, or the economic activity concerned sufficiently important, to warrant the commitment of further resources. None of these cases necessarily give rise to a decision by the Director as to whether a relevant prohibition is infringed.”

128. The use in the decision letters of 9 August 2002 and 6 September 2002 of exactly the same wording “the case does not appear to be sufficiently promising ... to warrant the commitment of further resources” strongly suggest that those letters of were drafted in an attempt to reflect the wording of paragraph 83 of *Bettercare*. That suggestion was not resisted by counsel for the Director, and we assume that that was in fact the case.

129. It is self-evident that a decision giving reasons should clearly and accurately convey the real reasons for a decision, preferably in plain language. The role of the draftsman or adviser is to assist the decision-maker to convey with clarity what his reasons in fact are, and to resist the

temptation to introduce a formula, or “gloss”, intended to reduce the risk of legal challenge. Otherwise, the parties may not receive the reasons with the clarity to which they are entitled, and difficulties could arise in establishing what the reasons in fact were (and see also the comments of Jowitt J in *R v Mayor and Burgesses of the London Borough of Wandsworth ex parte Dodia* 30 HLR 562, pp 565 to 566).

130. In the present case, the Tribunal was, quite properly, told by counsel for the Director during the hearing that the reason for the Director’s decision of 9 August 2002 was that he had concluded that there was insufficient evidence to establish an infringement (see paragraph 107 above). The surrounding circumstances amply confirm that that was indeed the case, as we set out in paragraphs 137 et seq below.
131. We do not, for our part, think that the expression “it [the investigation] was not sufficiently promising in terms of a likely decision of infringement to warrant the commitment of further resources” conveys at all clearly the Director’s conclusion that there was insufficient evidence to establish an infringement. In our view that wording tends to mask, rather than convey, the Director’s reasons. In this case the primary reason for closing the file is the Director’s view that no infringement could be established on the evidence. His view that the commitment of further resources would not be warranted was merely the *consequence* of the prior conclusion that the evidence of infringement was not sufficient. A similar point was made by the Tribunal in *Bettercare* at [87] to [88] and *Freeserve* at [104].
132. More fundamentally, in our view the drafting of the letter of 9 August 2002 is based on a misunderstanding of paragraph 83 of *Bettercare*. As we read that paragraph and the following paragraphs of the judgment, the Tribunal was there exploring the ambiguity of the expression “reject a complaint”, pointing out that the rejection of a complaint may, or may not, amount to an appealable decision, depending on whether the Director has, in fact, made a decision on the question of infringement. The examples of possible non-appealable decisions given in that paragraph are expressed to be cases that may not *necessarily* give rise to a decision that the relevant prohibition has been infringed (see the last sentence of paragraph 83), thus leaving open the possibility that the contrary may equally be the case. As we read it, the particular example in paragraph 83 of *Bettercare* of a case “which does not appear sufficiently promising or the economic activity sufficiently important” relates primarily to a situation where the Director does not pursue a complaint because his resources are better deployed elsewhere, without going into the merits. As the Tribunal said in *Freeserve* [101], paragraph 83 of *Bettercare* refers to cases where the Director “has genuinely abstained from expressing a view,

one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition”. We do not think that paragraph 83 of *Bettercare* was contemplating a case such as the present where the Director has fully investigated the matter and concluded to his satisfaction that the evidence is not sufficient to establish an infringement.

133. It follows, in our view, that the main reason given by the Director in his letters of 9 August 2002 and 6 September 2002 for his view that section 47 of the Act did not apply, namely that the letter of 9 August 2002 merely communicated an administrative decision to close the file “on the grounds that it was not sufficiently promising in terms of a likely decision of infringement to warrant the commitment of further resources”, was both inadequate and erroneous in law. It was inadequate because it did not reveal with sufficient clarity the Director’s true reason for closing the file, namely that the evidence was not sufficient to establish an infringement. It was erroneous because it sought to transpose some wording from paragraph 83 of *Bettercare* to a situation which was not, in our view, contemplated by that paragraph.

– *A non decision on the question of infringement?*

134. That takes us on to the second difficulty we have, which is to determine the underlying meaning of the language used in the body of the letter of 9 August 2002.
135. The letter of 9 August 2002 states that the evidence gathered during the investigation “is not sufficiently persuasive as to the existence or absence” of an infringement of the Chapter II prohibition (see the second paragraph, and also the second paragraph under the heading of “Alleged Abuse”). Similar language is also used towards the end of the letter, e.g. that the investigation did not uncover “sufficiently persuasive evidence either way” of intent to exclude competitors; that “there is insufficient evidence to come to the conclusion as to whether or not” the alleged price discrimination was abusive; and that “the evidence available [on the all of Scotland contracts] was not sufficiently persuasive to lead us to think that we would be able to make a finding as to whether or not the contracts in question amounted to an abuse.” It is also indicated in the letter of 9 August 2002 that the Director has not reached “any firm conclusions” (fourth paragraph under the heading “Express’s submissions to the OFT”) and that “We are not however reaching any final view on these points” (second paragraph under the heading “Alleged abuse”).

