

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1008/2/1/02

The Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London WC1A 2EB

Tuesday, 1st April 2004

Before:

**THE PRESIDENT
SIR CHRISTOPHER BELLAMY QC
(CHAIRMAN)**

**MR PETER CLAYTON
and
MR PETER GRANT-HUTCHISON**

B E T W E E N :

**CLAYMORE DAIRIES LIMITED
EXPRESS DAIRIES LIMITED** Applicants

v.

THE DIRECTOR GENERAL OF FAIR TRADING Respondent

supported by

**ROBERT WISEMAN DAIRIES PLC
and
ROBERT WISEMAN & SONS LIMITED** Interveners

MR NICHOLAS GREEN Q.C. appeared on behalf of the Applicant.

MR GEORGE PERETZ appeared on behalf of the Respondent.

LORD GRABINER Q.C. appeared on behalf of the Interveners.

P R O C E E D I N G S

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1 THE CHAIRMAN: Good morning, ladies and gentlemen. At this
2 case management conference our normal procedure is to
3 take the agenda which has been circulated and work
4 through it to see where we are on the case and what
5 further steps or directions we need to take or make.
6 In this particular case, the Tribunal is conscious
7 of two things. One is that in a sense this is the case
8 that got away in the sense that it has now taken quite a
9 long time to bring this case to its present state. The
10 case has therefore gone much more slowly than other cases
11 in front of the Tribunal, and we now need to think how we
12 bring matters to a head.
13 The second thing is that the Tribunal has,
14 understandably, only recently received the OFT's defence
15 and has therefore not had an extended amount of time in
16 order to consider the general situation in the case. So
17 we are very much looking to the parties now for
18 constructive propositions as to where the case goes from
19 here.
20 We have the impression that the amended notice of
21 appeal is fairly wide-ranging. I think there are 19
22 grounds of appeal now identified and it has occurred to
23 us to ask whether, in the interests of saving time and
24 costs, there is some way of slimming this case down so
25 that we can focus on essential points without necessarily
26 having to examine in all necessary minutiae the whole
27 range of grounds pleaded. It may be that there are a
28 certain numbers of points of principle that, one way or
29 another, would be decisive of the case, in which case
30 there may be some argument for taking those points and
31 concentrating on them, rather than trying to cover the
32 whole range of matters.
33 With those somewhat imprecise first comments, the
34 convenient thing to do is to take the agenda, the first
35 item of which is a preliminary discussion with the
36 parties of the main issues in the light of the amended
37 pleadings and see where we are. If we may, we would like
38 to invite the views of the parties on the first item on

1 the agenda. I think it falls to you, Mr Green, first.

2 MR GREEN: Sir, as you have seen, we have put in a notice of
3 application and we did provide a summary of the main
4 points on pages 4 to 8 of the notice of application and
5 in Mr Haberman's report he has drawn together his
6 conclusions. If one wanted to find two umbrella terms to
7 describe the application, first, there are material
8 errors of law in the notice of abuse. For example - this
9 is simply one of the illustrations of the alleged errors
10 - in the OFT's analysis of predatory pricing it has taken
11 a long period of time and that is an example of the point
12 of law that we take, although it is mixed fact and law to
13 be precise.

14 We have also launched an attack, root and branch,
15 upon the procedure and methodology adopted by the OFT and
16 we note that in Freeserve the Tribunal, endeavouring to
17 categorize the heads of challenge, judicial review on the
18 merits, referred amongst others to facts and analyses
19 relied on, law applied, investigation undertaken and
20 procedures followed.

21 Our accountants believe that in myriad different
22 ways the process by which the OFT came to their negative
23 conclusion was inadequate. As to that, there really is
24 no alternative but just to take seriatim the criticism
25 made and to say cumulatively or indeed individually there
26 are material errors. There is really no way round an
27 attack upon procedure and methodology without going
28 through the nuts and bolts. I fully understand the
29 problem, but that is why there are a large number of
30 grounds.

31 We recognised the problem, so we sought in the
32 notice of application to provide a series of headings:
33 predation, intent, targeted discriminatory discounting,
34 exclusionary exclusive contracting and then methodology,
35 covering data collection and analysis, which is our head
36 (d) on pages 6 and 7. We have tried to provide a summary
37 of the main points which then do follow Mr Haberman's
38 expert report.

39 A large number of the grounds fall under head (d),

1 but it is difficult to grapple with something like that
2 without going into the detail. It is a necessary
3 corollary of that sort of a challenge.

4 If you look at Mr Haberman's report, you will see
5 that he produces a summary. We asked him to do this
6 bearing in mind the fact that this is a complex case.
7 Right at the end of his report, page 81, conclusions, he
8 has identified in paragraph 5.149 under the headings (a)
9 through to (j) seriatim a list of errors. Then he
10 provides a summary of conclusions, so he has attempted to
11 draw the strands together which he set out in the
12 previous part of his report.

13 It is a bit difficult to go further than that. We
14 tried to boil it down twice - once in the report and then
15 in the notice of application - so that the overall
16 structure can be seen. We fully understand that if
17 preliminary issues can be identified which would be
18 decisive that may be one way forward. Our estimate of
19 time for the entire appeal will be two to three days and,
20 as part of preparing a skeleton, it would certainly be
21 our task and intent to try and draw the threads together
22 and reduce what is a complex set of materials to
23 something which is easily digestible.

24 We do have the difficulty in this case that we do
25 not have a target: it is not as if we have a reasoned
26 decision. We had a decision which was not reasoned. We
27 had Mr. Lawrie's statement; we then had a reply to a
28 request for information; we have had disclosure. We
29 have had to discern what happened from those three
30 sources. That does create a difficulty because it is
31 somewhat elusive. That, with great respect, is the OFT's
32 problem, not ours: we did not have a decision which was
33 reasoned to start with. That is where we are.

34 We have these five headings set out at the beginning
35 of our notice of application, four of which are mixed law
36 and fact, the fifth of which is plainly law, but in a
37 judicial review sense it is methodology matters, and so
38 one is looking at the nuts and bolts of what happened.
39 We have a series of cumulative attacks upon the

1 methodology of the process, which we say fits in with the
2 categories of challenge which were identified in
3 Freeserve. Just for your reference, Freeserve paragraph
4 114 and 121.

5 One of the issues which does arise squarely in this
6 case - though it is intermingled with all the other
7 issues - is the issue which the Tribunal identified in
8 paragraph 121 of Freeserve.

9 THE CHAIRMAN: The margin of appreciation.

10 MR GREEN: Indeed. It is squarely raised in the Office of
11 Fair Trading's defence in this case: it is plainly an
12 important issue. We would not suggest that that is a
13 preliminary issue, because it is interspersed with what
14 actually happened and cannot be understood without an
15 understanding of the facts.

16 Reluctantly, we would suggest that we do not see a
17 great saving in time in reducing it to preliminary
18 issues. We do think the entire appeal could be done in
19 two to three days.

20 THE CHAIRMAN: Two to three days spent in a hearing is very
21 much the tip of the iceberg, because an enormous amount
22 of time is needed to prepare for a hearing like that.

23 MR GREEN: And afterwards, of course.

24 THE CHAIRMAN: We are now, as a Tribunal, moving into the
25 situation that has affected the civil courts for many
26 years: in disposing of cases justly, you have to think
27 about how your resources are devoted as between cases, as
28 between different applicants. We have to try to avoid
29 the Tribunal becoming unduly or unreasonably blocked by
30 particular cases at the expense of other cases.
31 Therefore, I think it probably is incumbent upon us to
32 explore in each case ways of cutting to the main issues
33 and leaving more subsidiary matters for later or on one
34 side.

35 You may have formed a view that in this wide range
36 of grounds some of them are more important than others or
37 clearer than others or ----

38 MR GREEN: We have sought to isolate issues but, to a
39 degree, it has been an artificial exercise, because, if

1 one takes by way of illustration the question of the
2 period of time over which one assesses predation, the
3 Office of Fair Trading has put forward a number of
4 defences including, inter alia, that the period of time
5 that they worked on was reasonable and they adopted a
6 reasonable approach towards the assessment of predation.

7 So the question of predation is now interlinked with the
8 reasonableness of their methodology and their approach.
9 Indeed, all of the issues we have categorized as mixed
10 fact and law are intertwined with issues of procedure and
11 process within the nature of the defence.

12 We are hampered in this case by the lack of a
13 decision: we are not able to point to paragraph 167 and
14 say, "That's the nub of the OFT's principle and it is
15 wrong, because ..." We have had to discern what happened
16 from a combination of rather elusive documents.

