Neutral citation: [2003] CAT 16

IN THE COMPETITION
APPEAL TRIBUNAL

Cases: 1014 and 1015/1/1/03

New Court
Carey Street
London WC2A 3BZ

30 July 2003

Before:

SIR CHRISTOPHER BELLAMY (The President)
THE HONOURABLE ANTONY LEWIS
MS VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ARGOS LIMITED
(2) LITTLEWOODS LIMITED

Appellants

and

THE OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

Mr Mark Brealey QC and Mr Mark Hoskins (instructed by Burges Salmon) appeared for Argos

Mr Nicholas Green QC and Ms Marie Demetriou (instructed by DLA) appeared for Littlewoods

Mr Brian Doctor QC and Ms Kassie Smith (instructed by Director of Legal Services, Office of Fair Trading) appeared for the respondent

Heard at New Court on 1 and 3 July 2003

JUDGMENT

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The issue

1. This judgment is given following the second case management conference in separate appeals to the Tribunal lodged by Argos Limited, and Littlewoods Limited, respectively, against a decision adopted by the Office of Fair Trading ("OFT") on 17 February 2003 under section 46 of the Competition Act 1998 ("the 1998 Act").[1] The issue before the Tribunal is whether the OFT should be permitted to adduce three witness statements in support of the contested decision, notwithstanding that such statements contain relevant factual material that is not to be found in the contested decision and was not put to Argos or Littlewoods in the administrative procedure which preceded the adoption of the decision. This judgment deals only with that issue.

The contested decision

2. Argos and Littlewoods are both well-known multi-channel retailers, who sell their goods essentially through catalogues.

3. In the contested decision the OFT found that Argos, Littlewoods, and a third company, Hasbro UK Limited, had infringed the Chapter I prohibition imposed by section 2 of the 1998 Act. Section 2 of the 1998 Act provides, as far as relevant:

> "(1)… 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 …
>
> (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 …"

4. That provision is modelled on Article 81(1) of the EC Treaty. Pursuant to section 60, questions arising under the 1998 Act are to be determined, as far as possible, and having regard to any relevant differences, in a manner which is consistent with Community law.

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[1] Technically, the contested decision was adopted by the Director General of Fair Trading ("the Director"). However, since 1 April 2003 the functions of the Director have been assumed by the OFT who is the respondent to these proceedings pursuant to the provisions of Part I of the Enterprise Act 2002. Where necessary, references in this judgment to the OFT are to be taken as referring to the Director and vice-versa.

5. The essence of the infringement found by the OFT in the contested decision is that: (i) Hasbro, Argos and Littlewoods entered into an overall agreement and/or concerted practice to fix the resale prices of certain Hasbro toys and games sold by Argos and Littlewoods through their respective sales catalogues; and (ii) Hasbro and Argos, and Hasbro and Littlewoods, respectively, each entered into two bilateral resale price fixing agreements to the same effect. The infringement is alleged to have lasted from 1 March 2000 – that being the date when the 1998 Act came into force, although the arrangements are alleged to have commenced before that date – until sometime between 15 May 2001 and 14 September 2001. The goods concerned by the alleged agreements were, so it is alleged, initially Hasbro's "Action Man" range, and what are known as Hasbro's "Core Games" – "Monopoly", "Cluedo" and other games. From May 2000, it is alleged, the arrangements were extended to other Hasbro toys. The allegation is that the sale prices contained in the catalogues of Argos and Littlewoods were in fact fixed pursuant to those agreements or concerted practices.

6. For those infringements, Argos has been ordered, pursuant to section 36(2) of the 1998 Act, to pay a penalty to the OFT of £17.28 million. Littlewoods has been ordered to pay a penalty to the OFT of £5.37 million. Hasbro, on the other hand, has not been ordered to pay any penalty in apparent application of the OFT's leniency programme. (See generally *The Director General of Fair Trading's Guidance As To The Appropriate Amount Of Penalty*, March 2000 (OFT 423)). The basis of the leniency according to Hasbro is that it was Hasbro who apparently brought the alleged infringements to the OFT's attention.

7. In the decision, which runs to some 91 pages, the OFT relies on a number of e-mails. Those e-mails, with two exceptions, those of 18 May 2000 and 28 December 2000, are internal Hasbro e-mails. The e-mails of 18 May 2000 and 28 December 2000 are from Hasbro employees to certain Littlewoods employees. In addition, the OFT relies on certain notes of interviews conducted by OFT officials. Those interviews were conducted with ten employees of Hasbro, who were co-operating with the OFT as part of the leniency programme, and with three employees of Littlewoods, whom Littlewoods voluntarily made available to the OFT.

The statutory framework

8. In adopting the contested decision the OFT was required to follow certain statutory procedures and requirements, which are set out in the 1998 Act, and in the Competition Act 1998 (Director's Rules) Order 2000, S.I. 2000 no. 293 ("the Director's Rules").

9. Section 31(1) of the Act provides:

"(1) Subsection (2) applies if, as the result of an investigation conducted under section 25, the OFT proposes to make –

(a) a decision that the Chapter I prohibition has been infringed …

(2) Before making the decision, the OFT must –

(a) give written notice to the person (or persons) likely to be affected by the proposed decision; and

(b) give that person (or those persons) an opportunity to make representations."

10. Rule 14 of the Director's Rules provides, so far as relevant:

"(1) If the Director proposes to make a decision that the Chapter I prohibition … has been infringed, he shall give written notice:–

…

(b) to each person who that Director considers is a party to the agreement … which that Director considers has led to the infringement.

…

(3) A written notice given under paragraph (1) or (2) above shall state the facts on which the Director relies, the matters to which he has taken objection, the action he proposes and his reasons for it.

…

(5) Subject to paragraph (6) below, the Director shall give each person referred to in sub-paragraph (1)… (b) above … a reasonable opportunity to inspect the documents in that Director's file relating to the proposed decision.

…

(7) … the Director shall give each person referred to in sub-paragraph (1)… (b) … written notice of the period within which that person may make written representations to him on the information referred to in paragraph (3) above.

(8) The Director shall give each person referred to in sub-paragraph (1)… (b) … a reasonable opportunity to make oral representations to him on the information referred to in paragraph (3) above."

11. Rule 14(3) of the Director's Rules is normally complied with by the service of what is known as "a Rule 14 notice", which is the equivalent of the statement of objections issued under Council Regulation no. 17 by the European Commission in cases where the European Commission is pursuing an infringement of Article 81 or 82 of the EC Treaty. Like the statement of objections, the Rule 14 notice sets out in detail the infringements alleged, the evidence relied on and the conclusions the OFT proposes to draw from the evidence set out in the notice.

The administrative procedure in this case

12. In this case the Rule 14 notices were issued separately to Hasbro, Littlewoods and Argos on 1 May 2002. In the Rule 14 notices – which run to some 66 pages (including annexes) – the OFT relied, essentially, on the notes of interviews and e-mails mentioned above, to establish the alleged fixing of resale prices.

13. In their replies to the Rule 14 notices Argos and Littlewoods submitted detailed argument directed to rebutting the matters alleged in those notices. Both Littlewoods and Argos also submitted witness statements. Five witness statements were submitted in the case of Argos, and ten witness statements were submitted in the case of Littlewoods. Those witness statements consisted, for the most part, of evidence from employees allegedly concerned with the alleged price fixing arrangements. The witnesses, in their statements, essentially denied that they were party to any price fixing agreement or understanding either with Hasbro, or with each other. The witnesses of both Argos and Littlewoods contended, in essence, that each company had adopted certain resale prices in its catalogue as a result of commercial decisions independently arrived at, and not as a result of any agreement, understanding, or concerted practice with Hasbro that might infringe the Chapter I prohibition.

14. In addition, in their replies to the Rule 14 notices, Argos and Littlewoods strongly criticised the notes of interviews relied on by the OFT as incomplete and contradictory. It was also said that the interviews were not properly conducted, and/or were in part favourable to the case put forward by Littlewoods and Argos. The e-mails, did not, said Argos and Littlewoods, prove the OFT's case either.

15. Those written representations were made pursuant to Rule 14(7) of the Director's Rules, set out above. At the same time Argos and Littlewoods had the opportunity to inspect the OFT's file pursuant to Rule 14(5) of the Director's Rules. After the written submissions were lodged, Argos and Littlewoods then had the opportunity to make oral representations to the OFT pursuant to Rule 14(8) of the Director's Rules. Those representations were made in the context of what is colloquially known "as the oral hearing" which took place on 27 June 2002 in the case of Argos and 3 September 2002 in the case of Littlewoods before an official of the OFT (in this case Mr Vincent Smith). Although referred to as "a hearing" this occasion is one in which the parties simply have the opportunity to elaborate their arguments orally to the OFT.

16. Although at least Argos apparently invited the representatives of the OFT to put questions to its witnesses, there exists no formal possibility for the questioning of witnesses in the course of the administrative procedure envisaged by Rule 14 of the Director's Rules. In particular, the administrative procedure which the OFT follows before taking a decision does not provide for the possibility of questioning witnesses under oath, or cross-examining witnesses in a manner equivalent to the well-known procedures of the court room.

17. In this case there was no cross-examination of witnesses at the administrative stage although the representatives of the OFT asked a few clarificatory questions at the oral hearing. The Director thus reached his decision on the basis of the written material before him and the submissions he had received.

Rules 15 and 17 of the Director's Rules

18. Rule 15 of the Director's Rules provides that:

> "(1) If the Director has made a decision as to whether or not an agreement has infringed the Chapter I prohibition … he shall, without delay:
>
> (a) give written notice of the decision:
>
> …
>
> (ii) … to each person who that Director considers is a party to the agreement …
>
> stating in the decision the facts on which he bases it and his reasons for making it; and
>
> (b) publish the decision."