136. In the Director’s draft defence, which was ordered to stand as his skeleton argument on the issue of admissibility, it is submitted that the letter of 9 August 2002 was “in reality a decision to close the investigation without deciding either that Wiseman *had* infringed the Chapter II prohibition *or* that it had not” (paragraph 3.13). It is also suggested that this was a case where the Director was “genuinely undecided” (paragraphs 4.5, 4.7.2), or, as it was put in oral argument, “agnostic” on the issue of infringement (transcript, p 32).
137. However, as already stated, during the hearing the Tribunal was also told that the Director’s position was that, although there was evidence to support a finding of abuse, he had reached the conclusion that the evidence was insufficient to establish a breach of the Chapter II prohibition to the standard of proof required by the Tribunal in its judgment in *Napp*, cited above (transcript, pp 33 and 35).
138. That position, which was clearly explained to the Tribunal at the hearing, is consistent with the Director’s conclusion in the letter of 9 August 2002 on the central allegation of predatory pricing, namely “We do not think these instances [of pricing below total cost] could support a conclusion that Wiseman had engaged in predatory behaviour”. That sentence, it seems to us, is a clear conclusion on an issue of infringement.
139. Similarly, the OFT’s press release of 9 August 2002 states that
- “... after an extensive and thorough investigation, the OFT takes the view that further investigation is unlikely to lead to a finding of abuse ...”
140. In addition, the notes of the meeting of 19 June 2002 (paragraph 50 above) refer to Dr Mason’s view that
- “[if] we do not see a realistic possibility of a breach of the Competition Act to the level of proof set out in *Napp*, then we are currently minded that ... the only fair thing we could do would be to make a non-infringement decision.
- ...
- We are of the view that we should now bite the bullet and now make a non-infringement decision.
- I think we should take a decision one way or the other and take it to the next stage.
- ...
- ... We will cover all of Scotland deals in our decision and will consider any paper you want to send. ...
- The proper analysis will be in a decision. You can send us whatever you want to send us. ...”



141. That note, setting out the position of the most senior official in charge of the investigation, strongly indicates that the Director's team considered that they were in a position to take a decision of non-infringement, and were minded to do so. That was how those present at the meeting understood the position, as the applicants' solicitors' letters of 21 June 2002, to Mrs Bloom and Dr Mason respectively, make clear (paragraphs 52 and 53 above):

“Donald concluded by saying that, although the Office would carefully consider the memorandum that had been left with them, they were presently minded to adopt a non-infringement decision relating to Wiseman's conduct since March 2000” (to Mrs Bloom.)

“[You stated] ... that the Office intended to reach a decision shortly. The overriding impression given was that this would be a non-infringement decision relating to Wiseman's conduct since March 2000” (to Dr Mason).

142. In addition, the letter of 9 August 2002 was written at the end of an extensive and wide ranging investigation which had lasted nearly two years. It is not suggested that, in the Director's view, there were further matters to be investigated, or avenues of inquiry left unexplored. The effect of the letter of 9 August 2002 was to close the Director's investigation. That, in turn, meant that the interim assurances, given by Wiseman on 14 September 2001, lapsed (see paragraph 45 above). In all the circumstances, including the note of the meeting of 19 June 2002, it seems to us inconceivable that, in closing the investigation, the Director had not assessed the evidence before him and come to a conclusion that no infringement could be established on that evidence.

143. That is confirmed, if confirmation were needed, by Mr Lawrie's letter of 15 August 2002 (paragraph 59 above) to the effect that the OFT would not be prepared to examine Wiseman's conduct any further unless “persuasive if not compelling” new evidence was produced.

144. The foregoing elements, in our view, throw light on the meaning to be attributed to the letter of 9 August 2002. It seems to us, on the totality of the material before the Tribunal, that the Director's conclusion in this case was that no infringement of the Chapter II prohibition could be established on the evidence or, to put the matter the other way round, that there was insufficient evidence to establish an infringement.

145. Similarly, in our view that conclusion by the Director was to all intents and purposes a final conclusion, subject only to re-opening on the basis of “compelling” new evidence. In our view there is nothing provisional or tentative about his conclusion that no infringement could be established on the evidence. In our view, the Director has reached a firm decision that no infringement of the Chapter II prohibition is established on the evidence before him.

146. In our view, the drafting of the letter of 9 August 2002 does not show any bad faith but rather reflects an erroneous legal approach to the situation in which the Director found himself: see paragraphs 154 et seq below. In consequence of that error, the language used in the letter of 9 August 2002 tends to mask the underlying reality that the Director closed the file because, in his view, he could not prove an infringement on the evidence he had. We propose to decide this preliminary issue on that basis.

*Does the Director's conclusion that an infringement was not sufficiently established by the evidence before him give rise to an appealable decision in the circumstances of this case?*

147. We therefore address the question whether the decision by the Director that no infringement of the Chapter II prohibition could be established on the evidence before him or, conversely, that there was insufficient evidence to establish an infringement is, in the particular circumstances of this case, a decision “as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b) of the Act. In our view the answer is “Yes”, for the following reasons.

148. In our view a useful approach is to pose two questions: Did the Director ask himself whether the Chapter II prohibition has been infringed? What answer did the Director give to that question when making his decision?

149. It is clear that in this case the Director did indeed ask himself the first question, namely whether the Chapter II prohibition had been infringed. That indeed was the whole purpose of his extensive two-year investigation, as the note of 19 June 2002 confirms. Having asked himself that question, the answer which the Director gave was, as we have held, “an infringement of the Chapter II prohibition cannot be established on the evidence before me”. It seems to us that the answer “no infringement of the Chapter II prohibition can be established on the evidence”, is a perfectly proper and understandable answer to the question “whether the Chapter II prohibition has been infringed”. We cannot ourselves see why a decision to that effect should not fall within the wording of section 46(3)(b), without doing any violence to the statutory language.

150. Nor do we think that, as a matter of statutory construction, a statutory right of appeal should be interpreted restrictively, unless the language of the statute clearly so requires. We do not think that the wording of section 46(3)(b) of the Act does so require.