17 THE CHAIRMAN: In a sense - and I am only thinking aloud -
18 the whole case so far has got onto a somewhat atypical
19 basis: we started with a fairly rudimentary decision;
20 we then, in effect, permitted the OFT to elaborate its
21 reasons in Mr Lawrie's statement. That, in a sense,
22 raised more questions than it answered, according to you.

23 MR GREEN: Yes.

24 THE CHAIRMAN: And referred to a great many documents, many
25 of which have now been disclosed, which to some extent
26 has enabled the applicants to understand more about what
27 happened and has now raised further questions in their
28 mind. Where that actually takes one in terms of the
29 Tribunal's jurisdiction and how we should handle a case
30 like that is probably a question we need to ask
31 ourselves, because in a sense our job is to deal with the
32 original decision, such as it was, and there are perhaps
33 risks in being drawn into much more detailed analysis on
34 a "What if?" basis when it is not that clear that the
35 "What if?" ever was the "What if?" that was being
36 considered at the time, if you see what I mean.

37 MR GREEN: Yes. Again, we are conscious of that and what we
38 did try to do, particularly with Mr Haberman's report,
39 which set out in detail a big factual section, which does

1 refer to all the documents, so that we at least were able
2 to say to you, "We believe we understand what happened
3 and this is a chronology and this is how the story pans
4 out."

5 THE CHAIRMAN: Absolutely.

6 MR GREEN: One would have hoped, in an ideal world, that
7 there would have been something equivalent to that in the
8 decision. We tried to make it as non-controversial as
9 possible, but I am sure that it is controversial: these
10 things never avoid that.

11 Our endeavour was, first of all, to decide what
12 happened chronologically and to set out the facts,
13 identify what then appeared to be the main legal issues
14 and to identify our criticisms of it.

15 So we have got to a point where we think we know
16 what happened and we think we know why they went wrong.
17 We are where we are, the best part of 18 months beyond
18 the decision and more beyond the decision itself. The
19 Tribunal would be justified in saying, "We pull the
20 shutters down now and let's just stop where we are and
21 measure the case as if it were a standard merits judicial
22 review à la Freeserve and, at the end of the day, the
23 Tribunal would say, "We will hear all the argument on all
24 the issues, but we may limit our judgment to those which
25 we believe are crucial." That would be perhaps one way
26 of streamlining the exercise. I fully appreciate that if
27 you have to produce a judgment on every single issue that
28 is quite a task; we understand that.

29 THE CHAIRMAN: Very well, that is your position.

30 MR GREEN: Yes.

31 THE CHAIRMAN: Let us see what Mr Peretz has to say.

32 MR PERETZ: May I start by recording for the transcript the
33 Office's gratitude and my personal gratitude to Daniel
34 Beard for stepped in to do the defence. As you, sir, are
35 well aware, I have had other things on over the last six
36 weeks and Mr Beard has stepping in to fill the gap.

37 There are two points I wish to make at this stage.
38 First, a very short one. My learned friend says the
39 OFT's decision is not clear. We would say it is entirely

1 clear what the OFT's decision was from the Lawrie witness
2 statement as supplemented by the reply. So we would not
3 accept a description of the OFT's decision as being
4 elusive in any respect.

5 In terms of how the Tribunal might shorten the
6 matters which it needs to resolve, we would invite it to
7 take the following course, which is essentially to stand
8 back from the detailed criticisms made at great length
9 and, to some extent, repetitiously in the revised notice
10 of application, and to ask itself rather more fundamental
11 questions, which we invite it to do at the beginning of
12 our defence.

13 What we say this case is about is essentially the
14 exercise of the Office's discretion under Section 25 of
15 the Act to start and then to continue or not to continue
16 an investigation which it has undertaken. In deciding
17 whether or not to continue an investigation, the Office
18 is, we say, entitled to take account, inter alia, of the
19 various factors set out at paragraph 24 of the defence.

20 THE CHAIRMAN: How do you generally marry that approach, Mr
21 Peretz, with our earlier unappealed judgment that we are
22 actually dealing with a decision?

23 MR PERETZ: You are indeed dealing with a decision.

24 THE CHAIRMAN: It seemed at first sight that some of those
25 arguments were a re-run of the arguments we had before
26 when we were deciding whether or not there was a
27 decision.

28 MR PERETZ: I think we take it in two stages. There is
29 plainly a decision by the Office.

30 THE CHAIRMAN: A non-infringement decision.

31 MR PERETZ: A non-infringement decision. What we would say
32 is that plainly the Tribunal's ruling in the first round
33 of this case was to the effect that this decision was a
34 non-infringement decision for the purposes of
35 establishing its jurisdiction under the Act. What we say
36 is that does not get one very far in analyzing how the
37 Tribunal should approach its scrutiny of the decision.
38 In deciding how to approach what the Tribunal's scrutiny
39 of the decision should be, how the Tribunal should

1 approach it, one needs to look at the type of decision
2 that it is and, in a sense, putting aside the non-
3 infringement decision label that is attached to it.

4 Of course, it is a non-infringement decision in the
5 sense that it is a decision falling within Section 46 of
6 the Act, as the Tribunal has decided. But one then needs
7 to make the point that what this decision was was a
8 decision to close the investigation at a stage where the
9 OFT had not formed a positive view one way or the other
10 as to whether or not there was actually an infringement.

11 THE CHAIRMAN: That is the bit I struggle with, because,
12 whether our first decision in this case was right or
13 wrong, it was not appealed and there we are: that is
14 what we held. We must work on that basis.

15 MR PERETZ: I think one has to separate the question of
16 jurisdiction and attach quotes to "non-infringement
17 decision". It is a non-infringement decision in the
18 sense that it is, as the Tribunal held, a decision as to
19 whether or not the Chapter 2 prohibition was infringed.
20 In that sense, it is a non-infringement decision.

21 THE CHAIRMAN: It was a decision as held by us. It was a
22 decision that, on the material then available to it, the
23 OFT had decided there was no infringement.

24 MR PERETZ: On the basis of the material available.

25 THE CHAIRMAN: On the basis of the material available. It
26 may be that implicit in what you are saying is to agree
27 with Mr Green that what we now have to do is to explore
28 the various dicta in Freeserve to see how the Tribunal
29 should approach its jurisdiction in that kind of
30 circumstance, i.e. to what extent one should look at the
31 basis upon which, on the basis of the material then
32 available, the OFT came to the view that it did.

33 MR PERETZ: Yes. It is important to understand that,
34 certainly as we understand it, the applicants are not now
35 saying that the OFT erred in deciding on the basis of the
36 material before it that there was not enough to make an
37 infringement decision or, rather, to issue a Rule 14
38 notice.

39 THE CHAIRMAN: The applicants are not saying that the OFT

1 erred on the basis of the material before it in deciding
2 insufficient to establish infringement.

3 MR PERETZ: Yes. They are not saying that what the OFT
4 should have done on the day that it decided to close the
5 file was to issue a Rule 14 notice. That is not, as I
6 understand it, the applicant's case.

7 THE CHAIRMAN: What is your understanding of their case?

8 MR PERETZ: What our understanding of their case is that we
9 should have taken somewhat unspecified further steps to
10 get to the bottom of issues which they accept that the
11 Office had not got to the bottom of.

12 At the end of the day, what they are inviting the
13 Tribunal to do is to quash the decision and send the
14 matter back to the OFT, one assumes to do further work.

15 THE CHAIRMAN: I was under the impression - but we will come
16 back to Mr Green when we have completed this tour - that
17 although they are saying that the Office should have
18 taken various further steps, they are also saying that,
19 on the basis of the steps that the Office did take and
20 the material that it did have, it did not properly apply
21 to that material the various legal tests and criteria
22 that it should have applied.

23 MR PERETZ: Yes, that is certainly what we understand from
24 the revised notice of application. But that is not
25 inconsistent with our understanding that they are not
26 saying that we should have issued a Rule 14 notice.
27 Their case may well be that we misunderstood or applied
28 the wrong legal test to such material as we had, but it
29 is not their case that we should have issued a Rule 14
30 notice on 9th August 2002.

31 It is their case that we should now go on to do
32 further work and that we should be directed by the
33 Tribunal essentially to do that, as we understand it: to
34 do further work.

35 THE CHAIRMAN: Either do further work or reconsider the work
36 that was done on the basis of a different appreciation of
37 the legal criteria to be applied.

38 MR PERETZ: Yes, but our understanding of what they are
39 saying is that even if we did that they accept that we

1 still did not have the material necessary to issue the
2 Rule 14 notice. That is our understanding of their
3 position.