19. Rule 17(2) of the Director's Rules provides:

> "Where the Director requires an undertaking to pay a penalty under section 36, he shall at the same time inform that undertaking in writing of the facts on which he bases the penalty and his reasons for requiring that undertaking to pay it."

20. Similar provisions requiring the OFT to set out in the decision the facts upon which the decision is based and the reasons for making it are to be found variously in Rules 17(1), 18(3), 20(2), and 21(3) of the Director's Rules.

21. In this case the contested decision was adopted on 19 February 2003. The decision sets out at considerable length the reasons for the decision and the facts upon which the OFT relies. In essence, the OFT relies partly on the e-mails, and partly on the notes of interview. In some cases the OFT relies on part of the notes of interview in support of its case, while rejecting other parts of the same interview. In the latter part of the decision under the heading "III

Analysis of Representations", the OFT sets out in detail why the various representations made by Littlewoods and Argos in answer to the Rule 14 notice are rejected. The decision also sets out why certain evidence from the witness statements put forward by Argos and Littlewoods is rejected.

The appeals

22. In their respective notices of appeal lodged on 17 April 2003, Argos and Littlewoods both submit that the evidence relied on by the OFT is inadequate, and fails to prove the alleged infringements to the necessary standard of proof. In particular Argos and Littlewoods strongly criticise the notes of interview, and rely on the witness statements they had previously submitted during the administrative procedure. With the exception of one witness statement (that of Mr Duddy, Chief Executive Officer of Argos, which we do not regard as material for the present purposes) both Argos and Littlewoods rely essentially on the same evidence and the same arguments as they relied on in the administrative procedure in order to rebut the allegations made in the Rule 14 notice.

23. The OFT's case on an infringement of the Chapter I prohibition turns, therefore, on issues of proof and credibility.

The first case management conference

24. In accordance with the Tribunal's usual practice, the first case management conference in the appeals was held on 21 May 2003, at a time when the time for service of the defence had not yet expired. At that case management conference the OFT intimated their desire to attach to the defence – then due to be served by 3 June 2003 – certain new witness statements from Hasbro employees who had originally been interviewed by the OFT. The OFT did not know at that stage whether they would be able to obtain such witness statements, or from whom. The OFT's proposal was that such statements should stand as part of the Director's evidence, and that those witnesses would then be available for cross-examination before the Tribunal. The OFT took the view that, as the case essentially depended on the credibility of witnesses, a proper procedure of examination and cross-examination of the witnesses before the Tribunal was going to be essential in order to determine the issues in the case.

25. The OFT's position at the first case management conference was strongly opposed by Argos and Littlewoods. It was submitted on behalf of Argos and Littlewoods that the introduction at this stage of new evidence in the form of witness statements, after the appeals had been lodged, would be in breach of Rule 14 of the Director's Rules. By definition, the new

material sought to be adduced would not have been put to the parties in the course of the administrative procedure and would not be found in the decision under appeal. Both Argos and Littlewoods proposed that the Tribunal should determine the appeal "on the papers" in the way that the Director had done, without the oral hearing of witnesses, although both Argos and Littlewoods said that their witnesses were available to be heard should the Tribunal wish to do so.

26. At the conclusion of the case management conference on 21 May 2003 the Tribunal decided that it should not rule one way or the other whether the OFT should be permitted to file new witness statements until it became clear what statements the OFT wished to adduce, and what the contents of those statements were. The Tribunal accordingly decided that the OFT's defence should be served by the due date (3 June 2003) and that any witness statements relied on by the OFT should be served within 14 days thereafter. The question of whether any such witness statements should be admitted at all, or under what conditions, was to be argued at a second case management conference: see [2003] CAT 10.

The three new witness statements

27. Following the service of the defence on 3 June 2003, the OFT served three further witness statements, which it now seeks to adduce as evidence in this case. Those are witness statements by Mr David Bottomley, former Sales Director of Hasbro, Mr Ian Shotbolt Thomson, Business Account Manager responsible for Hasbro's account with Littlewoods, and Mr Neil Wilson, formerly the Hasbro Account Manager responsible for Argos.

28. In our view, those witness statements contain significant evidence that, at first sight, is material to whether an infringement of the Chapter I prohibition has been committed. The witness statements also contain evidence that is not in the original notes of interview or indeed the decision. In general, the witness statements amplify, at first sight to a considerable extent, the evidence available to the OFT as to whether there was an infringement, how the infringement came about, and the course it took.

29. The position therefore is, that the OFT seeks to support the decision with new material that is not contained in or referred to in the decision, and was not put at the administrative stage. It is only now, after the notice of appeal has been filed, that Argos and Littlewoods have seen this material for the first time.

The choice before the Tribunal

30. The main issue with which this judgment is concerned, therefore, is what is the correct course to follow as regards these three new witness statements. In the course of argument the Tribunal put to the parties essentially three possibilities:

(a) that the material should be excluded altogether;

(b) that the material should be admitted in its entirety, as the OFT suggests, and that the case should proceed accordingly; or

(c) that the matter should be remitted to the Director, with a view to the Rule 14 procedure being followed in relation to the new witness statements, and Rules 15 and 17 of the Director's Rules being complied with in relation to any facts found by the Director in reliance on the new witness statements.

The second case management conference and the arguments of the parties

31. At the beginning of the case management conference on 1 July 2003 it appeared to be the case that all three parties were content for the witness statements to be admitted in evidence, for the appellants to file such counter-evidence as might be appropriate, and for the matter to proceed, broadly speaking, in the way suggested by the OFT. After the Tribunal itself had expressed doubt as to whether that was the proper course to take, it appeared that it was only with some reluctance that Argos and Littlewoods were "consenting" to the course proposed. It does not appear to the Tribunal that either of those parties have, in fact, unequivocally consented to the three witness statements going in as suggested by the OFT. In those circumstances, the Tribunal has heard argument as to what course should be followed.

32. Putting the matter very briefly, both Argos and Littlewoods submit, first, that course (a) (excluding the statements altogether) should be followed; the Director has taken the decision, the decision sets out the evidence relied on, and it is too late now to adduce new evidence. Similarly, Argos and Littlewoods submit that it would not be correct procedure to follow course (b) (admitting the statements): that would mean that new material was being adduced which had not been subject to the Rule 14 procedure, and was not set out in the decision.

33. As regards course (c), (remittal to the Director for the Rule 14 procedure to be followed), Littlewoods argued that delay in the proceedings was undesirable, since witnesses' memories would fade; there would be a risk of losing witnesses who might retire or leave the company; further management time would be involved; even if a new Rule 14 procedure were followed,

there would still be a conflict of evidence, which would ultimately have to be resolved by the Tribunal; the proceedings should be completed sooner rather than later; and a continuation of the administrative procedure would involve Littlewoods in further irrecoverable costs. Littlewoods argued that the correct procedure would be to "fillet out" of the three witness statements all new material. As a provisional exercise, which had been completed at that stage only on Mr Thomson's witness statement, Littlewoods estimated that about 80 per cent of the evidence would have to be filleted out. However the truncated witness statements could remain, the witnesses could be called to give evidence before the Tribunal, and cross-examined. Littlewoods also sought disclosure of certain documents, the existence of which, said Littlewoods, is to be inferred from Mr Thomson's statement.

34. Argos submitted that, if the Tribunal felt that the evidence should not be excluded under option (a), but the Tribunal accepted Argos's arguments under option (b), the only solution would be to remit the matter to the OFT under option (c). Argos considered, however, that any such remittal back should be on the basis that the existing decision be set aside, and that Argos should be compensated in costs.

35. The OFT submitted, essentially, that the Tribunal should follow option (b), i.e. that the Tribunal should simply admit the witness statements under Rule 20 of the Tribunal's Rules, cited below. The essential role of the Tribunal was to ensure fairness in the procedure. There could be no unfairness to the appellants in this case, first because they had already been prepared to agree to the witness statements going in; secondly, because the Tribunal through its procedures could protect the appellants against any unfairness that might arise; and thirdly because the appellants had not identified any specific element in the witness statements which, according to them, could give rise to unfairness if the statements were to be admitted before the Tribunal.

36. Since the appellants had not identified any specific unfairness, submitted the OFT, there was no reason to suppose that any unfairness should arise. Moreover there would be no purpose in sending the matter back to the OFT to go through a Rule 14 procedure, because the matter would only have to come back to the Tribunal and the same situation would arise; the Tribunal is the forum in which conflicts of evidence affecting credibility of witnesses are to be resolved. It is inevitable, submitted the OFT, that the appeal process involves looking in more detail at the allegations made in the decision; the details of a case such as the present are likely to range far and wide; the OFT is not required to set out in the decision every single fact relied on, but only the salient or material facts. In the course of any procedure involving the oral evidence of witnesses, new facts are bound to emerge in the course of the

proceedings. In the present case the decision sets out the essence of the Director's findings, which are not materially affected by the new evidence.

37. Furthermore, submitted the OFT, it is not the case that the Tribunal will not allow anything to go before it that was not raised in the administrative procedure: see *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2001] CAT 3, [2001] CompAR 33 ("*Napp: preliminary issue*"). The Tribunal's previous decision in *Aberdeen Journals Limited v Director General of Fair Trading* [2002] CAT 4, [2002] CompAR 167 ("*Aberdeen Journals (No.1)*") is distinguishable: in that case, there was little or no material contained in the decision to support the Director's conclusion on the evidence of relevant market; for the issue to be properly debated it was essential that the matter be remitted to the Director for the Rule 14 procedure to be resumed. In this case, by contrast, the Director's case is already set out in the contested decision in a wealth of detail, so the substance of the matter is already covered. It would not be unfair to permit these further witness statements to be adduced without insisting that a new Rule 14 procedure be followed.