151. On that approach, the Director's decision in this case is to be contrasted with other kinds of decisions to close the file, such as where the Director, without going into the merits, decides

not to open an investigation because he has other cases to pursue in priority (the situation dealt with by the Court of First Instance in *Automec*, cited above); because he has decided to make a market investigation reference to the Competition Commission under the Enterprise Act 2002; because another competition authority is investigating the matter; because of the possible effect on criminal proceedings under section 188 of the Enterprise Act 2002; or for some other reason which does not involve him taking a considered position on the merits of the case.

152. Those examples are, however, a long way from the present case. Applying the test set out by the Tribunal in *Freeserve* at [101], we cannot say that, in the present case, “the Director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition”. In this case the Director has investigated the matter exhaustively for the purpose of reaching a conclusion on whether the Chapter II prohibition has been infringed. His conclusion, as we have held, is that such an infringement cannot be established on the evidence before him. He has not, therefore, abstained from expressing a view on the question of infringement. His considered view is that an infringement is not established on the evidence.
153. The Director’s principal submission, as we understand it, is that a conclusion that there is insufficient evidence to prove an infringement does not establish that there is, in fact, no infringement. However logical that statement may be, in the abstract, it does not seem to us to focus on the factual situation that arises in this case. As we have already held, in this case the Director did reach a conclusion, namely that no infringement was established on the evidence before him. The only point we have to resolve is whether a conclusion to that effect is a decision “as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b) and on the facts of this case. In our view it is.
154. Moreover, it seems to us that there is an error of law in the Director’s approach. The Director seems to be saying that he cannot reach a decision of “non-infringement” unless he is satisfied on a “positive assessment” to some absolute level of certainty that there is, in fact, no infringement, i.e. that the Director cannot take a “decision of non-infringement” unless he is in a position to prove the negative. Hence his argument that if an astronomer says he cannot, with the means available to him, find life on other planets, that does not mean that there is no life on other planets (see paragraph 103 above). This, it appears, is why the letter of 9 August 2002 refers several times to the evidence being insufficiently persuasive as to the “existence or absence” of an infringement, and to the Director’s purported inability to decide “whether or not” there is an infringement.

155. This approach, it seems to us, mistakes both the nature of the process in which the Director is engaged, and what in fact happened in this case. Under the Act the Director has the functions of both investigation and decision-making. Initially, the Director is engaged in a process of investigation. The object of that investigation is to come to a conclusion whether the Chapter II prohibition has been infringed. In the nature of the process, that conclusion can be reached only on the basis of the evidence available. At some stage in the investigation the Director reaches the point where he considers that he has all the evidence he needs or can usefully obtain. At that stage he assesses the evidence and makes up his mind. The Director is not, however, an astronomer seeking life on other planets: he is performing a statutory function. In discharging that function, the criteria by which he makes up his mind is not some absolute level of certainty but the much more prosaic civil standard of proof, albeit applied with due regard to the seriousness of the allegation being made (*Napp*, cited above, at paragraphs [106] to [109] of the judgment). Applying the appropriate standard of proof to the evidence that he has, the Director then makes a decision as to whether the evidence meets that standard. If it does, an infringement has been established to the requisite standard of proof; if it does not, no infringement has been established to the requisite standard of proof on the evidence available. If the Director then takes as a decision to the latter effect, he makes, it seems to us, a decision, “as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b) of the Act.
156. That seems to us to be what happened in this case. The Director’s investigation was long and detailed; it appears from the letter of 9 August 2002, that no stone was left unturned. In particular, according to that letter, very large quantities of information were obtained using statutory powers; an additional case officer was assigned to the investigation; specialist software was bought; and consultations with internal and external experts were held. Moreover, the Scottish milk market is not a minor matter, but an important sector of economic activity. From the parties’ point of view, the stakes were high and the consequences of the Director’s decision potentially very serious. The Director and his staff gave close consideration to the evidence and reached a view. That view was that the evidence did not amount to proof of an infringement. As we have said, there was nothing provisional or tentative about that conclusion. On the contrary, it appears from the note of 19 June 2002 (paragraph 50 above) that the Director’s staff were in a position to write a decision giving full reasons for their conclusions. In such circumstances, we see no basis for construing the Act narrowly, in a way which would deprive the applicants of an appeal to the Tribunal.

157. An examination of other “non-infringement” decisions reached by the Director and mentioned in paragraph 116 above shows that what the Director does in such cases is to evaluate the often contradictory evidence he has with a view to reaching a decision on whether the Chapter II prohibition is infringed. In all cases in which he takes a “non-infringement” decision the evidence is, by definition, insufficient to establish an infringement. In its essentials, the Director has followed the same process in the present case. The fact that the evidence may be clearer in some other cases does not in our view alter the nature of the underlying exercise which the Director has undertaken in this case, namely to evaluate the evidence and reach a conclusion as to whether an infringement of the Chapter II prohibition has been established.
158. The Director does not, however, submit that Claymore/Express have no recourse. His submission is that if, on the evidence before him, it is clear, in his view, that there is no infringement, the appeal goes to the Tribunal, whereas if the evidence is, in his view, less clear-cut, but still insufficient to establish an infringement, any challenge should be by way of judicial review only.
159. The consequence of this argument is that a wholly unsuccessful complainant has a right of appeal to the Tribunal, whereas a complainant who gets nearer to establishing an infringement but on the Director’s analysis still fails to do so, has no such right of appeal. That does not seem to us to be a sensible result.
160. More fundamentally, the effect of the Director’s argument is to make the right of recourse (appeal to the Tribunal or judicial review by the Court) depend entirely on the particular nuance in the wording used by the draftsman of the decision to describe the Director’s appreciation of the evidence. In other words, which appeal route was applicable would depend entirely on whether the evidence, in the Director’s necessarily subjective view, showed “no infringement” or merely “no infringement established by the evidence”. Where the boundary, if any, is between these two concepts is, in our view, wholly unclear, particularly when one is dealing with such broad concepts as “dominance” and “abuse”. There will be many cases where either expression would be justifiable, and the question whether the evidence showed “no infringement” (giving the Tribunal jurisdiction) or showed “no sufficient grounds for finding an infringement” (depriving the Tribunal of jurisdiction) would be a matter of much debate and uncertainty. We do not think that the right of recourse in a particular case should depend on such imprecise and subjective criteria, or on the precise drafting used in a decision in a particular case.