4 I would state, for example, that their case is we
5 should have used, in analyzing the issue of predatory
6 pricing, what they call a top down approach rather than a
7 bottom up approach. It is plain and accepted that we did
8 not adopt what they call a top down approach. That may
9 or may not be an error of law or of fact such as to call
10 into question the decision that was taken. But, even if
11 the applicants win their case on that point, the plain
12 fact is, we did not do a top down approach and we have
13 got to go away and do it if that is the approach that we
14 should have conducted and the Tribunal decides that that
15 is something which we should now be required to do, an
16 important second step, which we would also resist.

17 That is our understanding of their position. On
18 that basis, we say the Tribunal needs, in a sense, to
19 stand back and to ask itself various questions or ask the
20 applicants various questions about what it is that the
21 applicants say that the OFT should now do; in what
22 respects did the OFT err in exercising its discretion to
23 complete the investigation; what is the basis upon which
24 the Tribunal is now being asked to intervene?

25 THE CHAIRMAN: None of this, you say, is clear at the moment.

26 MR PERETZ: We say it is not clear. The matter is set out
27 in full in the defence, which I am attempting to
28 summarise.

29 The fact that there are alternative ways of
30 investigating - there might have been alternative ways of
31 investigating the case - we say is irrelevant, unless it
32 can be shown that the OFT erred in not pursuing those
33 ways, bearing in mind the OFT's discretion as to, among
34 other things, the deployment of its resources.

35 In relation to the various errors that are pleaded
36 by the applicant, we say in essence the Tribunal needs to
37 stand back from each of those alleged errors and say to
38 itself, "Even if they are made out, are those errors such
39 as to justify the intervention of the Tribunal and the

1 directions which are sought by the applicant?" In a
2 nutshell, does the error matter that much? Is it such a
3 fundamental error that it calls into question the
4 exercise of the OFT's discretion, which it has under
5 Section 25?

6 THE CHAIRMAN: Just remind me of this while we are on the
7 subject. The directions sought - it is the last page.
8 To set it aside.

9 MR PERETZ: Yes, to set the decision aside, to remit the
10 matter to the OFT for proper consideration and
11 investigation, together with such directions and findings
12 as the Tribunal sees fit and further or other relief.

13 THE CHAIRMAN: That is pretty vague.

14 MR PERETZ: It is fairly vague. For those reasons, we say
15 it is our understanding of the appellant's case - I am
16 not sure that I can assist you any further in relation to
17 this agenda item.

18 THE CHAIRMAN: Thank you, Mr Peretz. Yes, Lord Grabiner?

19 LORD GRABINER: May it please you, sir, can I just say that
20 our starting point is that there is a decision and that
21 it is a non-infringing decision. That is, so to speak, a
22 given. That is a fact of life.

23 Secondly, anyone coming to this afresh would perhaps
24 be saying to oneself with puzzlement, "How on earth has
25 this thing lasted for so long? What has been going on
26 here? It is backwards and forwards and up your jumper.
27 It is fantastic stuff." Now they want an amended claim,
28 they want more disclosure of confidential material and so
29 on. All this offends against the notion that there must
30 be an end to litigation. The whole point about any
31 process, particularly if it contains an appeal structure,
32 is that it should have an end, otherwise there is no
33 logical stopping point. That is very unprincipled and
34 you should stamp on that, because otherwise you are going
35 to be inviting this sort of exercise away into the
36 future.

37 There happen here to be fundamental commercial
38 differences between these parties which drive all this,
39 but you are going to have to anticipate that kind of

1 relationship between litigants in future in the Tribunal,
2 so, in my submission, it is important to be quite tough
3 about this, both from your point of view and, indeed,
4 from the point of view of the litigants, so that people
5 should understand where the Tribunal is coming from.

6 THE CHAIRMAN: The original problem was that what was held to
7 be the original decision did not fully have the OFT's
8 reasons in it.

9 LORD GRABINER: I understand that.

10 THE CHAIRMAN: So that, in fairness to the OFT, we gave them
11 the opportunity to give their reasons and that provoked a
12 further reaction, so in some ways we have been drawn away
13 from the purity of the procedure as one should have
14 perhaps initially envisaged it.

15 LORD GRABINER: And also one is drawn away from the provisions
16 or terms of the original complaint. We now have a very
17 fancy complaint that extends over areas that were
18 previously not even contemplated. That is the trouble.
19 Once you open the box, so to speak, on it goes and there
20 will be no limit to it.

21 In our submission, it ought to be possible - and if
22 it cannot be done then their claim should be simply
23 dismissed at this stage - for the applicant to identify
24 what we would call clear and cogent reasons - we mean
25 those words very strongly - as to why the investigation
26 should be remitted to the OFT. If they cannot satisfy
27 such a test, then the application should be dismissed.

28 They ought to have to point to significant errors of
29 law or significant errors of fact that go to the heart of
30 that decision and not marginal debating matters.

31 THE CHAIRMAN: Significant errors of law or fact going to the
32 heart of the decision.

33 LORD GRABINER: Absolutely, and nothing less will do. What
34 that also indicates, in our submission, is that asking
35 for fresh discovery and new material and so on is all
36 irrelevant because what you are really concerned with or
37 should be concerned with is the robustness or otherwise
38 of the OFT decision. That is an historical exercise. It
39 is not an exercise which should be undertaken on the

1 basis of further and better material. It is entirely
2 inconsistent with the notion that you are testing the
3 robustness of an historical decision. That is quite
4 wrong, in our submission: wrong in principle.

5 If you were to adopt an approach along those lines,
6 then, in our submission, you might actually get to a
7 situation in which you are saying, "There is a margin of
8 appreciation here, for want of a better expression. The
9 OFT has done its best. There are limited resources."

10 One of the problems in this case is that the
11 assumption made by the applicants is that there is in
12 theory absolutely no limit to the financial and
13 administrative resources of the OFT: that is not the
14 case, they are real. That is a perfectly good basis for
15 the OFT to say, "We are going to close the file." And
16 that is what they have done.

17 That involves the concept of proportionality. It is
18 a perfectly reasonable approach for them to take. I dare
19 say that there is not a single case that one could ever
20 have where it is not possible for one party after the
21 event to come along and say, "Oh, but they could have
22 looked at it in this way and they could have looked at it
23 in that way. I have now got a magical economist who can
24 see it this way and 27 other ways." What is the purpose
25 of it all? There must be an end to it, in our
26 submission, and that is really the decision that you
27 should be dealing with.

28 Can I just mention one other point and then I will
29 sit down on this point, if I may? That is this. You
30 mentioned in your opening remarks the possibility of
31 slimming down the exercise. I think that was the word
32 you used. But it is quite a good indication of the
33 willingness of the applicants to open up the box.

34 One of the points that they are making in the
35 revised notice is the incorporation of a Chapter 1 case.

36 It is ground 17 of the application. We now that, as
37 long ago as 2nd September 2003, the Chapter 1 appeal was
38 stayed and, since 12th August 2003, that investigation
39 has been pending before the OFT.

1 In our submission, it is fundamentally inappropriate
2 that this should be an issue in this Tribunal and you
3 should simply strike it out.

4 THE CHAIRMAN: Because it is pending elsewhere.

5 LORD GRABINER: Absolutely. It is pending elsewhere and,
6 moreover and for what it is worth, because of the
7 confidentiality arrangements that are in place, we have
8 never even seen the documents which relate to the Chapter
9 1 case against us, so that to put it in is rather
10 pointless, but the mere fact that they thought it
11 necessary or worthy of being inserted suggests, I would
12 respectfully submit, that they have put in the kitchen
13 sink because, on any view, this is not sustainable and it
14 might lead you to think that, looking at the other 17
15 grounds, as I think you probably have done, as indicated
16 by your opening observations, would suggest that this is
17 a kitchen sink exercise. There is a danger here that you
18 go running on with that issue, you lose sight of the wood
19 for the trees and what we would respectfully urge you to
20 do is to concentrate on the basic question, namely, "Can
21 you, the applicant, show a real, cogent basis for having
22 this decision attacked to the extent that we will send it
23 back to the OFT for it to re-visit?" Otherwise, as I
24 will be submitting to you in due course when we come to
25 the substantive hearing, against the background of this
26 case, it does not matter that you yourselves have come to
27 a different view or that some other tribunal might have
28 come to a different view what you should be doing here is
29 to say, "There must be an end to it and we are going to
30 dismiss the application." But that is for another day.
31 That essentially is our position.