The statutory provisions governing appeals to the Tribunal

38. We have already referred above to section 31 of the 1998 Act, and to Rules 14, 15 and 17 of the Director's Rules, which govern the procedure that the OFT must follow *before* taking a decision.

39. *Once the decision is taken*, the decision may be appealed to the Tribunal pursuant to section 46 of the 1998 Act. Section 46, as amended by the Enterprise Act 2002, provides:

> "(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> …
>
> (3) In this section "decision" means a decision of the OFT–
>
> (a) as to whether the Chapter I prohibition has been infringed,
>
> …"

40. Since 1 April 2003, this Tribunal, to which the appeal lies, is constituted under Section 14, and Schedule 4, of the Enterprise Act 2002.

41. Schedule 8, paragraph 2, of the 1998 Act, as amended by the Enterprise Act 2002, provides:

> "2(1) An appeal to the Tribunal under section 46 or 47 must be made by sending a notice of appeal to it within the specified period.

(2) The notice of appeal must set out the grounds of appeal in sufficient detail to indicate–

(a) under which provision of this Act the appeal is brought;

(b) to what extent (if any) the appellant contends that the decision against, or with respect to which, the appeal is brought was based on an error of fact or was wrong in law; and

(c) to what extent (if any) the appellant is appealing against the OFT's exercise of its discretion in making the disputed decision.

(3) The Tribunal may give an appellant leave to amend the grounds of appeal identified in the notice of appeal.

(4) In this paragraph references to the Tribunal are to the Tribunal as constituted (in accordance with section 14 of the Enterprise Act 2002) for the purpose of the proceedings in question."

42. As far as the powers of the Tribunal are concerned, paragraph 3 of Schedule 8 to the 1998 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 OFT,

(b) impose or revoke, or vary the amount of, a penalty,

…

(d) give such directions, or take such other steps, as the OFT could itself have given or taken, or

(e) make any other decision which the OFT could itself 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 OFT.

(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."

43. The Tribunal's procedure is governed by rules that are now made under section 15, and Part II of Schedule 4, of the Enterprise Act 2002: see the Competition Appeal Tribunal Rules 2003 S.I. 2003 no. 1372 ("the 2003 Rules"), which came into force on 20 June 2003. However, since this appeal was lodged prior to 20 June 2003, the Tribunal's procedure in this specific case is governed by the previous rules to be found in the Competition Commission Appeal Tribunal Rules 2000 S.I. 2000 no. 261 ("the 2000 Rules"), made under section 48 of the 1998 Act: see paragraph 69 of the 2003 Rules. There does not appear to be any material difference for present purposes between the two sets of rules.

44. The 2000 Rules, made under the powers contained in Part II of Schedule 8 to the 1998 Act, in particular paragraph 9(1) of that Schedule, include the following relevant rules.

45. Rule 17 (Directions) provides:

> "(1) The tribunal may at any time, on the request of a party or of its own motion, at the pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
>
> (2) The tribunal may give directions–
>
> (a) as to the manner in which the proceedings are to be conducted, including any time limits to be observed in the conduct of the oral hearing;
>
> (b) that the parties file a reply to the defence or other additional pleadings;
>
> (c) for holding a pre-hearing review;
>
> (d) requiring persons to attend and give evidence or to produce documents;
>
> (e) as to the evidence which may be required or admitted in proceedings before the tribunal and the extent to which it shall be oral or written, including, where a witness statement has been submitted, whether the witness is to be called to give oral evidence;
>
> (f) as to the submissions in advance of a hearing of any witness statements or expert reports;
>
> (g) as to the examination or cross-examination of witnesses;
>
> (h) as to the fixing of time limits with respect to any aspect of the proceedings;
>
> (i) as to the abridgement or extension of any time limits, whether or not expired;
>
> (j) to enable a disputed decision to be referred back (or in Scotland, remitted) to the person by whom it was taken;
>
> (k) for the disclosure between, or the production by, the parties of documents or classes of documents; or in the case of proceedings taking place in Scotland, for such recovery or inspection of documents as might be ordered by a sheriff;
>
> (l) for the appointment and instruction of experts, whether by the tribunal or by the parties and the manner in which expert evidence is to be given; and
>
> (m) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the tribunal.
>
> (3) The tribunal may, in particular, of its own motion–
>
> (a) put questions to the parties;
>
> (b) invite the parties to make written or oral submissions on certain aspects of the proceedings;
>
> (c) ask the parties or third parties for information or particulars;
>
> (d) ask for documents or any papers to the case to be produced;

(e) summon the parties' representatives or the parties in person to meetings or case conferences."

46. Rule 20 (Evidence) provides:

"(1) The tribunal may control the evidence by giving directions as to–

(a) the issues on which it requires evidence;

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the tribunal.

(2) The tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken and notwithstanding any enactment or rule of law relating to the admissibility of evidence in proceedings before a court.

(3) The tribunal may require any witness to give evidence on oath or affirmation or if in writing by way of affidavit.

…"

47. Rule 21 (Summoning or citing of witnesses) provides:

"(1) Subject to paragraphs (2) and (3) below, the tribunal may at any time, either of its own motion or on the request of any party, issue a summons, (or in relation to proceedings taking place in Scotland, a citation), requiring any person wherever he may be in the United Kingdom to do one or both of the following–

(a) to attend as a witness before the tribunal at the time and place set out in the summons or citation; and

(b) to answer any questions or produce any documents or other material in his possession or under his control which relate to any matter in question in the proceedings.

…"

48. Rule 24 (Procedure at the hearing) provides:

"(1) The proceedings shall be opened and directed by the President or Chairman who shall be responsible for the proper conduct of the hearing.

(2) The tribunal shall, so far as it appears to it appropriate, seek to avoid formality in its proceedings and shall conduct the hearing in such manner as it considers most appropriate for the clarification of the issues before it and generally to the just handling of the proceedings.

…

(4) Unless the tribunal otherwise directs, no witness of fact or expert shall be heard unless the relevant witness statement or expert report has been submitted in advance of the hearing and in accordance with any directions of the tribunal.

(5) The tribunal may limit cross-examination of witnesses to any extent or in any manner it deems appropriate, having regard to the just, expeditious and economical conduct of the proceedings."

The Tribunal's previous decisions

49. The Tribunal has on two previous occasions had to consider issues similar to those that arise in the present case. The relevant decisions are those in the *Napp* case (two judgments, one on a preliminary issue, one on the substance) and *Aberdeen Journals(No. 1).*

Napp: preliminary issue

50. In *Napp: preliminary issue* [2001] CAT 3, [2001] CompAR 33, the Director sought to introduce additional witness statements at the stage of lodging his defence in an appeal against a decision under which he had found that Napp had been guilty of an infringement of the Chapter II prohibition (abuse of a dominant position) imposed by section 18 of the 1998 Act in relation to its pricing policies. At a case management conference Napp principally argued that no new evidence should be admitted on the appeal, or only very sparingly, otherwise the rights of the defence at the administrative stage in Rule 14 of the Director's Rules would not be respected. On this preliminary issue, the Tribunal said at paragraphs 68 to 82:

> "68. In addressing Napp's argument that the new evidence should in principle be excluded altogether, even at this stage, we do not, at first sight, find analogies with other jurisdictions particularly helpful.
>
> 69. As far as analogies drawn by Napp with criminal procedure are concerned, the Director concedes, in our view rightly (see Case C-235/92P *Montecatini v Commission* [1999] ECR I-4575, points 175 and 176), that these proceedings are 'criminal' for the purposes of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR). However, it does not follow that an analogy can usefully be drawn with the procedure traditionally followed in a criminal trial in the Crown Court or on appeal to the Court of Appeal (Criminal Division). The administrative procedure before the Director is manifestly not a trial in that sense and does not follow either the criminal rules of evidence or criminal procedure.
>
> 70. As the Court of Appeal has recently indicated in *Han & Yau and ors v Commissioners of Customs and Excise* (3 July 2001), the fact that certain proceedings may be classified as 'criminal' for the purposes of the ECHR gives the defendant the protection of Article 6, and in particular the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6(1)), to the presumption of innocence (Article 6(2)) and to the minimum rights envisaged by Article 6(3) including the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" Article 6(3)(d). But it by no means follows, from the conclusion that Article 6, applies that civil penalty proceedings are, for domestic purposes, to be regarded as criminal and therefore subject to the procedures that apply to the investigation of crime and the conduct of criminal proceedings as defined

by English law (see Potter LJ at paragraph 84 and Mance LJ at paragraph 88 of that judgment).

71. Similarly, we do not find the analogy of the approach of the Court of Appeal (Civil Division) to new evidence as exemplified in *Ladd v Marshall* [1954] 1 WLR 1489 directly in point. Here there has been no 'trial' as there has been in civil proceedings, there has merely been an administrative procedure. The procedure before the Court of Appeal, although strictly speaking a 'rehearing'; does not bear any real resemblance to the procedure akin to that of a court of first instance. Similarly, the practice of the Administrative Court in judicial review proceedings is not directly analogous, since these proceedings are not judicial review but a full determination of the merits. The Court of First Instance of the European Communities (CFI), upon which the Tribunal is broadly modelled, is perhaps a little closer, but the jurisdiction of this Tribunal is couched in wider terms than that of the CFI under Arts 229 and 230 (ex 172 and 173) of the EC Treaty. Moreover, the fact-finding procedures of the CFI are rooted in the inquisitorial civil law tradition and rarely involve witness statements of the kind in issue here. We do not find that analogy directly helpful either.