161. In any event, we are unpersuaded that a case such as the present should be susceptible only to judicial review, rather than appeal to the Tribunal. To determine in a competition case such matters as the sufficiency of the Director's reasons, or whether the Director has made any material error in applying the law, may ultimately involve a detailed analysis of issues of law, economics and accounting in a still developing area. As pointed out in *Bettercare* at [90] to [92], Parliament has established the Tribunal as a specialist tribunal equipped to deal with such issues, not sitting as a judge alone but consisting of three members with relevant expertise and training.
162. It does not seem to us that the procedure of judicial review is designed to deal with complex, perhaps disputed, facts, the weighing of evidence, and the interaction of the evidence with issues of economics and accounting: see e.g. the comments of Thomas J in *R v Secretary of State for Health ex parte API and Dowelhurst* [2001] EuLR 464 at [161], and those of the Court of Appeal at [2002] EuLR 197 at [34], in relation to the suitability of judicial review proceedings for considering complex issues under Articles 28 and 81 of the EC Treaty.
163. We would have thought that a first reading of Parts 11 and 12 of the *BSkyB* decision of 17 December 2002 (Margin Squeeze and Mixed Bundling) which, according to the Director's submission at the hearing, are susceptible only to judicial review, is enough to show both the highly technical nature of the issues potentially involved, and the practical difficulties that would be encountered in going into issues of that kind in proceedings for judicial review.
164. Indeed, the Director's submission was that where, in the same decision, the Director reaches on one abuse a finding of "no infringement", and on another abuse a finding of "insufficient grounds of infringement", the unsuccessful complainant must challenge the former finding before the Tribunal and the latter finding before the Court by way of judicial review (paragraph 107 above). That would, in our view, produce the result that different parts of the same decision would have to be challenged in two sets of proceedings, one before the Tribunal, and the other before whichever Court in England and Wales, Scotland, or Northern Ireland, was seized of the matter. The resulting duplication of effort, cost and expense, let alone the risk of inconsistent decisions, is not in our view a result that could conceivably have been intended (see in a different context the comments of Booth J in *Allen v Allen* [1985] Fam 8). The fact that that is, however, the logical consequence of the Director's submissions seems to us further to demonstrate that those submissions are unsound.

165. For all the foregoing reasons we do not think the Director's argument that decisions of the kind here under discussion should be challenged only by way of judicial review is correct.

*Other points*

166. It remains for us to deal with certain subsidiary arguments.

*– Section 24*

167. The Director argues that if the letter of 9 August 2002 is a decision, and if in this case Wiseman had notified its conduct to the Director under section 22 of the Act, then by virtue of section 24 the Director would be unable to impose a penalty on Wiseman, were clear and compelling evidence later to emerge that Wiseman had, in fact, infringed the Chapter II prohibition. In our view this argument does not assist us. First, Wiseman's conduct was not notified to the Director, so the argument is based on a hypothesis that does not arise in this case. Secondly, whether or not the letter of 9 August 2002 is a relevant decision is primarily a question of fact, on which the wording of sections 22 and 24 can have no bearing. Thirdly, even if Wiseman had notified its conduct under section 22, and the Director's decision of 9 August 2002 had, hypothetically, been a decision on that notification, no significant limitation on the Director's future freedom of action is, in our view, likely to arise. Fourthly, even if some such limitation could exceptionally arise, we do not think that could affect the interpretation of section 46(3)(b) of the Act in a case such as the present.

168. Sections 20 and 22 of the Act provide that a person who thinks his conduct may infringe the Chapter II prohibition may notify that conduct to the Director and apply to him for a decision: sections 20(1) and 22(1). Under section 22(2), the Director may make a decision as to –

- “(a) whether the Chapter II prohibition has been infringed; and
- (b) if it has not been infringed, whether that is because of the effect of an exclusion.”

169. Section 24 provides:

“24.–(1) This section applies to conduct if the Director has determined an application under section 22 by making a decision that the conduct has not infringed the Chapter II prohibition.

(2) The Director is to take no further action under this Part with respect to the conduct unless–

- (a) he has reasonable grounds for believing that there has been a material change of circumstances since he gave his decision; or

- (b) he has a reasonable suspicion that the information on which he based his decision was incomplete, false or misleading in a material particular.
- (3) No penalty may be imposed under this Part in respect of any infringement of the Chapter II prohibition by conduct to which this section applies.
- (4) But the Director may remove the immunity given by subsection (3) if–
  - (a) he takes action under this Part with respect to the conduct in one of the circumstances mentioned in subsection (2);
  - (b) he considers that it is likely that the conduct will infringe the prohibition; and
  - (c) he gives notice in writing to the undertaking on whose application the decision was made that he is removing the immunity as from the date specified in his notice.
- (5) If the Director has a reasonable suspicion that information–
  - (a) on which he based his decision, and
  - (b) which was provided to him by an undertaking engaging in the conduct,

was incomplete, false or misleading in a material particular, the date specified in a notice under subsection (4)(c) may be earlier than the date on which the notice is given.”