32 THE CHAIRMAN: Yes, Mr Green, do you want to come back on
33 some that?

34 MR GREEN: Yes, sir.

35 THE CHAIRMAN: Can you just clarify, particularly in the
36 light of what Mr Peretz was saying, what exactly your
37 proposition is? He is saying that you are not saying
38 that it was plain on the evidence that they had that
39 there was an infringement and they should have issued a

1 Rule 14 notice on the day instead of closing the file,
2 you are apparently saying that either they misapplied
3 what they did or they should have done something other
4 than what they did, i.e. they should have taken some
5 further steps.

6 MR GREEN: The allegations that we make vary as to their
7 consequence. To take the illustration I gave earlier, in
8 relation to the period of time over which predation
9 should have been measured, we say they manifestly, by
10 taking a very short period of time -- there was
11 substantial evidence, not least from the Competition
12 Commission that the period of time was very long - two
13 years plus - applying the principles you laid down in
14 Aberdeen Journals and the OFT's own guidelines, that
15 should have been sufficient to render all the costs
16 avoidable and thereby they were variable costs and
17 thereby there was predation. The consequence we say is
18 factual errors, errors of assessment, legal errors, remit
19 for them to take an appropriate decision. Whether that
20 is to move straight to a Rule 14 or reconsider is, in a
21 sense, a matter upon which we would make submissions to
22 you with a view to you then, if you agreed with our
23 submission, deciding on appropriate directions, if you
24 thought it was proper.

25 We are not - and we wish to clarify this - asking
26 you to make any findings of fact yourself. We accept
27 that this is a case where you will, if you are with us,
28 remit but there may well be submissions about whether you
29 should attach directions to remission. That really is
30 for another day.

31 We are not saying that they should not have gone
32 straight to a finding of infringement through the
33 ordinary procedure. In some respects we do say that; in
34 other respects we simply identify what we say are
35 procedural errors, which do not, in their own right, lead
36 to a finding of infringement. So it is variable. It is
37 far too simplistic, the way in which our case is
38 described. We have set it out fully and we have set out
39 the consequences. It does not help for them simply to

1 make assertions about the notice of application and the
2 expert's report.

3 We do agree, as far as we understand the submission,
4 with Lord Grabiner, who says, as I understand it, you
5 should stamp on anything which is up your jumper. We
6 have the OFT's decision, for what it is worth, and we
7 have their explanations of it and we agree with Lord
8 Grabiner that there was a decision of non-infringement.
9 I do not quite understand the OFT's position: it is like
10 saying that you are only a little bit pregnant. This is
11 not quite a decision or it is only slightly a non-
12 infringement decision. It is a non-infringement decision
13 and it is either right or it is wrong. In deciding that,
14 the Tribunal will come to a view as to whether there is a
15 margin of appreciation in certain respects. That is an
16 issue in the appeal.

17 We agree with Lord Grabiner that we want to get on
18 and deal with it. The only application for disclosure
19 that we have outstanding relates to documents which were
20 before the OFT: there is nothing which is new or has
21 been generated after the event, it is all part and parcel
22 of the OFT's assessment. We simply want the redacted
23 bits of the Competition Commission, we want a few pieces
24 of cost data: we have got half and they have not given
25 us the other half. We do not see why they should not
26 give us the full picture. There are snippets of
27 information which we think would be valuable and useful.

28 It is not a great deal that we are seeking, but it was
29 all before the OFT and we agree with Lord Grabiner that
30 that is what it is that you should be reviewing, nothing
31 else. Did the OFT get it right at the time? We are not
32 suggesting anything else.

33 THE CHAIRMAN: Could we just, for argument's sake and
34 extremely tentatively, look a little bit further ahead in
35 this case? It maybe in very broad outline - and I am not
36 in any way pre-judging anything, let alone pre-judging
37 the position of the Tribunal, I am just thinking aloud
38 now - it may be that one might ask oneself whether, in
39 this particular case, the OFT did a proper job in the

1 investigation and it reached certain conclusions and
2 those conclusions were within the range of responses that
3 a properly directed OFT would have or could have reached.

4 In which case, it may well be that you would lose.

5 It may be, on the other hand, that one finds that
6 various points that you identify do raise issues about
7 what they could, should or had to consider and it is not
8 evident that those issues were considered properly, in
9 which case one might be considering whether to set aside
10 the decision.

11 On the hypothesis that one did set aside the
12 decision, there is perhaps quite a big question as to
13 what might happen next. To what extent can the Tribunal
14 or, indeed, should the Tribunal require the OFT to, as it
15 were, take a new decision, to use a neutral expression,
16 in particular now bearing in mind the fact that quite a
17 lot of water has gone under the bridge. We are dealing
18 now with the original complaint. It was dealing with an
19 historical period: that is now some time ago.

20 Assuming that you win on that wholly hypothetical
21 assumption - I stress those words, "wholly hypothetical"
22 - on some point or other as regards the merits of what
23 was actually decided, what then? What is the range of
24 options? You must have considered the range of options
25 you would be inviting us to take.

26 MR GREEN: In many respects, the allegations that we make
27 went on for longer periods than the OFT found and, in
28 some respects, are on-going, so we do not accept that
29 this is entirely historical. If the Tribunal were minded
30 to set aside the decision, at this stage it is difficult
31 to be either prescriptive or predictive, because it is
32 certainly a matter about which all parties would make
33 submissions. On the hypothesis you have set aside, in
34 light of the argument, we suggest you do A, B and C. It
35 will be our case that you should direct the OFT quite
36 closely as to a future decision, avoiding errors which,
37 either through declaration or through the reasoning of
38 your decision, you would have identified. The second
39 Freezer case was an illustration of that, where OFTEL

1 went away and produced ----

2 THE CHAIRMAN: They agreed to do it again, basically.

3 MR GREEN: They may have agreed to do it.

4 THE CHAIRMAN: We did not actually make a direction in the
5 end.

6 MR GREEN: A direction was not necessary, given the fairly
7 explicit guidance set out in the judgment. It would not
8 have been possible in that there is a convention in
9 administrative law that the Government does not flout a
10 declaration. Declarations can be set out formally or
11 they can be set out in the reasoning of the decision. It
12 would have been fairly extraordinary if OFTEL had said,
13 "We are just going to ignore what the Tribunal has said."

14 I do not think that could ever have been contemplated.

15 THE CHAIRMAN: No, they would not have done that, but it is
16 not every judicial review case where the respondent
17 public authority has to contemplate, as it were, re-doing
18 an investigation, as distinct from simply correcting some
19 administrative act or other.

20 MR GREEN: That rather makes an assumption which is that the
21 gist of our complaint is that we do not know what they
22 did. We think we do know what they did - and we have set
23 it out and summarised it in the factual section - and we
24 think we have a pretty good idea of the precise exercise
25 which was carried out. To come back to the illustration
26 I have been using throughout, on predation we know what
27 period of time they used and we know more or less what
28 costs data they used. We can now discern how they
29 analyzed that cost data. So the parameters of the
30 process undertaken are, in the main, well known. We are
31 not actually saying we find the process unfathomable: we
32 have fathomed it.

33 Our disclosure application is simply to plug a few
34 gaps, but we do know more or less what they did and, once
35 the Tribunal has had an opportunity to study it - it is
36 quite an exercise, undoubtedly - at that point we think
37 you will know what they did. We have been able to work
38 it out chronologically, month by month. We think the
39 Tribunal will be in a position to say they have almost

1 come to the conclusion on some issues that they should
2 have found an abuse.

3 You may decide you do not wish to go that far in
4 directing the decision to that effect, but we think you
5 will be able to come very close to that. It is very
6 difficult to make submissions at this stage. We have not
7 seen the interveners' response and, obviously, everyone
8 will make submissions as to what happens if you decide to
9 set aside.

10 THE CHAIRMAN: I am not intending to put you on the spot
11 unduly, I hope, just to get some feel for where we are
12 going in this case. Thank you.

13 LORD GRABINER: Sir, I wonder if I could just add one thing
14 arising out of your exchange with my learned friend Mr
15 Green. It does identify quite an important point, we
16 think. That is this.

17 My learned friend's submission essentially is that
18 he would like to have two bites of the cherry in front of
19 the OFT. First of all, he would like to be able to
20 demonstrate to the OFT, if you were to send it back to
21 them, that they were wrong in their previous analysis.
22 That assumes some kind of cocoon and ignoring everything
23 that has happened subsequently, so that they could do an
24 exercise which, because you have said so, they ought to
25 re-do - something along those lines. But then there is
26 the second cherry, which involves the proposition of
27 putting forward a further and better case, either on the
28 basis of the material that was then available - now five
29 years ago - and/or on the basis of subsequent events.
30 This is the point that came out of your exchange with Mr
31 Green: that there is a lot of water gone under the
32 bridge since then.