72. We start then from first principles but we do so only in a provisional way because the matter has not been fully argued and we have not been taken to any authorities. Under the structure of the Act what we have is an administrative procedure before the Director, followed by a full judicial determination of the merits of the Director's decision, with the tribunal being vested, notably, with the power to take any decision the Director could have taken (Schedule 8, paragraph 3(2)(e) of the Act).

73. As regards the administrative stage, under Rule 14 of the Director's Rules, the Director must put to the defendant "the matters to which he has taken objection, the action he proposes and the reasons for it", provide an opportunity for the defendant to inspect documents in the Director's file, and give the defendant the opportunity to make written and oral representations. We accept that under the case law of the CFI the European Commission's obligation to put to the defendant the essential facts on which he relies is a fundamental part of the rights of the defence, breach of which can result in the annulment of the decision: see e.g. Cases T-25/93 etc *Cimenteries CBR and others v Commission* (the *Cement* case) [2000] ECR II-491, paragraphs 106 and 476. While of course strongly persuasive, the judgments of the CFI are however influenced by the formal concepts of French administrative law, and by the nature of the jurisdiction exercised by that Court under Article 230 of the EC Treaty. Moreover, not every breach of the right to be heard in the administrative procedure will necessarily lead to annulment of the decision, see e.g. Case 85/76 *Hoffman La Roche v Commission* [1979] ECR 461, points 15 to 17; and the *Cement* case, at points 241 and 247.

74. We add that the fact that the administrative procedure before the Director may not itself comply with the requirements of Article 6(1) of the ECHR, does not constitute a breach of the Convention, provided that the Director is subject to subsequent control by a judicial body that has full jurisdiction and does comply with Article 6(1): *Albert and Le Compte v Belgium* 5 EHRR 533, and the decision of the House of Lords of 9 May 2001 in *Alconbury Developments Ltd and others* [2001] UKHL 23. As we see it, the Act looks to the judicial stage of the process before this Tribunal to satisfy the requirements of Article 6 of the ECHR.

75. As regards the judicial stage, we have already set out the provisions of the Act and the Rules which provide that the appeal is a full appeal on the merits, conducted by reference to witnesses and documents, under the discretionary control of the Tribunal. The ample nature of that appeal seems to us to equate to that under consideration in *Lloyd v McMahon* [1987] 2 WLR 821 where the House of Lords indicated that a court enjoying such a jurisdiction could in certain circumstances legitimately correct unfairness which may have occurred in the administrative procedure below without necessarily quashing the decision concerned: see Lord Bridge at pp 884F to 885C and Lord Templeman at p.891 E-G.

76. In that connection we note that the appellant is not limited to placing before this Tribunal the evidence he has placed before the Director but may expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test the evidence of witnesses before the Director, it is at this judicial stage of the proceedings that the applicant may apply to test by cross-examination the evidence of all relevant witnesses against him.

77. We doubt, however, whether exactly the same liberal approach to the submission of new evidence can be applied to the Director. In our view the exercise of the discretion to allow new evidence by the Director at the appeal stage should take strongly into account the principle the Director should normally be prepared to defend the decision on the basis of the material before him when he took that decision. It is particularly important that the Director's decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act, with important legal consequences, which in principle fixes the Director's position. In our view further investigations after the decision of primary facts, in an attempt to strengthen by better evidence a decision already taken, should not in general be countenanced.

78. Were it otherwise, the important procedural safeguards envisaged by Rule 14 of the Director's Rules would be much diminished or even circumvented altogether. There would be a risk that appellants could be faced with a "moving target". The Tribunal itself would be in difficulties if, instead of determining the appeal essentially by reference to the merits of the decision in the light of the material relied on by the Director at the time, the Tribunal was effectively adjudicating on a "bolstered" version of the decision. The Director himself concedes that he cannot 'make a new case' before the Tribunal.

79. For these reasons our provisional conclusion is that there should be a presumption against permitting the Director to submit new evidence that could properly have been made available during the administrative procedure.

80. On the other hand, there may well be cases where the Tribunal is persuaded not to apply the presumption we have indicated. As stated in the *Guide*, the procedures of this Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under Rule 1.1 of the Civil Procedure Rules. That includes, so far as practicable, ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate, proceeding expeditiously, and allotting to the case an appropriate share of the court's resources. Those considerations may militate against permitting new

evidence by the Director, but in some circumstances considerations of fairness may point in the other direction. An obvious example is where a party makes a new allegation or produces a new expert's report which the Director seeks to counter.

81. One factor that may well be relevant in this connection is the fairness of the appeal process itself. In accordance with the Act, the first occasion on which the Decision first receives full public judicial scrutiny is in this Tribunal. An appellant will often have submitted voluminous pleadings, witness statements, and documents unconstrained by the evidence presented to the Director. The Director, at the administrative stage, may not always be able to foresee (although of course he should endeavour to do so) from what direction or in what strength an attack might come at the appeal stage. A situation whereby the appellant could always have a "free run" before the Tribunal, but the Director was always confined to the material used in the administrative procedure could lead to a significant lack of balance and fairness in the appeal process.

82. Another possibly relevant consideration is the situation of adversely affected third parties such as competitors (here BIL and Link). Such competitors may choose formally to intervene, or they may have their point of view put by means of material presented by the Director. We are not persuaded that it matters very much which route is followed; we simply indicate that what is fair as regards closely involved third parties may also be relevant to the exercise of the Tribunal's discretion to admit further evidence."

51. On the facts of that particular case, the Tribunal decided not to exclude most of the witness statements in issue. It is important, however, to note that the witness statements considered in *Napp* did not constitute, or add to the case made by the Director as to the existence of the infringement as found in the decision. The additional statements went, essentially, to rebutting various arguments that Napp was putting forward in its appeal. Thus the Tribunal said at paragraph 83 :

> "… The thrust of the evidence of Messrs Hartley and Penrose is not directed to that pricing case [i.e. the case made by the Director in the decision] but to rebutting the defence put forward by Napp that its actions are legitimate because Napp profits from 'follow-on' sales in the community sector, a possibility equally open to its competitors. So we are dealing here with rebuttal evidence."

52. In addition there were various subsidiary reasons for admitting the evidence in that case, including the fact that Napp had criticised or made assertions about the competitors to which the evidence related, and the background and historical nature of the evidence: see paragraph 87.

Napp: substance

53. The Tribunal returned to the question of witness statements in its decision on the substance of the application *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading*

[2002] CAT 1, [2002] CompAR 13 ("*Napp: substance*"). The Tribunal said at paragraphs 116 to 119:

> "116. As we indicated in our judgment of 8 August 2001 (paragraphs 72 to 79) it is of obvious importance that, in the administrative procedure, the provisions of Rule 14 of the Director's Rules (see paragraphs 24 and 25 above) are properly observed.
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> 117. If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the rôles of "prosecutor" and "decision maker", becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional rôle of judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case "on the merits" and may, if necessary and appropriate, "make any other decision which the Director could have made": paragraph 3(2)(e). If confirming a decision, the Tribunal may nonetheless set aside a finding of fact by the Director: paragraph 3(4) of Schedule 8. Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts (see Schedule 8, paragraph 9 of the Act, and Rule 17 of the Tribunal's Rules) and may do so even if the evidence was not available to the Director when he took the decision: see Rule 20(2) of the Tribunal's Rules.
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> 118. In elucidation of these provisions, we refer to the statement made in the House of Commons by the then Minister for Competition and Consumer Affairs (Mr Griffiths) during the passage of the Competition Bill on 18 June 1998 (Hansard Col 496):
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> > "It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules.
> >
> > This is an important aspect of our policy, and I shall explain the rationale behind our approach. The Bill provides for a full appeal on the merits of the case, which is an essential part of ensuring the fairness and transparency of the new regime. It enables undertakings to appeal the substance of the decision including in those cases where it is believed that a failure on the part of the director general to follow proper procedures has led him to reach an incorrect conclusion. The fact that the tribunal will be reconsidering the decision on the merits will enable it to remedy the consequences of any defects in the director general's procedures."

119. As we have already said in our judgment of 8 August 2001, if, at the judicial stage, an applicant launches an attack which places under close scrutiny particular aspects of the Decision, in principle we do not think that the Director should be denied a reasonable opportunity to reply by adducing rebuttal evidence in support of the points already made in the Decision. Thus we do not accept Napp's principal submission that nothing may be relied on before the Tribunal unless it was relied on in the administrative procedure."

54. The Tribunal also dealt in its judgment on the substance (at paragraphs 133 to 135) with an argument advanced by Napp on the basis of the well-known decision in *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302:

"133. On this point, for the same reasons that we consider that our discretion to allow the Director to submit further evidence should be exercised only sparingly, we accept Napp's basic submission that, in principle, the Director should not be permitted to advance a wholly new case at the judicial stage, nor rely on new reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit.

134. However, given the powers of this Tribunal, it seems to us the analogy with *Ermakov* does not go as far as Napp submits. In those circumstances it is virtually inevitable that, at the judicial stage, certain aspects of the Decision are explored in more detail than during the administrative procedure and are, in consequence, further elaborated upon by the Director. As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the Decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the Director. For these reasons, while we accept the force of the general principle that lies behind *Ermakov*, the analogy is not exact.

135. In the present case, for the reasons given in more detail below (see paragraphs 428 to 442), we have reached the view that Napp's allegations as to the Director's alleged "change of case" do not in fact have the significance that Napp alleges as far as the Director's findings of infringement are concerned. As will be seen, we do not think that there is anything in the *Ermakov* line of reasoning which precludes us from determining this appeal on the merits in the light of all the material now before us."