170. As already stated, Wiseman has not notified its conduct under section 22, so the question as to the circumstances in which the Director could withdraw any immunity under section 24 does not arise. We do not think it useful to speculate on what course the Director would have taken had Wiseman notified its conduct under section 22. Nor does it seem to us that sections 22 and 24 bear on the factual determination which we have to make, namely whether there is an appealable decision in the particular circumstances of this case.
171. In any event, it is clear on the face of section 24 that the Director may withdraw any immunity from penalty on the grounds of a material change of circumstances, or if he has a reasonable suspicion that the information on which he based his decision was incomplete, false or misleading in a material particular: see section 24(2) and section 24(4)(a). In the hypothetical circumstances envisaged by the Director’s argument, in our view no practical difficulty is likely to arise in withdrawing the immunity from penalty under section 24(4); the Director would have been acting on incomplete information, or the circumstances would have changed materially.
172. As we understand it, the possible problem perceived by the Director is that under section 24(4)(c) such immunity from penalty could only be withdrawn with future effect, whereas the Director would wish to preserve the possibility of imposing a penalty in respect of *past*



conduct, if further information came to light. However, section 24(5) would entitle the Director to impose such a penalty for past conduct if he had a reasonable suspicion that the undertaking engaged in the conduct (here Wiseman) had provided him with information that was either incomplete, or false, or misleading in a material particular. We find it hard to envisage a realistic scenario in which that proviso would not be wide enough to protect the Director. On the hypothesis under discussion, Wiseman would have had to furnish extensive information to the Director in support of its application under section 22, the Director would have carried out his own investigation, and Claymore/Express would have made extensive representations. The possibility of the Director wishing to impose a retrospective penalty on the basis of new material coming to light otherwise than as a result of Wiseman having furnished the Director with “incomplete information”, seems to us to be remote. Even if, hypothetically, there was some remote possibility of a constraint on the Director’s ability to impose such a penalty, that does not in our view affect how section 46(3)(b) of the Act should be interpreted and applied on the facts of this particular case.

– *Wiseman’s analogy with the public prosecutor*

173. Wiseman argues that the letter of 9 August 2002 should be seen as analogous to a decision not to prosecute taken by a public prosecutor (e.g. the Director of Public Prosecutions or the Lord Advocate). According to Wiseman, such a decision is only rarely susceptible to challenge and only then, in exceptional circumstances, by way of judicial review.
174. In our view, that analogy is unsafe. Under the Act, the Director has both investigatory and adjudicatory functions. His role is not only to investigate cases, but also to decide whether a relevant prohibition has been infringed. His functions, in our view, cannot be compared to that of the authorities engaged in public prosecutions. Moreover, and most importantly, section 47 of the Act gives third parties having a sufficient interest an express right to challenge a decision of the Director as to whether there has been an infringement. That is a wholly different context from that of a criminal prosecution. The issue in the present case is whether “in deciding not to prosecute”, to use Wiseman’s terminology, the Director in fact also reached a decision “as to whether the Chapter II prohibition has been infringed” within the meaning of section 46(3)(b). In our view he did so, for the reasons already given and in the particular circumstances of this case.

– *Convention rights and related issues*

175. Claymore/Express argue that if the letter of 9 August 2002 is not an appealable decision, the alternative remedy in judicial review is at best limited, and in their view, unsatisfactory. Furthermore, say Claymore/Express, they would in those circumstances have difficulty in bringing civil proceedings for damages, not least because of the effect of section 58 of the Act. In consequence, it is argued, there would be a breach of the right of Claymore/Express to have their civil rights and obligations determined by an independent and impartial tribunal, in accordance with Article 6(1) of the ECHR.
176. In view of the conclusion we have already reached, we deal only briefly with this argument. We are provisionally inclined to the view that section 58 of the Act is not in point in this case. Section 58(1) provides that “a Director’s finding” is binding on the parties, unless the Court directs otherwise, if there has been no appeal by a “relevant party”, or if the finding in question has been appealed to the Tribunal and confirmed on appeal. However, under section 58(2) the “relevant party” for present purposes is “the undertaking whose conduct is alleged to have infringed the Chapter II prohibition”. In the present case there is no undertaking who has been found by the Director to infringe the Chapter II prohibition. In these circumstances, we doubt whether section 58 is applicable.
177. We can see that, in general, the position of Claymore/Express as regards pursuing other legal remedies may be less than satisfactory if the letter of 9 August 2002 is not appealable to the Tribunal, but we think it unnecessary to express a view on whether there could arguably be a breach of Article 6(1) of the ECHR. It has not been suggested that Wiseman’s Convention rights are affected by our decision in this case.

– *Legitimate expectations*

178. Finally, Claymore/Express submit that, if the letter of 9 August 2002 is not an appealable decision, there is a breach of their legitimate expectations that the Director would take an appealable decision. This argument, in our view, amounts to saying that it would be procedurally unfair to Claymore/Express if, in fact, the Director had not adopted an appealable decision in this case.
179. Our view, briefly, is that it is arguable that, on the particular facts of this case, Claymore/Express had a legitimate expectation that the Director would adopt an appealable decision at the end of his investigation so that, if the Director’s decision was adverse,

Claymore/Express could appeal to the Tribunal. It seems to us that such an expectation arguably arises from the facts that (i) the interests of Claymore/Express were closely engaged throughout the investigation; (ii) the Director opened interim measures proceedings specifically to prevent serious and irreparable damage to Claymore/Express (see paragraph 39 above) and presumably accepted Wiseman's voluntary assurances with that end in view; (iii) the outcome of the investigation could foreseeably have had a material effect on Claymore's survival as an independent competitor (see also Mr Davidson's letter of 20 June 2002, paragraph 51 above); (iv) Claymore/Express made extensive submissions to the Director; and (v) express statements were made to Claymore/Express at the meeting of 19 June 2002: see paragraph 50 above.