33 It would be extremely attractive for them to want to
34 open all of that up and to debate it so that, in effect,
35 you are inviting or they will be inviting a decision from
36 the OFT which is based on a completely different factual
37 premise or certainly a hugely changed factual background.

38 What I suspect he is not prepared to do is to give
39 any kind of undertaking as to what the scope of the

1 inquiry should be in front of the OFT if, contrary to our
2 submission, you decided to send it back there. In our
3 submission, that is quite an important consideration,
4 because one of the points that you should be taking into
5 account, we would respectfully suggest, is that it is not
6 legitimate at this stage to introduce argument and
7 materials which actually were available then, which could
8 have been introduced but which, for whatever reason,
9 never were. I suspect that quite a lot of the argument
10 that is going to be sought to be put back to the OFT
11 comes into that category.

12 THE CHAIRMAN: I think we are probably running ahead of
13 ourselves very considerably.

14 LORD GRABINER: I was concerned not to let it go past in case
15 the point did not arise again.

16 THE CHAIRMAN: That is not a criticism in the least, although
17 it is probably a criticism of myself for saying we should
18 not really be getting into the "What if?" discussion when
19 we have not even crossed the bridge of the substance. It
20 is certainly the case - and I just make this observation
21 in passing so that I can remind myself when I read the
22 transcript - that in Freeserve, which is the only
23 comparable decision we have had so far, what the relevant
24 director undertook to do was to reconsider the original
25 complaint and he took a new decision on the original
26 complaint, which is currently being appealed, and, at the
27 same time, as a matter of his discretion, he embarked on
28 a further investigation of matters that had occurred
29 subsequently to the new complaint. But, as far as the
30 Tribunal was concerned in that case, what he was actually
31 asked to reconsider and agreed to reconsider was the
32 original complaint and not subsequent events. I simply
33 note that so that we have it in our minds. Mr Peretz?

34 MR PERETZ: I do not want to prolong the discussion
35 unnecessarily, but I think it is important ----

36 THE CHAIRMAN: Sometimes a little bit of brainstorming helps
37 us all to see the wood for the trees, as Lord Grabiner
38 would say.

39 MR PERETZ: I want to put a marker down to this extent,

1 which is that it is not just a question of remedies, but
2 of what the Tribunal does if it is satisfied that the OFT
3 has got something wrong: should it remit or not? There
4 is plainly an issue as to whether the Tribunal is
5 entitled as an appellate tribunal in any way to direct
6 the OFT as to whether to start or re-start an
7 investigation in the light of the other calls upon its
8 resources and priorities.

9 The issue arises, in a sense, before one gets to
10 that stage of, "Has the OFT got something wrong?" It
11 arises in this way. When the Tribunal looks at a
12 particular criticism and looks whether it is a criticism
13 of a mistake of law or a criticism of a mistake of fact
14 or a criticism of a failure to investigate in some
15 respect, it needs to be asking itself the question, "Is
16 the error identified", assuming we see any force in the
17 suggestion that there is an error, "such as to call into
18 question the Office's decision at this stage to stop
19 investigating and to concentrate its resources on other
20 matters?"

21 THE CHAIRMAN: I have the underlying feeling that you want to
22 try to work back in the, "This is only an investigation,
23 not really a decision" argument under another guise.

24 MR PERETZ: It is a decision and it is plain that the Office
25 took the view that, on the evidence before it, there was
26 not enough material to justify issuing a Rule 14 notice.

27 Beyond question, the Office is not seeking in any way to
28 re-open that argument; but it is important when the
29 Tribunal comes to decide how to review, how to scrutinise
30 this particular decision, to understand the nature of the
31 decision that it is. That is not in any way seeking to
32 re-argue the debate about whether it is an appealable
33 decision or not.

34 THE CHAIRMAN: Thank you. We are going to rise for a few
35 moments to think about where we are.

36 (A short adjournment)

37 THE CHAIRMAN: On the first agenda item, which was a general
38 discussion of the issue, we are not sure that we can take
39 the matter much further at this stage, save to invite the

1 applicant, so far as possible, to concentrate their
2 skeleton argument on the main point, so far as they feel
3 able to do so in doing justice to their case, and not
4 necessarily to treat every single ground as being of
5 equal weight, but that is a matter for you, Mr Green, as
6 to how you put your case.

7 We now come to certain outstanding issues of
8 confidentiality and disclosure, which I think we had
9 better face up to.

10 MR PERETZ: Just before we move from agenda item one, can I
11 flag up one other matter? That is this. The revised
12 notice of application is expressed to be supplemental to
13 the original notice of application. As we point out in
14 the defence, we regard that as a somewhat unsatisfactory
15 position and we would invite the applicants to state if
16 any parts of the original notice of application continue
17 to be relied on and, if so, what. We have proceeded in
18 our defence on the basis that none of it is relied on,
19 but we note the use of the word "supplemental".

20 THE CHAIRMAN: I suggest you write to the applicants, Mr
21 Peretz, to seek clarification and if you do not get
22 satisfactory clarification you will have to come back to
23 us for a direction of some sort.

24 MR PERETZ: Indeed. I flag it up across the court.

25 THE CHAIRMAN: Yes, thank you. Yes, Mr Green?

26 MR GREEN: On confidentiality, the issue is relatively
27 straightforward. First of all, there is the issue of
28 redactions. I hope there is going to be no issue on this
29 because most of the redactions which are sought are
30 contained in documents we have produced, so we obviously
31 know about the content.

32 THE CHAIRMAN: Forgive me. I just need to find your request,
33 which I think is in ----

34 MR GREEN: That relates to a slightly different matter. If
35 you look at the letter of the 19th March, that contains
36 our request.

37 So far as confidentiality is concerned, there are
38 three issues. One is general confidentiality as between
39 the parties; secondly, general confidentiality,

1 particularly in relation to one category of documents,
2 which are the Chapter 1 documents; thirdly, our specific
3 request for disclosure.

4 If you want to have the relevant documents in front
5 of you, it is our letter of 19th March and there is the
6 Office's letter of 30th March. I was proposing to deal
7 with the more general points first, if that is
8 convenient.

9 THE CHAIRMAN: Yes.

10 MR GREEN: Which is paragraph 2 of the OFT's letter, the
11 Treasury Solicitor's letter of 30th March. There is
12 there a debate about general confidentiality. So far as
13 that is concerned, we do not perceive there to be any
14 difficulty, because we do not think there is any
15 practical advantage in having a long dispute about what
16 is confidential or not as a matter of law in our
17 documents. We will find an appropriate way of resolving
18 that between the parties. It would then only be a matter
19 between the parties and the Tribunal and the one hand and
20 the public on the other as to what was referred to in the
21 course of the hearing.

22 We should be able to resolve matters of
23 confidentiality between ourselves simply by us not taking
24 too rigid a view of the battle lines. When we have seen
25 the information and we know what is in it, we can refer
26 you to it, we can ask you to read bits without speaking
27 them onto a transcript.

28 THE CHAIRMAN: There are various procedures whereby things
29 are not mentioned in open court or we go into camera or
30 whatever.

31 MR GREEN: Yes. I hope that will not be a problem and one
32 hopes one will not have to go into camera. As matters
33 presently stand, no-one has suggested there is going to
34 be any cross-examination, but we can meet that as and
35 when.

36 The only sensitive category within that broader
37 category is one which the Treasury Solicitor is concerned
38 about, which is the information in relation to Chapter 1.
39 The Chapter 1 issue has been part of the scene since the

1 outset. It may be that it can be dealt with as one of
2 the issues that we make submissions about lightly in
3 response to your earlier invitation that there will
4 remain an issue as to confidentiality as between the
5 Office of Fair Trading and the intervener on that
6 material.

7 THE CHAIRMAN: Can you just take me to where the Chapter 1
8 point is made in the correspondence?

9 MR GREEN: I do not think it is specifically referred to.

10 THE CHAIRMAN: It is quite difficult for the Tribunal to
11 reach any view on the Chapter 1 allegations when they are
12 still being investigated.

13 MR GREEN: I do not think that that is going to be our
14 point. Our point is not going to be that you should form
15 any view of it; it is more of a judicial review type of
16 point, that it is a factor which is relevant to the
17 analysis, in particular certain types of contract, and
18 the OFT has itself excluded it from its consideration.
19 That does elide into the procedural issue that they have
20 now re-opened the investigation into Chapter 1. We do
21 not know what their conclusions are from that
22 investigations.