Aberdeen Journals (No.1)

55. In *Aberdeen Journals (No. 1*) the issue was whether the relevant market for the purpose of assessing whether Aberdeen Journals had a dominant position was the market for "paid-for" newspapers in Aberdeen (which effectively comprised one title, a paid-for daily evening

newspaper, the *Evening Express*), or whether the market consisted of both paid-for and free newspapers in Aberdeen (thus not only the *Evening Express* but two weekly free local newspapers, the *Aberdeen Independent*, and the *Herald & Post*).

56. For the definition of the "relevant market" the Director, in the decision, relied almost entirely on a single letter written by Aberdeen Journals which the Director considered was, in effect, an admission by Aberdeen Journals that the market was the market for both paid-for and free newspapers. Before the Tribunal, the Director sought to refer, in support of the decision, to a number of further documents which are set out at paragraph 77 of the judgment. None of those documents had been put to Aberdeen Journals during the administrative procedure. Aberdeen Journals submitted that that additional material could not be taken into account.

57. At paragraphs 164 to 178 of *Aberdeen Journals (No. 1)*, the Tribunal said:

> "164. Section 31 of the Act provides that, before taking a decision that the Chapter I or Chapter II prohibition has been infringed, the Director must give written notice to the person or persons likely to be affected and give that person or those persons an opportunity to make representations. Rule 14 of the Director's Rules (cited at paragraph 12 above) provides that, before taking an infringement decision, the Director shall give the undertaking concerned a written notice stating "the facts on which the Director relies, the matters to which he has taken objection, the action he proposes and his reasons for it": Rule 14(3). Under Rule 14(7) and (8) the undertaking may make written and oral representations in response to that notice (already colloquially known as "the Rule 14 Notice") and may also inspect the documents in the Director's file: Rule 14(5).
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> 165. These procedures constitute important safeguards for the rights of the defence. In the analogous context of proceedings by the Commission of the European Communities against an undertaking for infringement of Articles 81 and 82 of the Treaty, it has been held that the Commission is not entitled to rely in its decision on documents on which the undertaking has had no chance to comment during the administrative procedure: see e.g. Case T-4/89 *BASF v. Commission* [1991] ECR II – 1523, paragraph 36; Case C-310/93P *BPB v Commission* [1995] ECR I–865, paragraph 21. This obligation applies equally to documents emanating from the undertaking in question: Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraphs 26 to 27. As the Court said in that case at paragraph 27:
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> > "In this connection it must be observed that the important point is not the documents as such but the conclusions which the Commission has drawn from them. Since these documents were not mentioned in the statement of objections AEG was entitled to take the view that they were of no importance for the purposes of the case. By not informing the applicant that these documents would be used in the decision, the Commission prevented AEG from putting forward at the appropriate time its view of the probative value of such documents. It follows that these documents cannot be regarded as admissible evidence for the purposes of this case."

166. In addition, when the Director takes a decision as to whether or not the Chapter I or II prohibitions have been infringed, he must give written notice and state in the decision "the facts on which he bases it and his reasons for making it": Rule 15(1)(a) of the Director's Rules. Where the Director makes a direction or imposes a penalty he must inform the undertaking in writing of "the facts on which he bases" the direction or penalty, and his reasons for giving the direction, or requiring the undertaking to pay the penalty, as the case may be: Rule 17(1) and (2) of the Director's Rules.

167. If there is an appeal to the Tribunal, then under paragraph 3 of Schedule 8 of the Act (see paragraph 6 above) the Tribunal must determine the appeal "on the merits by reference to the grounds of appeal set out in the notice of appeal": paragraph 3(1). Rule 20(2) of the Tribunal Rules provides:

> "The tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken and notwithstanding any enactment or rule of law relating to the admissibility of evidence in proceedings before a court."

168. In the Tribunal's judgment in *Napp* of 15 January 2002, cited above, the Tribunal accepted that it had a discretion under Rule 20(2) of the Tribunal Rules, to permit the Director to rely on new evidence that was not contained in the Decision, but that such discretion should be exercised sparingly, so as not to jeopardise the safeguards provided by Rule 14 of the Director's Rules (paragraphs 114 to 119, 128 to 130, 133 and 134, and 314 of that judgment). The Tribunal envisaged, in particular, that the Director might be allowed to adduce such new evidence where the latter consisted, in essence, of matters going to rebut allegations made in the notice of appeal (paragraph 114). At paragraph 119 of that judgment the Tribunal said:

> "As we have already said in our judgment of 8 August 2001, if, at the judicial stage, an applicant launches an attack which places under close scrutiny particular aspects of the Decision, in principle we do not think that the Director should be denied a reasonable opportunity to reply by adducing rebuttal evidence in support of the points already made in the Decision. Thus we do not accept Napp's principal submission that nothing may be relied on before the Tribunal unless it was relied on in the administrative procedure."

169. However, it seems to us that the situation in the present case is not identical to the situation with which the Tribunal was concerned in *Napp*. The additional evidence adduced by the Director in *Napp* was primarily directed to rebutting various detailed allegations made by the appellants in that case (see paragraphs 121 to 126 of that judgment), or concerned material that came to light after the Director had taken his decision which went to rebuttal issues and completed the evidential picture (paragraphs 307 et seq of that judgment).

170. In the present case, by contrast, the documents on which the Director relies in the defence go directly to an essential part of the case on relevant market which it is up to the Director to establish in the Decision and to put in the course of the administrative procedure. Aberdeen Journals did not know the Director was relying on these documents until the stage when the Director's defence was lodged before the Tribunal.

171. It is true that, as the Director submits, the material upon which he now seeks to rely was provided by Aberdeen Journals themselves, as an appendix of, or as attachments to, the letter of 10 February 2000. It is also true that, in paragraph 4.5 of the notice of appeal, Aberdeen Journals encouraged the Tribunal "to read carefully through the correspondence, which is attached in the Bundle at pages 1-905". However, the fact that the Director wished to rely on these documents was not drawn to Aberdeen Journals' attention in the Rule 14 Notice, or at any subsequent stage of the administrative procedure, and Aberdeen Journals did not know, during the administrative procedure, what interpretation or weight the Director attached to the documents, or to the underlying facts to which the documents refer: see *AEG v Commission*, cited above. We do not accept that the reference in paragraph 43 of the Decision to "the submissions" of Aberdeen Journals is sufficient to draw attention to the documents in question or to the underlying facts to which they refer. Nor do we accept the Director's argument that decisions would be 'inordinately long' if the Director had to cite every document on which he relied. In this case it is a matter of some five further documents, at first sight material to the issue of the relevant market which, for whatever reason, were not included in the Decision.

172. We accept therefore Aberdeen Journals' submission that, if they were to be relied upon, these documents should have been put to Aberdeen Journals in the course of the administrative procedure. The Director was aware that Aberdeen Journals was strongly contesting the inferences to be drawn from the letter of 10 February 2000, since that was made clear by Aberdeen Journals during the administrative hearing which took place on 15 February 2001. At that stage, it would have been open to the Director to allow Aberdeen Journals an opportunity to comment on these documents without necessarily serving an entirely new Rule 14 Notice: see *AEG v Commission*, cited above, at paragraph 29, but that was not done.

173. These factual circumstances distinguish this case from *Napp*, where it was not found by the Tribunal that the material admitted as further evidence should have been put during the administrative procedure. The situation in this case is that Aberdeen Journals has not had the opportunity to comment, during the administrative procedure, on additional documents on which the Director now relies to support a primary finding in the Decision to establish his case on the relevant market. As the Tribunal said in *Napp*, at paragraph 116 "it is of obvious importance that, in the administrative procedure, the provisions of Rule 14 of the Director's Rules are properly observed". Moreover, the documents have not been included in the Decision either, so could not have been addressed by Aberdeen Journals in framing its notice of appeal.

174. On the face of Rule 20(2) of the Tribunal Rules, there is nonetheless a discretion to take this additional material into account, notwithstanding that it was not relied on in the Decision or referred to in the Rule 14 Notice. The Director urges us to do so, avoiding an unduly formalistic approach to our function. Such an approach is also suggested by the statement made in the House of Commons by the Minister for Competition and Consumer Affairs (Mr Griffiths) during the passage of the Competition Bill in 1998 (Hansard Col 496) which was cited in *Napp*, at paragraph 118 of that judgment, and which we cite again:

> "It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions

> contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules.
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> This is an important aspect of our policy, and I shall explain the rationale behind our approach. The Bill provides for a full appeal on the merits of the case, which is an essential part of ensuring the fairness and transparency of the new regime. It enables undertakings to appeal the substance of the decision including in those cases where it is believed that a failure on the part of the director general to follow proper procedures has led him to reach an incorrect conclusion. The fact that the tribunal will be reconsidering the decision on the merits will enable it to remedy the consequences of any defects in the director general's procedures."

175. We do not entirely rule out the possibility that, in an appropriate case, it would be sufficient to safeguard the "rights of the defence" if a party has an opportunity to comment on a document during the course of an appeal. Generally speaking, however, we think that would be the exception, rather than the rule. In general, it is at the stage of the administrative procedure, when the Director is marshalling his evidence, that the defendant should be afforded the opportunity to comment, as envisaged by section 31 of the Act and Rule 14 of the Director's Rules.

176. We bear in mind, in that connection, that the Act involves the imposition of severe penalties and that proceedings under the Act are "criminal" for the purposes of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") (*Napp*, at paragraphs 92 et seq). The administrative procedure required by section 31 of the Act and established under Rule 14 of the Directors' Rules, is there for a purpose, which is to enable the "right to be heard" to be exercised. If we, at the level of the Tribunal, accept that material matters forming part of the Director's essential case need not be put at the administrative stage, whether in the Rule 14 Notice or otherwise prior to the Decision, but can be raised for the first time at the stage of the appeal, the statutory right to be heard during the administrative stage would be materially weakened. In addition, the Director's duty to set out the facts on which he relies and to give reasons in his decisions under Rules 15(1), 17(1) and 17(2) of the Director's Rules would be materially weakened if we were to permit the Director to support an essential part of his case by further facts at the stage of his defence to an appeal, even if the facts emanate from the undertaking in question.