180. In particular, it was said on behalf of the Director, at the meeting of 19 June 2002, that:

“the only fair thing we could do would be to make a non-infringement decision. Then you could appeal.”

It was also said that such a decision:

“would include an exhaustive description of our methodology, the data collected, what we were looking for, how it has been analysed and would also talk about market definition.”

If Claymore/Express were to object, so it was said,

“the context for that would be an appeal to the Competition Appeals Tribunal.”

It was also said

“we should now bite the bullet and now make a non infringement decision” and that

“... we should take a decision one way or the other and take it to the next stage”.

181. In those circumstances it seems to us that, on the particular facts of this case, a legitimate expectation that the Director would proceed to make an appealable decision arguably arises from the Director's general duty to follow a fair procedure: see the remarks of Simon Brown LJ in *R v Devon County Council ex parte Baker* [1995] 1 All ER 73 at 88j to 89g.

182. We accept the Director's argument that the fact that there might be a legitimate expectation that the Director would take an appealable decision does not mean that the letter of 9 August 2002 is such a decision. However, if it is open to us to interpret and apply section 46(3)(b) of the Act on the particular facts of this case in a manner which would avoid procedural unfairness, we think we should do so. In our view, that course is open to us, for the reasons already given.

*Conclusion on admissibility*

183. For the foregoing reasons we hold unanimously that the Tribunal has jurisdiction to hear this appeal.
184. In reaching that conclusion, we have sought to clarify the scheme of sections 46 and 47 of the Act as we understand it. In our view, putting it simply, the scheme of the Act is that where the Director takes a decision to close an investigation and communicates his view on the merits of the case, a third party complainant having a sufficient interest is entitled to ask the Director to withdraw or vary his decision under section 47(1) and, if the Director refuses, to bring the matter before this specialised tribunal under section 47(6). However, there is a distinction to be drawn between the *right* to appeal under section 47, and the separate issue of what the Tribunal's role is in the context of such an appeal under paragraph 3 of Schedule 8 of the Act. That separate issue is currently before another formation of this Tribunal in *Freeserve.com v Director General of Telecommunications*, and will now be the subject of further argument in this case: see paragraphs 201 et seq below. In our view, the principal consequence of our decision on admissibility in this case is that a complainant in the position of Claymore/Express is, at the least, entitled to receive the reasons for the Director's decision in sufficient detail to enable him to understand why the complaint has been rejected, and for the Tribunal to control the adequacy of those reasons and their correctness in law. That approach, which of course remains to be more fully developed in this and other cases, seems to us to strike a reasonable balance between the interests of the Director and the interests of the third parties concerned, bearing also in mind the crucial role that third party complainants play in the enforcement of the Act. In our view, that approach is also in accordance with the general scheme of the legislation in question.

**IX JURISDICTION OF THE PROCEEDINGS**

185. The second preliminary issue before us is whether, in this case, the proceedings before the Tribunal are "proceedings before a tribunal in England and Wales", or "proceedings before a tribunal in Scotland" for the purposes of section 49 of the Act. At this stage the possible relevance of this issue is that, if the Tribunal is the former, any appeal from this judgment lies to the Court of Appeal under section 49(4)(a), whereas if the Tribunal is the latter any such appeal would lie to the Court of Session under section 49(4)(b). (Paragraph 4, of Schedule 5, to the Enterprise Act 2002, which replaces the existing section 49 with a slightly differently worded version, is not yet in force.)

*The statutory provisions*

186. Section 49 provides:

- “49.—(1) An appeal lies—
- (a) on a point of law arising from a decision of an appeal tribunal, or
  - (b) from any decision of an appeal tribunal as to the amount of a penalty.
- (2) An appeal under this section may be made only—
- (a) to the appropriate court;
  - (b) with leave; and
  - (c) at the instance of a party or at the instance of a person who has a sufficient interest in the matter.
- (3) Rules under section 48 may make provision for regulating or prescribing any matters incidental to or consequential upon an appeal under this section.
- (4) In subsection (2)—
- “the appropriate court” means—
- (a) in relation to proceedings before a tribunal in England and Wales, the Court of Appeal;
  - (b) in relation to proceedings before a tribunal in Scotland, the Court of Session;
  - (c) in relation to proceedings before a tribunal in Northern Ireland, the Court of Appeal in Northern Ireland;
- “leave” means leave of the tribunal in question or of the appropriate court; and
- “party”, in relation to a decision, means a person who was a party to the proceedings in which the decision was made.”

187. Rule 16 of the Tribunal Rules, under the somewhat awkward heading “The location of the proceedings”, provides as follows:

- “(1) The tribunal shall, as soon as practicable, taking account of the observations of the parties in the application and defence, determine whether the proceedings are proceedings before a tribunal in England and Wales, in Scotland or in Northern Ireland and shall instruct the Registrar to notify the parties of its determination.
- (2) In making this determination, the tribunal shall have regard to all matters which appear to it to be relevant and in particular, the part of the United Kingdom where—
- (a) the applicant is habitually resident or has his principal place of business;
  - (b) the majority of the parties are habitually resident or have their principal places of business;
  - (c) any agreement, decision or concerted practice to which the disputed decision relates was made or implemented or intended to be implemented;

(d) any conduct to which the disputed decision relates took place.