23 Can I suggest that we deal with it in this way? We,
24 on our side, will give some serious thought as to how far
25 we wish to raise it as a central issue? I do not want it
26 to become an obstacle in the progression of this case.

27 THE CHAIRMAN: If I can put it informally, I am not sure at
28 the moment that we are that keen on getting into or
29 approaching the Chapter 1 issue, even indirectly.

30 MR GREEN: Can we leave it with your informal indication and
31 if we think that it is something which we have to put to
32 you then we will have to come back.

33 THE CHAIRMAN: There are quite a lot of other grounds in the
34 case.

35 MR GREEN: There are.

36 THE CHAIRMAN: If none of those grounds was to succeed, it is
37 perhaps unlikely that the Chapter 1 point would be the
38 winning point.

39 MR GREEN: I see the force of it put that way. That is

1 Chapter 1. It may be that we could put it into abeyance
2 for the time being and we will see whether or not we have
3 to bring it back to the Tribunal and maybe we can resolve
4 it.

5 THE CHAIRMAN: Yes.

6 MR GREEN: Generally speaking, so far as confidentiality is
7 concerned, we would hope that we can simply agree what is
8 to be redacted without anybody taking too firm a view as
9 to what is properly in law to be treated as confidential,
10 and we will find a modus operandi to deal with it.

11 The other matter which arises concerns our letter of
12 the 19th March, in which we seek five categories of
13 disclosure. I just identify them first of all. There is
14 the residue of the parts of the Competition Commission
15 report which we have not yet seen. This goes directly
16 to, amongst other things, our analysis of Wiseman's costs
17 and profitability, which go to predatory pricing, amongst
18 other things.

19 THE CHAIRMAN: This is simply what was not published but what
20 is in the report.

21 MR GREEN: Yes. As we set out in our letter, the facts
22 which are in the CC report have lost confidentiality.
23 Some of the data is now three, four, five and more years
24 old. It is highly relevant. For example, we want to see
25 what the CC said about the duration of the predatory
26 pricing. As we understand the report from the parts we
27 can see, they found predation for a lengthy period of
28 time. We want to see the context in which that was said.

29 That is just one illustration. We do not see why it
30 should not be released into the confidentiality ring.

31 THE CHAIRMAN: When you say "They found predation", you mean
32 the majority.

33 MR GREEN: The majority. I would have to check the facts to
34 see whether or not those facts themselves were contested
35 or whether it was the inferences from the facts. We
36 would want to say, when you are analyzing what is a
37 variable cost, you look at the period of time over which
38 the allegation occurs and it is relevant in this regard
39 that the precursor to the OFT inquiry was the CC report.

1 The Secretary of State asked the OFT to investigate. If
2 the CC found as a fact that there was pricing below
3 average total costs for a period of 12/18 months, that is
4 the period that the OFT should have taken into account.
5 That is an example.

6 THE CHAIRMAN: Do we know what paragraph that is?

7 MR GREEN: We have identified the relevant paragraphs.
8 Paragraphs 2.107 through to 2.138 of the CC report, then
9 2.72 through to 3.114, and then finally 4.255 to 4.356.
10 That is the third paragraph under our first request.

11 THE CHAIRMAN: Having been in a position to do all this work
12 and produce an amended notice of appeal and to a
13 comprehensive expert's report, why is this further
14 disclosure necessary at this stage?

15 MR GREEN: It bears directly upon the issues which the
16 accountants have sought to address, and the accountants
17 have had to work with the redacted versions. It would be
18 unfortunate if the OFT say in relation to Mr Haberman's
19 report, "You have drawn this inference from para X, but
20 if you had seen para Y you would have seen that it is
21 rebutted."

22 The conclusions upon which the experts rely are
23 directly relevant to the paragraphs that we wish to see.

24 It is really that the experts have had to work with the
25 data which has been available to them, and we want to
26 ensure that they have got it right and also that if there
27 is a point upon which they are entitled to rely in their
28 favour, because there was a finding by the CC to that
29 effect, that is something which we can draw to the
30 Tribunal's attention.

31 The second category of documents (at the top of the
32 next page) - attachment to Wiseman's 29th November letter
33 - concerns two categories of cost. The gist of the
34 application really comes out in the last sentence in the
35 first paragraph: "We are unable to see any sensible
36 basis upon which the respondent has provided run and
37 depot costs information but not equivalent trunking and
38 dairy cost information." We have been provided with a
39 category of information, which is the run and depot

1 costs. Falling into that same category are trunking and
2 dairy costs, but we have not been provided with them.

3 The cat is out of the bag: they have provided the
4 relevant information and it is just simply completing the
5 jigsaw so that Mr Haberman can be certain that the
6 conclusions he has drawn are fair, reasonable and
7 accurate ones.

8 The Office has said that the confidentiality ring is
9 not adequate to deal with such concerns, but why not? We
10 have already got half of the information, why not
11 complete the picture? The information itself is
12 historical. In a sense, it is more than two years old.
13 As we say in the third paragraph, "It is no longer
14 tenable for the respondent to take a point on relevance.

15 The criticism of the methodology adopted by the
16 respondent in respect of the identification and
17 assessment of Wiseman's costs is clearly set out in the
18 revised notice of application. The methodology adopted
19 by the respondent to run and depot costs was revealed in
20 a meaningful way only once the respondent was required by
21 the Tribunal to remove the redactions applied to the 13th
22 December 2001 Wiseman report and following the reply.
23 The applicant's criticisms have relied upon this
24 material" - and we refer to the relevant paragraphs of
25 the report. "In this regard, it is unacceptable for the
26 respondent to continue to withhold equivalent material
27 bearing up on its methodology in respect of trunking and
28 dairy costs from the confidentiality ring and the
29 Tribunal where, for example, the respondent has itself
30 indicated that a key aspect of Wiseman's incremental
31 costs of serving the Highlands lay in trunking milk and
32 ... the depot." Again, we have given the reference.

33 So the data pre-dates May 2001 and it is historical
34 in nature, but it is directly relevant to points made by
35 Mr Haberman. We have been given half the data; there is
36 no reason why we should not be given the other half of
37 the data. That is the second category. It is really
38 just completing the jigsaw that had already been handed
39 to us.

1 The third category, the price/cost matrix. "The
2 applicants advance their entitlement to disclosure on the
3 price/cost matrix on very much the same basis of
4 information provided under cover of the 29th November
5 2001 letter. The way in which the respondent has created
6 the sample of costs and price data, the use to which that
7 data has been put and the conclusions the respondent has
8 drawn from it are matters which have been criticised by
9 Mr Haberman in the report. It is the applicant's case
10 that the methodology and subsequent analysis applied by
11 the respondent as encapsulated in the price/cost matrix
12 and the patterns it produced was flawed below minimum
13 investigative standards and effective important respects"
14 - we repeat the observations in relation to the
15 attachments to the 29th November letter: it is
16 historical. It applies equally to that category.

17 The same criticisms and the same points can be made
18 in relation to information to monitor the voluntary
19 assurances.

20 THE CHAIRMAN: Just a moment. On the price/cost matrix. I
21 am not entirely following this, Mr Green. You are
22 seeking disclosure of the price/cost matrix.

23 MR GREEN: Yes.

24 THE CHAIRMAN: But you are also saying that the methodology
25 and analysis as encapsulated in the price/cost matrix and
26 the patterns it produces is flawed.

27 MR GREEN: We have seen a certain amount of data from the
28 Office of Fair Trading in relation to this. The
29 price/cost data is underlying that. We have been able to
30 criticise what we have seen, but we are unable to get to
31 the underlying root of the disclosure, their
32 explanations. Again, (a) Mr Haberman is entitled to be
33 certain he is not making a mistake. If he is making a
34 mistake, he would wish to withdraw what he says. And,
35 (b), if there is a good point that he is entitled to make
36 to prove his criticisms, then he should be entitled to do
37 so, not least because my learned friend Mr Peretz is
38 going to say they acted reasonably.

39 If they simply put down the shutters and say, "You

1 can't see what's behind our submissions and our
2 explanation", in a sense it is unfair: it is not
3 bringing cards face up to the table.

4 The same goes for information to monitor voluntary
5 assurances. The Tribunal will recollect there were
6 assurances given at a fairly early stage in the procedure
7 and the criticism we made is that these were not properly
8 monitored and there was information which was received in
9 relation to the voluntary assurances on which the OFT
10 then relied as part of the information which it used to
11 dismiss the complaint and find no infringement.