177. Perhaps more importantly, such an approach could give rise to a tendency to transform this Tribunal from an essentially appellate Tribunal to a court of trial where matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time at the level of the Tribunal when they could and should have been raised in the administrative procedure and dealt with in the decision. We do not think that such a

development would be conducive to appropriate rigour in administrative decision making, or to a healthy and fair system of appeals under the Act.

178. Aberdeen Journals has decided to take a formal objection to the documents in question. In those circumstances, for the reasons given above, we do not think we should take the documents in question into account for the purpose of upholding an essential element in the Decision, namely the definition of the relevant market, in circumstances where (i) the documents are not referred to in the Decision nor in a Rule 14 Notice or equivalent document; and (ii) no convincing reason is advanced for that omission."

58. The Tribunal concluded that, in those circumstances, it had no alternative but to set aside the decision under paragraph 3(2) of Schedule 8 to the 1998 Act on the grounds that the treatment in the decision of the relevant product market was inadequate: see paragraph 189 of *Aberdeen Journals (No. 1)*. The Tribunal, however, decided to remit the matter back to the Director for further consideration of the issue of which newspapers constituted the relevant product market: see paragraph 194. The Tribunal explained its approach at paragraphs 190 to 193 in the following terms:

"190. However, paragraph 3(2)(a) of Schedule 8 of the Act gives the Tribunal power to remit the matter back to the Director. A further such power is to be found in paragraph 9(1)(f) of Schedule 8, and Rule 17(2)(j) of the Tribunal Rules, but we do not for present purposes need to explore the precise relationship between these provisions. The power to remit is clearly established under the Act. In that respect, it seems to us that there is a "relevant difference", for the purposes of section 60 of the Act, between our powers and those of the Court of Justice and Court of First Instance where there is no power to remit: see Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, at paragraph 96. Nor are we aware of any overriding principle of domestic law, including the Human Rights Act 1998, that would preclude the Director from reconsidering the matter and arriving at a further decision.

191. Notwithstanding that these are "criminal" proceedings for the purposes of Article 6(1) of the ECHR the various statutory provisions governing the circumstances in which, following a criminal appeal, the relevant appellate court in Scotland, England & Wales or Northern Ireland (in this case Scotland) may authorise a new criminal prosecution, or order a retrial in a criminal case, do not apply to proceedings by the Director under the Act (see the Tribunal's judgment in *Napp*, cited above, at paragraph 95 and *Han v Commissioners of Customs & Excise* [2001] 4 All ER 687 CA). However, it seems to us that, in infringement proceedings potentially involving a penalty under section 36 of the Act, we should not exercise the power to remit with a view to the matter being further considered by the Director unless we are satisfied that the proceedings should continue in the interests of justice.

192. In this case we are so satisfied. There is an important public interest in seeing that the Chapter II prohibition is respected. As it turns out, the issues canvassed in this judgment turn largely on matters of due process. The main purpose of remitting to the Director is to ensure that due process is respected at the administrative stage rather than left to the appeal stage. At this early point in the operation of the Act (this is only the second

decision imposing a penalty) the parties had no prior guidance from the Tribunal on the extent to which relevant matters should be put during the administrative procedure, or the extent to which the Tribunal would itself be prepared to admit further evidence. That procedural issue having been clarified, we see no basis for preventing the Director from reconsidering the matter.

193. From Aberdeen Journals' point of view, the documents in question are already in existence, emanate from Aberdeen Journals itself and appear to be material to the issues. We see no unfairness or oppression if the proceedings continue against Aberdeen Journals. Moreover it is in the general interests of the newspaper industry, including the Northcliffe Group, that the ambit of the Chapter II prohibition in circumstances such as these should be fully explored. The interests of the complainant, Aberdeen Independent, go in the same direction. In the light, notably, of its wider ramifications for the newspaper industry, and for the issue of predatory pricing under the Act, we do not think that the present case can be regarded as in any way insignificant, albeit that the penalty relates to an infringement of only one month in the Aberdeen area. On the contrary, in our view this case raises a number of serious issues upon which an authoritative adjudication – whatever that may ultimately be – remains highly desirable."

59. The Tribunal also set a timetable for the taking of any further decision, and made this comment as to the procedure to be followed in the event of a further appeal at paragraphs 195 to 196 of *Aberdeen Journals (No. 1)*:

"195. If, the Director having adopted a further decision, there is then an appeal to this Tribunal, it seems to us that the efforts that have already been made in this appeal should not be allowed to go to waste. As at present advised, the Tribunal would see scope, within the wide flexibility accorded by the Tribunal Rules, for dealing with any new appeal in a way that allowed the existing record to stand, or be consolidated with, any new appeal, so as to minimise duplication in any future proceedings.

196. In those circumstances our present view, subject to any further submissions that may be made, is that the question of costs should be reserved for the time being until it is known what further course the Director proposes to take."

60. In the event, the Director issued a second Rule 14 notice against Aberdeen Journals, which led to a second decision against Aberdeen Journals of 16 September 2002. That second decision was appealed to the Tribunal, and the pleadings filed with the Tribunal in the course of the first appeal were consolidated with the second appeal. The Tribunal proceeded to determine the appeal as a whole on the basis of the pleadings in the first and second appeals and gave judgment, upholding, in all essential respects, the Director's second decision but reducing the penalty imposed on Aberdeen Journals: see Tribunal judgment of 23 June 2003, [2003] CAT 11.

Analysis

61. The above survey of the statutory framework, the Tribunal's Rules and the Tribunal's previous decisions thus illustrates the specific nature of the procedures to be followed in relation to decisions of infringement of the Chapter I and Chapter II prohibition adopted by the OFT under the 1998 Act.

62. In particular, the statutory scheme is quite unlike the procedure that is normally followed in a criminal prosecution, where the offence is stated with short particulars in the indictment, but the facts relied on by the prosecuting authorities are essentially set out in witness statements then given by way of oral evidence from the witness box before the jury, subject to the detailed rules of evidence in criminal cases. Similarly, the procedure is not akin to that followed in the former Restrictive Practices Court, and in other civil litigation, where there is a *pleading*, such as a statement of case, summarising shortly the OFT's contentions of fact and law, which is supported by separate witness statements which contain the *evidence*.

63. In the system as set up under the 1998 Act, the OFT in the administrative stage acts as investigator, prosecutor and, ultimately, decision maker. Broadly speaking, the OFT moves from the mode of investigation to the mode of prosecution when it is decided to issue a Rule 14 notice. At that stage, however, the safeguards provided under Rule 14 apply. The OFT must serve a written notice stating "the facts on which the [OFT] relies, the matters to which [it] has taken objection, the action [it] proposes and [its] reasons for it" (Rule 14(3)). The undertaking concerned then has "a reasonable opportunity to inspect the documents in the [OFT's] file relating to the proposed decision" (Rule 14(5)). That is followed by an opportunity to make written representations on the matters set out in the Rule 14 notice (Rule 14(7). Finally there is a reasonable opportunity to make oral representations on those matters (Rule 14(8)). Only then may the OFT adopt a decision, which must set out "the facts on which [the OFT] bases [the decision] and [the OFT's] reasons for making [the decision]": Rule 15(1)(a). If a penalty is imposed, the OFT must set out in writing "the facts on which it bases the penalty and the reasons for requiring that undertaking to pay it": Rule 17(2). We see little scope for avoiding or watering down these statutory provisions.

64. It is also important to appreciate that the purpose of the Rule 14 procedure is not just to give the parties the "right to be heard": it is an important instrument enabling the OFT to reach findings on what facts it accepts, what facts it does not accept, and, to the extent that the OFT rejects the parties' representations, to state on what basis it does so. Thus, when it comes to framing a Rule 14 notice, or the subsequent decision, the OFT does not simply serve witness

statements on the undertaking against whom it proposes to take a decision stating that it relies on the contents of the statements to prove a concerted practice to such and such an effect between such and such a date, in a manner akin to that of a prosecutor in a criminal trial. On the contrary, the OFT sets out in detail in the Rule 14 notice and in the decision the facts it has found and the inferences it has drawn on the basis of the material it has, and identifies the items of evidence relied on for that finding or inference. In this respect the OFT follows the practice of the European Commission when issuing a statement of objections under Council Regulation no. 17.

65. We also note that:

(1) The appeal before the Tribunal is directed against "the decision that the Chapter I or Chapter II prohibition has been infringed", which necessarily implies that the appeal is directed against the facts and matters set out in the decision and not against other facts and matters not set out in the decision (section 46(1) and paragraph 2(1) of Schedule 8 to the 1998 Act).

(2) That is confirmed, notably, by paragraph 2(2)(b) and (c) of Schedule 8 to the 1998 Act, which requires the notice of appeal to indicate to what extent the appellant contends that the decision "was based on an error of fact or was wrong in law", which necessarily implies that the appeal is principally concerned with the facts as found in the decision and not other facts.

(3) The Tribunal must determine the appeal on the merits, but by reference to the grounds of appeal set out in the notice of appeal. Since the notice of appeal must refer to and so far as necessary put in issue the facts as set out in the decision, it follows that the Tribunal is concerned with the facts in the decision, as contested in the notice of appeal, and not with the correctness of other facts sought to be adduced as evidence of the infringement after the notice of appeal has been lodged and which, by definition, the notice of appeal has not dealt with.