(3) The tribunal may hold any meeting, case conference, pre-hearing review or hearing or give any directions in such place as it thinks fit having regard to the just, expeditious and economical conduct of the proceedings.”

188. The background to these provisions is that the Tribunal exercises jurisdiction throughout the United Kingdom. At the appellate level the United Kingdom is of course organised under the separate jurisdictions of England & Wales, Scotland, and Northern Ireland although, at the apex, the House of Lords covers all three. The Tribunal will often be involved in cases where the parties come from more than one of the three domestic jurisdictions, or where the matters in issue straddle more than one jurisdiction. In these circumstances, Rule 16 was no doubt introduced to secure procedural certainty, not only as regards rights of appeal, but also on matters of procedure arising under the Tribunal Rules such as the summoning of witnesses, (Rule 21); disclosure of documents, (Rule 17(2)(k)); or orders for costs (Rule 26).

*Submissions of the parties*

189. In the present case, Claymore/Express has submitted that these proceedings should be heard in London, at least as far as admissibility is concerned, and that the proceedings should be treated as proceedings before a tribunal in England and Wales. Claymore/Express suggest in particular that complications may arise from the fact that parallel proceedings for judicial review have been commenced in England and Wales, if the Tribunal declares that the proceedings are proceedings before a tribunal in Scotland. Moreover, if the appeal were to go to the Court of Session, there would be additional costs, since a new Scottish legal team would be needed.

190. The Director is neutral on the issue of jurisdiction, although he draws to our attention a number of factors which point in the direction of Scotland, namely that the conduct took place in Scotland, that both Claymore and Wiseman are companies registered in Scotland, and that Express, an English company, is only affected in its capacity as a shareholder in Claymore. As regards the judicial review, the Director points out that the applicants could have brought proceedings for judicial review in Scotland. In any event the Director does not believe that the existence of the judicial review proceedings in England give rise to any difficulty if the Tribunal declares that the proceedings are before a tribunal in Scotland.

191. Wiseman submits that the proceedings should be held to be proceedings before a tribunal in England and Wales. The English judicial review proceedings are one complicating factor, now supplemented by a second English judicial review of the closure of the Chapter I

investigation. In those circumstances, submits Wiseman, there is considerable scope for conflicting decisions as between the English and Scottish jurisdictions. Furthermore, from the outset, Wiseman has been represented by Herbert Smith, who have instructed specialised English counsel. It would not be right for Wiseman to have to instruct a new legal team, with no background experience in a complicated and long-running case, for the purpose of an appeal to the Court of Session. That would be necessary as a practical matter, even if Scottish procedural rules were to permit the existing legal team to appear.

### *Analysis*

192. In *Aberdeen Journals* [2001] CAT 5, [2002] CompAR 1, which concerned an alleged abuse of dominant position by Aberdeen Journals Limited in relation to newspapers circulating in the Aberdeen area, the Tribunal held that the proceedings were proceedings before a tribunal in Scotland on the ground that the principal parties were based in Scotland and the conduct in question took place in Scotland: see [4] to [10] of the judgment. The Tribunal further held that the hearing should take place in Scotland under rule 16(3): see [10] to [14] of that judgment. In *Bettercare* [2001] CAT 6, [2002] CompAR 9 the Tribunal similarly held that the proceedings were before a tribunal in Northern Ireland on the basis that all the parties were situated in Northern Ireland and that the alleged conduct took place there: see [10] to [15]. The Tribunal rejected the possibility that it could be regarded as a tribunal in England and Wales for the purpose of the preliminary issue only: see [14]. In that case, the Tribunal also held the hearings in Northern Ireland.
193. If we apply the specific criteria of Rule 16(2) in the present case, the situation is that one applicant, Claymore, has its principal place of business in Scotland and is a company registered in Scotland. The other applicant, Express, has its principal business in England and is a company registered in England. Express is, however, the majority shareholder in Claymore and has, as we understand it, funded Claymore's losses. In that respect, Express has financial and trading interests in Scotland, through Claymore. Wiseman has its registered office in Scotland, albeit that we are told that the majority of its turnover is now generated in England. The Director's statutory functions extend throughout the United Kingdom. The fact that his office is physically situated in England, is, we think, a consideration of little or no weight: see *Aberdeen Journals* [2001] CAT 5, at [8]. There is no doubt that the abuse alleged took place in Scotland albeit that, in *Scottish Milk* Mr Clothier and Mr McKay considered that Wiseman's actions were part of a competitive struggle between Express and Wiseman in the wider Great Britain market. All the customers of Claymore affected by the alleged conduct are, however, situated in Scotland.