12 It is referred to in paragraph 29 of Mr Lawrie's
13 statement. He refers to, "The information received by
14 the respondent from Wiseman during the course of
15 monitoring the voluntary assurances. Whilst Mr Lawrie's
16 statement is unclear, the data would appear to bear upon
17 the period from approximately autumn 2001
18 [August/September] when the assurances were negotiated
19 until summer of 2002 when the OFT closes its file." So
20 the data had relevance right up until the date upon which
21 the decision of non-infringement was taken.

22 "The respondent has confirmed that Wiseman had to
23 increase prices and/or rationalize rounds to reduce costs
24 in order to comply with the interim measures, but there
25 is no evidence at all that the respondent considered the
26 implications of this point or the information provided in
27 the context of the investigation.

28 "In response to our request for this information,
29 the respondent has referred to its first and second
30 observations, which broadly noted that the applicants
31 should amend their application before seeking disclosure
32 of the material", and then they claimed it was not
33 relevant. "We submit it is clear from the revised notice
34 of application that the methodology in relation to
35 interim measures and voluntary assurances is relevant to
36 the issues, as is the data provided by Wiseman in the
37 context of the interim assurances in respect of conduct
38 during the period."

39 THE CHAIRMAN: Which bit of the revised notice of application

1 is being referred to there?

2 MR GREEN: There is a lengthy section starting at 3.41 on
3 interim measures.

4 THE CHAIRMAN: Which page is that?

5 MR GREEN: Page 18, heading before 3.41 on interim measures,
6 which itself is in section B, supplementary statement of
7 facts. Paragraph 3.62 at the end of that section:
8 "Importantly, the OFT had indicated that in order to
9 comply with the interim measures Wiseman had to implement
10 a number of price increases and had rationalized rounds
11 to reduce costs." The evidence for that comes from the
12 note of the meeting which Wiseman had with the OFT.

13 THE CHAIRMAN: How far are we now concerned with what
14 happened at the interim measures stage?

15 MR GREEN: The information which the OFT was examining at
16 this point post-dated the interim measures themselves and
17 was relevant to Wiseman's conduct up to almost the date
18 of the OFT decision, so it is not focusing upon the
19 interim measures per se: it is focusing on the period
20 after that, which, as we say in the letter, covers the
21 period from mid-2001 to summer 2002, immediately prior to
22 the decision. It is information that was in the hands of
23 the OFT in the course of the investigation and nothing
24 beyond that.

25 Those are the four categories of information we
26 seek. We do have one final category. So far as category
27 five is concerned, my client feels concerned and, with
28 respect, is entitled to feel concern that there are notes
29 of meetings which are relevant to the investigation and
30 contain material evidence which they have not seen.

31 The Tribunal will recollect a distinct problem over
32 a meeting referred to in Mr Lawrie's statement of 14th
33 March 2002. It was said that no meeting notes existed
34 and it was not the OFT's routine practice to keep notes.

35 Then a note appeared. So that the Tribunal and, indeed,
36 my clients can be satisfied that there are no further
37 meeting notes containing relevant information, we suggest
38 that the OFT produce a list of all such meeting notes so
39 that we can be satisfied of this.

1 We are not making this suggestion lightly, but the
2 OFT have past form on this: having said there was no
3 record of a meeting, which was quite important in Mr
4 Lawrie's statement, suddenly (and a considerable period
5 later) a note appeared, an informal note, which
6 contradicted certain aspects of the explanation of that
7 meeting.

8 If this were a procedure under the CPR, one would
9 routinely expect to see a defendant produce a list
10 deposed to by a solicitor and we would suggest a similar
11 approach is proper. It may turn up nothing at all, in
12 which case we can all be satisfied there is no further
13 evidence. But based upon our experience in this case, we
14 think that is a reasonable request.

15 That is a general matter. The matters we have asked
16 for are therefore fourfold apart from that: the other
17 parts of the CC report; information to complete the
18 picture that we already have, trunking costs, price/cost
19 matrix again to complete the picture of information that
20 we already have and then, finally, the information in the
21 OFT's possession up to the data of the decision about
22 Wiseman's costing decreases and price changes immediately
23 prior to the decision. That is all information in their
24 possession and nothing beyond that.

25 THE CHAIRMAN: Thank you. Yes, Mr Peretz?

26 MR PERETZ: First an opening observation. The letter to
27 which my learned friend has been referring, the 19th
28 March letter, was served well over a month after the
29 revised notice of application, which you will have
30 observed, sir, seems to have been prepared quite
31 effectively without the information now sought. It
32 arrived just at the point at which we were finalizing the
33 defence and, as we set out in our letter, we concentrated
34 on finalizing the defence, rather than on dealing with
35 the letter.

36 What we would suggest is this. Insofar as the
37 applicant, having thought further about the issues in the
38 light of our defence - they have had only two days now -
39 if they wish to persist with these applications, we have

1 a hearing to deal specifically with that application. We
2 would suggest that could be some time in late April or
3 May, when they, the Tribunal and the interveners will
4 have absorbed the pleadings and be rather more on top of
5 the case than, with respect, I suspect the Tribunal is
6 now.

7 These are very important issues; there is a very
8 sensitive and delicate balance to be struck between the
9 applicant's interests and what is necessary for the just
10 resolution of this case, as opposed to the extreme
11 sensitivity of much of the information which is now
12 sought, as to which Lord Grabiner is in a better position
13 than I am to explain the sensitivity to Wiseman. Insofar
14 as we understand Wiseman's concerns, they are perfectly
15 reasonable.

16 From a public policy concern, which is my client's
17 main concern, there is obviously a public policy concern
18 if subjects of very intrusive investigation such as these
19 have a concern that their information that they provide in
20 confident to the OFT ends up being circulated among even
21 their competitors' lawyers and accountants. There is,
22 perhaps rightly or wrongly, a certain amount of cynicism
23 about the effect of Chinese walls in these circumstances.
24 One can understand that this is a factor which is bound
25 to bear on the minds of subjects of investigation in
26 these circumstances. That is a concern which the Office
27 genuinely holds about this sort of application.

28 So these are difficult issues which need to be
29 resolved carefully in the light of a full understanding
30 of the pleaded case. We would therefore respectfully
31 stress that now is not the time. I am not sure to what
32 extent my friend says it is the time. I had understood
33 their position to be that they have no particular
34 objection to the matter going off until April or May.

35 Of course, the matter clearly needs to be dealt with
36 and it needs to be dealt with within a significant time
37 before the hearing, because the worst situation of all is
38 if information comes out shortly before the hearing and
39 the parties then have to try and absorb what implications

1 that may have for the hearing at rather short notice.
2 You, sir, will know of the difficulty that one can get
3 into.

4 So that is our starting point and, insofar as the
5 Tribunal wants me to respond ----

6 THE CHAIRMAN: Are you able to indicate, at least briefly,
7 your first reaction?

8 MR PERETZ: The over-riding comment is that we would find it
9 helpful if the applicants could justify their continuing
10 requests for disclosure against the case as now pleaded,
11 including both their pleading and the defence.

12 THE CHAIRMAN: On that specific point, just help me
13 generally. How are you approaching Mr Haberman's
14 evidence? Are you putting in countervailing facts or are
15 you simply saying, "That is a point of view, but we have
16 another point of view and our point of view is as
17 reasonable as his point of view", or are you challenging
18 the factual conclusions to which he comes or what?

19 MR PERETZ: We have some difficulty with Mr Haberman's
20 report. The first difficulty is that we are not clear
21 from the pleadings precisely to what extent what he said
22 in his report is adopted in the pleading. Let me just
23 take you to an example. At paragraph 4.16 of the pleaded
24 case - it is of some relevance to the issues my learned
25 friend have just been discussing - it states in rather
26 broad terms: "The nature and consequence of the OFT's
27 failing in respect of the assessment is considered
28 further in the EY report."

29 We have not pleaded to that because it is not
30 entirely clear what the status of what is said in the EY
31 report is actually pleaded out by the applicants as part
32 of their case. It does not even say, "We adopt what is
33 said", it simply says, "... is considered further."

34 If one then turns to those paragraphs, the
35 paragraphs in the EY report, 5.55 to 5.68, pages 62 and
36 63 of the report, one finds, rather interestingly, those
37 are the paragraphs which are specifically relied on in
38 support of the application for the data attached to
39 Wiseman's letter of 29th October 2001. Those paragraphs

1 deal with specific points arising out of the depot costs
2 data that were disclosed.