66. Turning to the principles to be distilled from the *Napp* cases and *Aberdeen Journals (No. 1)*, we note the following:

(1) The Director should normally be prepared to defend the decision on the basis of the material before him when he took the decision. The decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act which fixes the Director's position.

An attempt to strengthen by better evidence a decision already taken should not in general be countenanced: *Napp (preliminary issue)* at [77].

(2) Were it otherwise, the important procedural safeguards envisaged by Rule 14 of the Director's Rules would be much diminished or even circumvented altogether. There would be a risk that appellants would be faced with a "moving target". The Tribunal would not be adjudicating on the decision as taken, but on a "bolstered version": *Napp: preliminary issue* at [78]; *Aberdeen Journals (No. 1)* at [176].

(3) There is therefore a presumption against permitting the Director to submit new evidence that could have been made available in the administrative procedure: *Napp: preliminary issue*, at [79]; *Napp: substance*, at [133].

(4) That presumption may be rebutted, notably, where what the OFT wishes to do is to adduce evidence in rebuttal of a case made on appeal, as distinct from evidence that is intrinsic to the proof of the infringement alleged in the decision: *Napp: preliminary issue*, at [83]; *Napp: substance* at [119]; *Aberdeen Journals (No. 1)*, at [169].

(5) On the other hand, where the new evidence goes to an essential part of the case which it was up to the OFT to make in the decision, the Tribunal will not admit evidence that was not put to the parties in the course of the Rule 14 procedure: *Aberdeen Journals (No. 1)* at [169] to [178]. This approach applies where the evidence in question goes to "an essential part of the case … which it is up to the Director to establish", or is relied on "to support a primary finding in the decision", or is sought to be adduced "for the purpose of upholding an essential element in the decision": *Aberdeen Journals (No. 1)*, at [170], [173] and [178] respectively.

(6) The Tribunal should resist a situation in which matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time at the level of the Tribunal, when they could and should have been raised in the administrative procedure and dealt with in the decision: *Aberdeen Journals (No. 1)*, at [177].

(7) If there is relevant evidence sought to be adduced on appeal which has not been the subject of the Rule 14 procedure, the Tribunal has power to remit the matter to the Director for the Rule 14 procedure to be followed, if satisfied that the interests of justice so require: *Aberdeen Journals (No. 1)*, at [190] to [197].

67. Applying those principles to the present case, the first issue we have to decide is whether the three witness statements at issue constitute, at least at first sight, evidence that is adduced to support a primary finding of infringement, or an essential element of the finding of

infringement in the decision, as was the case in *Aberdeen Journals (No. 1)*, or whether the evidence is rebuttal evidence, or otherwise unobjectionable, as was the case in *Napp*.

68. Unlike the situation in *Napp*, the appellants in this case advance no material new evidence beyond that already advanced at the Rule 14 stage. The three witness statements sought to be adduced by the OFT do not, therefore, deal with a new case advanced by the appellants on appeal and are not, therefore, "rebuttal evidence" in the sense used in *Napp*. Moreover, in *Napp* the new evidence did not involve any material addition to the evidence of infringement set out in the decision in question.

69. In the present case, by contrast, the three witness statements now sought to be adduced by the OFT contain, at first sight, direct, new, evidence of the infringements alleged in the decision. For obvious reasons, at this stage of the proceedings, it is inappropriate to describe in any detail the precise contents of those witness statements or to enter into questions of credibility, weight or hearsay. It suffices to say that, in our view, the three statements in question materially add to the direct evidence of infringement relied on by the OFT. The statements provide new or further details of alleged meetings involving Hasbro and Argos, and Hasbro and Littlewoods, respectively, and of the persons allegedly concerned, and set out the background and course of the alleged infringements in considerably more detail than do the notes of interview relied on in the decision. In our view, the witness statements go well beyond mere "clarification" of the notes of interview. There is also the suggestion, advanced by Littlewoods, that the witness statements refer to or imply the existence of as yet undisclosed documents that are material to the matters alleged.

70. Assessing the matter provisionally – and without of course forming any view whatever as to the correctness of the matters alleged – our assessment is that the witness statements in question would, if adduced, materially add to the evidence relied on by the OFT to establish the infringements alleged. Indeed, in our view, the evidence in the three witness statements, at first sight, adds an important additional dimension to the facts and matters set out in the decision. The new witness statements are likely to be, in our view, a central feature of the OFT's case before the Tribunal.

71. Neither the three witness statements, nor the detailed facts and matters alleged therein, were put to Argos or Littlewoods during the Rule 14 procedure. Equally, the decision does not refer to the three witness statements and does not set out many of the detailed facts and matters which are described in the witness statements but which are not referred to in the notes of interview. To take only one example, it is sufficient to compare paragraphs 9 to 67

of Mr Thomson's witness statement with paragraphs 39 to 49 of the decision to see that the former adds to the latter in many material respects.

72. Although counsel for the OFT submitted that the present case is distinguishable on the facts from *Aberdeen Journals (No. 1)*, in our view the principle of *Aberdeen Journals (No. 1)* is applicable to the present case. In this case, as in *Aberdeen Journals (No. 1)*, the OFT seeks to support primary findings of infringement by material new evidence that is not referred to in the decision and was not put in the Rule 14 procedure. In *Aberdeen Journals (No. 1)* the evidence on relevant market in the decision was scanty, and the Director wished to submit material additional evidence on the appeal to bolster the original decision on the issue of relevant market. Although in this case the evidence as to infringement contained in the decision is at first sight less scanty than was the case in *Aberdeen Journals (No. 1)* on the issue of relevant market, nonetheless the situation in this case is that the OFT seeks to bolster the decision on the issue of infringement by introducing at the appeal stage important new evidence, which at first sight materially expands the existing evidence and, as we have said, adds a further new dimension to this case.

73. It follows, in our view, that we cannot admit the three witness statements in question without breaching, or at least running a serious risk of breaching, Rules 14, 15 and 17 of the Director's Rules.

74. Despite the flexibility built into the Tribunal's rules, and the need to avoid procedural formality, we are not persuaded that there would be no unfairness if we were to countenance such a breach of the Director's Rules. The statutory framework envisages a two-stage procedure. At the first, administrative stage, the allegedly infringing undertaking has the safeguards that the evidence of infringement must be put; that the undertaking may reply to that evidence in writing and orally; and that the OFT must then state, in the decision, all facts and matters relied on. If there is an appeal, one then moves to the second, judicial stage before the Tribunal. The effect of the OFT's submission is, in our view, to elide these two stages into one, thus cutting down the procedural safeguards envisaged by the legislator.

75. Bearing in mind the heavy financial penalties involved in a case such as the present, we are reluctant to cut down those safeguards. Nor do we think that such a course would be countenanced under Community law, which we are obliged in principle to follow under section 60 of the 1998 Act: see *Aberdeen Journals (No. 1)* at [165].

76. We are also conscious of the fact that, if we were to cut down the "two-stage" procedure for imposing penalties envisaged by the statutory framework, arguments could arise regarding Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms: see generally *Begum v London Borough of Tower Hamlets* [2003] UKHL 5, [2003] 2 WLR 388. In particular, the appeal process is likely to become skewed. Instead of an appellant bringing his case against the decision in his notice of appeal, the appellant may not become aware of central features of the OFT's case until after the notice of appeal has been lodged. It is then only at the stage of reply in the appeal that the appellant can deal fully with the evidence of infringement. That does not seem to us to be satisfactory, nor in conformity with the statutory scheme.

77. It is true, as the OFT submits, that the appeal stage will often involve going into matters in more detail than was the case in the administrative stage, and that new matters may well come to light during the appeal, to the detriment of one side or the other. However, the fact that new elements may come naturally to light during the appeal process does not seem to us to be a justification for permitting the OFT to present new evidence that should have been available during the administrative stage. We have not been given any reason why the three witness statements in question could not have been prepared and made available to the appellants at some stage during the Rule 14 procedure.

78. On those grounds we are not persuaded that it would be correct simply to admit these witness statements on the appeal. We therefore reject option (b) at paragraph 30 above.

79. The next alternative to consider is option (a) at paragraph 30 above, which is simply to exclude the three witness statements altogether. However, we do not consider that this option is satisfactory either.

80. First, while it is unfortunate that the present situation has arisen, this is the first case under the Act to come before the Tribunal in which the issue of proof of an alleged infringement of the Chapter I prohibition has arisen. Although *Aberdeen Journals (No. 1)* is perhaps a strong pointer, the Tribunal has not previously had the occasion to clarify, in the Chapter I context, what must be done at the Rule 14 stage and what new material the Tribunal is prepared to accept at the appeal stage. In those circumstances it seems to the Tribunal that it would be too draconian simply to prevent the OFT making any use whatever of the witness statements in question, especially as the appellants came close to consenting to the statements going in.

81. Secondly, we accept the OFT's submission that, in a case which turns, or may turn, on the credibility of witnesses it is undesirable that the matter should be considered by the Tribunal "on the papers", as the appellants suggest. In our view, the Tribunal should exercise its powers to hear witnesses. On the appellants' side, the witness statements are available and the witnesses are available to be cross-examined under oath. On the other hand, if we were to exclude the OFT's three witness statements altogether, the OFT would have no witness statements to put forward. The notes of interview are not, in our view, satisfactory substitutes for witness statements. Whether or not, with the benefit of hindsight, this situation might have been foreseen, the result is to place the Tribunal in an unsatisfactory position. In our view the appeal would proceed on a wholly lopsided basis if the appellants called witnesses to counter the OFT's case but the OFT was not in a position to call witnesses to support it.