194. It is true that, physically speaking, the hearing on the preliminary issue on admissibility was held in London, as was the first case management conference, but that was for the purposes of administrative convenience under Rule 16(3).
195. Taking the foregoing matters into consideration, in our view the jurisdiction with which this case has the closest connection is Scotland. The case centres on competition between Claymore and Wiseman, two Scottish registered companies, and in particular on Wiseman's attempts to take business from Claymore in the Scottish Highlands. The place where the alleged conduct took place, within the meaning of Rule 16(2)(d), seems to us to be a matter to which we should give particular weight, together with the fact that the customers and consumers directly affected by the alleged conduct are situated in Scotland.
196. However, under Rule 16(2), in addition to the specific matters listed, the Tribunal "shall have regard to all matters which appear to it to be relevant". Two matters are urged on us in that connection, namely: (i) the existence of the two sets of judicial review proceedings in England; and (ii) the extra inconvenience and cost of instructing a new Scottish legal team, were the matter to be taken on appeal to the Court of Session.
197. As regards the proceedings for judicial review, if the view we take on the admissibility of the appeal is correct, the proceedings for judicial review are otiose. As we see it, a possible complication could arise only if, hypothetically:
- (i) the Court of Session were to hold on an appeal from this judgment that there was no appealable decision; but
  - (ii) in the judicial review proceedings the High Court, or Court of Appeal, in England were to consider that there was an appealable decision, and that the matter should not therefore proceed by judicial review because of the existence of an alternative statutory remedy.
- However, we do not think this hypothetical possibility should weigh with us. In our view the existence of other proceedings in England and Wales, which could equally have been commenced in Scotland, are of no more than marginal relevance to the issue we have to decide under Rule 16.
198. As regards the problems and costs that could arise for the parties in having to instruct a new legal team to conduct an appeal before the Court of Session, we can understand the concern voiced by the parties.



199. Notwithstanding the points made, we do not think that the possible complications regarding legal representation in the event of an appeal, can be determinative of whether these are proceedings before a tribunal in England and Wales, or Scotland, for the purposes of section 49(4) of the Act and Rule 16. On the contrary it seems to us that the overriding consideration in this case is that the events with which we are concerned took place in Scotland and primarily concern the Scottish activities of two Scottish companies, and the impact of those activities on Scottish customers and consumers.

200. On those grounds we unanimously determine, under Rule 16 of the Tribunal's Rules, that these are proceedings before a tribunal in Scotland.

## **X CASE MANAGEMENT**

201. In accordance with the Tribunal's normal practice, we have provisionally considered the most efficient means of progressing this case from the case management point of view.

202. In that respect, it seems to us that, without at this stage excluding other issues, a major part of Claymore/Express's argument in the notice of application focuses on the "all of Scotland" contracts offered by Wiseman to the outlets of Claymore's customers in the Highlands. According to Claymore/Express, in practice Wiseman is the only supplier in Scotland in a position to offer such contracts. Claymore/Express say that Claymore cannot economically offer all of Scotland contracts because of its distance from the Central Belt, although its prices to its Highlands outlets are competitive with those offered by Wiseman to those outlets. In addition, say Claymore/Express, the prices offered by Wiseman to those outlets are below the incremental costs to Wiseman of supplying those outlets, and have also remained below average total costs for a considerable period. The formula used by the Director in the assurances for the purpose of assessing costs did not, say Claymore/Express, reflect Wiseman's true costs of supply. In addition, so Claymore/Express contend, the prices in question were offered to Claymore's customers by Wiseman on a selective or targeted basis for the purpose of eliminating or weakening a smaller competitor who, following its acquisition by Express, might challenge Wiseman's dominance in the Central Belt. Those prices are also, it is submitted, discriminatory, first because the same low price is offered to all the outlets in question even though the costs of supplying the Highlands' outlets are higher; and secondly because Wiseman offers higher prices to other customers where Wiseman is not facing competition or targeting a competitor. Finally, the effect of the 'all of Scotland' contracts is to give rise, in practice, to a contract of exclusive supply in favour of Wiseman.

Although these practices began in 1999 they continued, according to Claymore/Express, after 1 March 2000.

203. At this stage we have no view on whether the underlying facts support these allegations, or what the proper analysis of the facts would be under the Chapter II prohibition. As we see it, one principal question may be how far an allegedly dominant enterprise – again we form no view at this stage on the issue of dominance – may defend its interests when faced with competition, particularly by offering lower prices in a part of the market where it faces competition in order to defend a dominant market share in the market as a whole. From the legal and economic point of view, the question of the proper application of cost based tests, as in *Akzo* and *Tetra Pak II*, cited above, and/or the relevance of other approaches, as in cases such as *Irish Sugar* and *Compagnie Maritime Belge*, cited above, could be of some importance. Nor, in our view, is there any doubt that these issues are significant, both as regards the parties involved, and as regards competition in the milk market in Scotland.
204. However, the principal thrust of the arguments of Claymore/Express on the substance is to criticise the reasons given by the Director in his decision. We note, too, the submission made to us at the end of the hearing by counsel for Wiseman that, if the appeal is admissible, the proper course may well be to remit this matter straight away to the Director, on the basis that the decision is insufficiently reasoned. Counsel for Claymore/Express echoed that sentiment, and invited the Tribunal to consider with the parties what the “next steps” should be, once the parties have had time to consider this judgment.
205. As presently advised, we can see the force of those suggestions. As we have indicated at paragraph 184 above, it seems to us that one of the primary functions of the Tribunal in a case such as the present is to control the adequacy of the Director’s reasons. Although we have not of course yet had the advantage of the Director’s submissions, at first sight it does seem to us that the letter of 9 August 2002 does not set out the facts found in any detail, nor does it indicate the legal criteria applied by the Director to those facts, either as regards the substantive law, or as regards the standard of proof applied.
206. The question arises, therefore, as to whether this matter should be remitted to the Director for further reasons to be supplied. If the matter were to be remitted, we would think that were better done sooner rather than later, possibly by way of a consent order and perhaps limited to certain issues. The next step, therefore, is for the Tribunal to fix a case management conference in order to hear submissions from all parties on the future progress, and possible disposal, of this case.

Christopher Bellamy

Peter Clayton

Peter Grant Hutchison

Charles Dhanowa  
Registrar

Delivered in open court

March 2003