82. Thirdly, in our view the Tribunal needs to take account of the interests of justice and the wider public interest. Those interests include not only the interests of the appellants in a "fair trial" but the interest of the OFT in establishing infringements of the Chapter I prohibition and the public interest that the Chapter I prohibition should be fairly and properly enforced. The present case involves serious allegations against two nationally known retailers, and has wider ramifications, not only for the appellants, but also, notably, for Hasbro and for consumers. The impact of the case on retailing generally in the United Kingdom may be not inconsiderable. In those circumstances it does not seem to the Tribunal that it is in the interests of the proper administration of justice, or in the wider public interest, for this appeal to proceed on the basis that the Tribunal cannot see the full picture, because apparently highly material evidence is excluded.

83. The same objections apply to Littlewoods' suggestion that the witness statements should be admitted, but with some 80 per cent of their contents filleted out. Apart from the difficulty inherent in any such filleting exercise, the result is likely to be unsatisfactory, for the reasons already given.

84. For those reasons, we are not persuaded that we should adopt option (a), or the variant of option (a) proposed by Littlewoods.

85. In the light of the above, we turn to option (c) at paragraph 30 above, which is to remit this matter to the Director to enable Rules 14, 15 and 17 of the Director's Rules to be complied with in respect of the witness statements in question.

86. Dealing first with the mechanics of any such course of action; it seems to us that several procedural possibilities arise.

87. The first procedural possibility is that the Tribunal should simply stay the appeal, with a view to the OFT undertaking a supplementary Rule 14 procedure in respect of the three witness statements in question. That would involve the OFT serving a supplementary Rule 14 notice, which need not be an elaborate document but would need to set out the salient facts and matters the OFT wishes to allege on the basis of the witness statements. Argos and Littlewoods would then have the opportunity to respond in writing and, if they wish, orally. At that stage the OFT, having considered all the material before it would, if so advised, adopt an amended decision, which would be appealable to the Tribunal. In the event of any such appeal, many of the pleadings in the existing appeal could stand as part of the new appeal, as was done in *Aberdeen Journals (No. 2)*, cited above. As we see it, at least provisionally, a procedure along the above lines would technically involve the OFT withdrawing the existing decision and replacing it with an amended or supplemented decision.

88. The second procedural possibility is for the Tribunal to remit the matter back under Rule 17(1) and/or Rule 17(2)(j) of the Tribunal's rules, with a view to a similar procedure being followed.

89. Rule 17(1) of the Tribunal's rules provides:

> "The tribunal may at any time, on the request of a party or of its own motion, at the pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings."

90. Rule 17(2)(j) of the Tribunal's rules provides that:

> "the tribunal may give directions to enable a disputed decision to be referred back (or in Scotland, remitted) to the person by whom it was taken."

91. It seems to us that this power of "referral back" under Rule 17(2)(j) is a power that can be used at an interlocutory stage, since it occurs in the context of numerous "case management type" powers set out in Rule 17, which itself occurs under Part V of the Tribunal's rules under the heading "Preparation for deciding the application". It seems to us that this is a useful and flexible power that can be used, if necessary, relatively early in the appeal process, notably as a means of sorting out procedural difficulties. Alternatively the Tribunal's wider power to give directions under Rule 17(1) would also, so it seems to us, constitute a legal basis for

referring the matter back to the OFT, and/or staying the appeal pending a resumption by the OFT of the administrative stage in respect of the three witness statements in question.

92. We note in passing that paragraph 9(1)(f) of Part II of Schedule 8 to the 1998 Act provides that the Tribunal's rules may make provision:

> "(f) for enabling the tribunal to refer a matter back to the [OFT] if it appears to the tribunal that the matter has not been adequately investigated"

93. Rule 17(2)(j) of the Tribunal's rules allows the Tribunal to refer a matter back, without requiring that it appear to the Tribunal "that the matter has not been adequately investigated". Section 48 of the 1998 Act provides that the Secretary of State may make rules with respect to appeals (section 48(2)) and that Part II of Schedule 8 "is not to be taken as restricting the Secretary of State's powers under this section (section 48(4)".

94. In those circumstances, it seems to us that it is not necessary for us, in order to refer the matter back under Rule 17(2)(j), or indeed Rule 17(1), to find that the matter has not been adequately investigated. If, contrary to our view, it were necessary for us to find that the matter had "not been properly investigated" before we could refer the matter back, we would be prepared to make such a finding. The preparation and production of witness statements containing material evidence after the appeal has been lodged would seem to us sufficient to establish that the matter has not been "properly investigated", in that those witness statements were not taken at an earlier stage, nor referred to in the Rule 14 procedure or the decision. In this case, it must have become apparent to the OFT, during the Rule 14 procedure, that Argos and Littlewoods were relying on witness statements to contest the facts alleged in the Rule 14 notice. At that stage, in our view the OFT could or should have considered – if necessary by taking advice on evidence – whether the preparation of witness statements on behalf of the OFT was necessary or desirable, even before the conclusion of the Rule 14 procedure. If that had been done, the statements could then have been put to Argos and Littlewoods before the decision was adopted, thus respecting the Rule 14 procedure.

95. The third procedural possibility is for the Tribunal to make use of its powers under Schedule 8, paragraph 3(2) of the 1998 Act, according to which:

> "(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 OFT,
>
> …
>
> (d) give such directions, or take such other steps, as the OFT could itself have given or taken …"

96. We are inclined, provisionally, to the view that these powers are more appropriate to the final disposal of the appeal, but they are, on their wording, wide enough to encompass the present situation.

97. We do not, for present purposes, need to decide the precise boundary between these three procedural possibilities, although in our view a stay of the appeal combined with a direction under Rule 17(2)(j) seems the most appropriate possibility for implementing option (c).

98. Turning to the advantages and disadvantages of option (c), the main advantages are, first, that the provisions of Rule 14 of the Director's Rules will be respected as far as the three witness statements are concerned; secondly, that the provisions of Rules 15 and 17 of the Director's Rules will be respected, in that any amended decision will set out the facts and matters alleged by the OFT in reliance on the witness statements in question; thirdly, that in any further appeal to the Tribunal, the appellants will be able to meet, fairly and squarely, the evidence against them from the outset; fourthly, the Tribunal will be able to dispose of the further appeal free of procedural complication and possible "tunnel vision"; and, fifthly, that the interests of the parties and the public interest in the appeal being disposed of on the basis of all the available evidence, and in accordance with the statutory provisions, will be fully respected.

99. As against those advantages, there is the disadvantage of some further delay before the matter is ultimately heard by the Tribunal. The Tribunal is well aware of the need for expedition, and the need to avoid procedural complications, where possible.

100. On the other hand, we consider that the disadvantages of option (c), as submitted by Littlewoods (but not Argos) may be overstated. It does not seem to us that the procedure outlined above need involve a delay of more than (say) three months and perhaps much less. As to witnesses' memories, statements can be taken immediately from Littlewoods and Argos employees in answer to the three new witness statements. It does not seem to us, from what we have been told, that there is any serious problem of a witness becoming unavailable as a result of the passage of time in these proceedings. It is true that a resumption, in a limited form, of the administrative procedure may involve Littlewoods in some further irrecoverable costs and management time, but we doubt whether that is a compelling consideration in the overall context of this case, given the amounts at stake. As far as concerns any costs in the appeal which would not otherwise have been incurred such costs can be dealt with by the Tribunal making appropriate orders for costs, in due course. As concerns the argument that the matter will have to come before the Tribunal in any event, we think it better that the

matter should revert to the Tribunal once the statutory procedure has been followed, rather than attempting a short cut likely to lead to further procedural complications further down the line.

101. Bearing all these considerations in mind, in our view the advantages of option (c) outweigh the disadvantages by a wide margin. In our view, option (c) also steers a middle course between options (a) and (b), both of which themselves have difficulties and disadvantages. In our view option (c) strikes a reasonable balance between the different interests involved.

102. For the foregoing reasons, the Tribunal proposes to stay the appeal with a view to the decision being remitted to the OFT so that the three witness statements at issue may be put to the parties in accordance with Rule 14 of the Director's Rules and that any amended decision the OFT may decide to adopt may be adopted in accordance with Rules 15 and 17 of the Director's Rules. We would hope that the timetable for this procedure and any necessary consequential directions may be agreed between the parties, but the Tribunal will as necessary hear further argument on the precise terms of the order to be made.

103. As in *Aberdeen Journals (No. 1)* at [195] to [196], our expectation is that much of the work on the existing appeal will be relevant and useful to any resumed appeal. In those circumstances, it is appropriate in our view to reserve the costs until the Tribunal is in a better position to judge the final outcome.

The "Filiatra" point

104. We mention, finally, that at the second case management conference there was some discussion of a possible difficulty arising out of the fact that, in the contested decision, the OFT relies on parts of the notes of interview of some witnesses while rejecting other parts of the notes of interview. The principal perceived problem is to what extent the OFT could cross-examine, or even put in issue the testimony of, witnesses on whom it relies in part, in the light of the decisions in *The Filiatra Legacy* [1991] 2 Lloyd's Rep 337 (CA) and *McPhilemy v Times Newspapers* [2000] 1 WLR 1732.

105. In view of our decision to remit the matter to the OFT at this stage, it is premature for the Tribunal to address the question of whether or how far the rule applied in the *Filiatra* or *McPhilemy* cases is applicable before the Tribunal, what form any future examination or cross-examination of these witnesses should take, and how the interests of witnesses who are not before the Tribunal may be protected. We simply observe that, as far as the Tribunal is

concerned the Tribunal will be guided by circumstances of overall fairness, rather than technical rules of evidence. The Tribunal is not, however, in a position to make any concrete ruling on this aspect at this stage.

Christopher Bellamy Antony Lewis Vindelyn Smith-Hillman

Delivered in open court

Charles Dhanowa 30 July 2003
Registrar