3 The reason that is interesting is that when the
4 applicants get the data - we set this out in the
5 correspondence leading up to the 2nd December hearing
6 last year - on reflection the applicants probably were
7 not entitled to those data at all, but nonetheless they
8 had them and they have done something with them. What
9 they have done with them is not clearly adopted in their
10 pleading. That shows what little relevance, at the end
11 of the day, these data actually have in the case as now
12 pleaded out.

13 THE CHAIRMAN: That is helpful, Mr Peretz, but it does not
14 quite answer the question that I put or perhaps does not
15 answer it completely, which is, what is your general
16 approach to Mr Haberman's report? The additional data is
17 sought partly on the basis that Mr Haberman is entitled
18 to verify that the conclusions that he draws on the basis
19 of the information he has got are not wrong and that he
20 has drawn reasonable inferences from what he has got. If
21 that is not challenged, then it might weaken the argument
22 for further disclosure, might it not?

23 MR PERETZ: Our position in respect of his report is
24 essentially a series of questions. First, to what extent
25 does it form part of the pleaded case? Second, to what
26 extent is it said, insofar as it is relied on as part of
27 the pleaded out case, that Mr Haberman's status as an
28 accountant gives him an opinion which is of any interest
29 to this Tribunal? It is entirely trite that an expert's
30 report is only of interest to a court insofar as it
31 speaks of a matter in which that expert has expertise.
32 We are entirely unclear in relation to a lot of the
33 assertions made by Mr Haberman why his expertise as an
34 accountant entitles him to an opinion which is entitled
35 to be taken into account by the Tribunal. He is merely
36 adding, as an accountant, to a whole series of assertions
37 which, with respect, adds nothing.

38 THE CHAIRMAN: That would go to the weight of his evidence,
39 but to what extent do you contest his conclusions?

1 MR PERETZ: We contest quite a lot of his conclusions. I
2 have not done an analysis by going through it paragraph
3 by paragraph, but it is plainly apparent that we do
4 contest a lot of what he says. We also contest not his
5 right to say them in the sense that, of course, he is
6 entitled to his personal opinion, but we do contest the
7 basis upon which his opinion is entitled to be considered
8 as expert evidence by this court. Insofar as it is not,
9 one can just put it to one side.

10 THE CHAIRMAN: So we should give it no weight, in other
11 words.

12 MR PERETZ: Give it no weight, indeed. I would not be
13 applying formally to exclude it, but there is a question
14 as to what extent Mr Haberman's opinions really take the
15 matter any further. Of course, if they are adopted by
16 the applicants as part of their pleaded case and they
17 wish to plead out the case in the way that he is adopted
18 then that is a submission which the Tribunal will
19 consider along with all the other submissions.

20 Certainly, as presently advised, we are not
21 proposing to deal with Mr Haberman's report as such, but
22 what we would invite the applicants to do at this stage
23 is (a) to make clear which parts of his report on which
24 they propose to rely and (b) to explain why those parts
25 of his report are opinions which should be given weight
26 by this Tribunal, given that he is an accountant. Once
27 we have had that explanation, we will decide what to do,
28 if anything. It may well be that we can simply deal with
29 what he says even - quotes - "as an accountant" as a
30 matter of submission.

31 Returning to the 19th March letter, we would say
32 about both the Competition Commission's report - the full
33 version of the report - and about the price/cost matrix
34 that we simply await particulars of precisely which parts
35 of the pleaded case they have now pleaded out in the RNA
36 and in the defence those items are said to go. We would
37 share, with respect, your initial observation that the
38 applicants have pleaded out a very full case without
39 apparently suffering too much from not having this

1 material. Ditto with respect to the information to
2 monitor the voluntary assurances on the third page of
3 that letter.

4 I note in passing that the paragraph to which my
5 learned friend drew your attention, paragraph 3.62,
6 occurred simply in the historical summary, which we
7 describe as a "tendentious summary" in the defence, but
8 in the summary of what has happened it does not appear
9 and my learned friend has not drawn your attention to any
10 part where that issue arises in relation to their pleaded
11 case - the specified grounds set out in section 4 of this
12 application.

13 THE CHAIRMAN: One of the difficulties with this part of the
14 case, which I think we have encountered at an earlier
15 stage but parked and may perhaps now have to face up to,
16 is that a number of these documents are referred to in Mr
17 Lawrie's witness statement. It is rather difficult,
18 perhaps, to argue that matters that are relied on in the
19 witness statement are not relevant and, prima facie,
20 material to whatever view the Tribunal finally comes.

21 MR PERETZ: One has to trace that out. The mere fact that
22 something is referred to, perhaps in passing, by Mr
23 Lawrie - and I have not looked up the particular
24 references, at least recently, to which this material
25 relates - one would have to look at those references and
26 see to what extent ----

27 THE CHAIRMAN: You cannot really rely on ----

28 MR PERETZ: It may be a matter of some significance if that
29 has to be argued out. I am not sure that either Mr Green
30 or myself is in a position to argue that out.

31 THE CHAIRMAN: No.

32 MR PERETZ: The mere fact that it happens to be mentioned by
33 Mr Lawrie in his report, though plainly (if I put it in
34 this way) relevant to the issue of relevance, is not of
35 itself decisive.

36 THE CHAIRMAN: It is fairly trite, I think, to observe in
37 passing that you cannot have it both ways and rely on
38 something in his statement that refers to a document the
39 disclosure of which you are objecting to.

1 MR PERETZ: Indeed.

2 THE CHAIRMAN: As to the meeting notes --?

3 MR PERETZ: As to the meeting notes, the meeting note taken
4 by Miss Pope of the March 2002 meeting was disclosed by
5 letter of 18th September. The history behind that is
6 simply that Miss Pope was away at the time at which we
7 were trying to identify such notes. This was a personal
8 note of hers and it was not, therefore, discovered until
9 her return, which was unfortunately either just before or
10 after the 2nd September case management conference.

11 Once it became clear that it was there and it was a
12 note of what is plainly an important meeting in this case
13 - and the only note of which we are aware of that meeting
14 - it seemed appropriate to disclose it, which is what we
15 did.

16 THE CHAIRMAN: No steps have been taken to ascertain if there
17 are any other notes?

18 MR PERETZ: It may be helpful, sir, if you look at our
19 letter of 18th September. It was copied to the Tribunal.

20 THE CHAIRMAN: We have it, yes. Document 89.

21 MR PERETZ: We set out what other notes there were, they
22 were brief personal notes made during meetings, of which
23 there are full notes in the application or in material
24 already disclosed. Their added value (if one could put
25 it in that way) is nugatory. There is a better note.

26 There are also notes taken during meetings or
27 conversations relating to irrelevant issues. Then there
28 are personal notes relating to officials' own thinking
29 and internal discussions with colleagues. We can see no
30 basis upon which a particular view expressed by an
31 official as to the progress of the case is of any
32 relevance to this Tribunal's consideration. They are
33 plainly internal documents and they are, as the Tribunal
34 will be aware, not documents that would ever be disclosed
35 on access to the file in an infringement case.

36 Those are the remaining notes that there are. We
37 see nothing to be gained at all by listing them out.
38 That is all I need to say on this.

39 THE CHAIRMAN: Yes, Lord Grabiner?

1 LORD GRABINER: Thank you, sir. We object to giving the
2 disclosure and our submission is that the application
3 should be rejected, essentially for three reasons, each
4 of which I would like to develop briefly, if I may.

5 THE CHAIRMAN: Yes.

6 LORD GRABINER: First of all, we say the application is too
7 late. Secondly, we say that further disclosure is
8 unnecessary. Thirdly, we say that the balance tips
9 firmly in favour of the maintenance of confidentiality
10 and it is a balancing exercise that needs to be done
11 here.

12 As to the first point about lateness, Mr Peretz has
13 essentially made the point and we respectfully agree with
14 what he said. The revised notice of application was
15 served on 16th February; directions for disclosure could
16 and should have been sought at that time, and they were
17 not. The other side have waited a month until the 19th
18 March to seek further disclosure. It is unreasonable, in
19 our submission, to expect a response at such a late
20 stage.

21 Also, in our submission, one has to take account of
22 the consequences of any disclosure order being made in
23 terms of a point that I was trying to make a little
24 earlier this morning in terms of the likely hearing date
25 of this appeal. What will happen is that if the
26 disclosure proves in any degree material - in any degree,
27 whatever it may be - that is likely to lead to some
28 amendments to the defence, the statement of intervention
29 and so on and that could have a consequential impact upon
30 timetabling to the extent, possibly, that this may not
31 happen until next year. The scope of the further
32 disclosure sought is potentially very large indeed.

33 We say next that the further disclosure is
34 unnecessary and we say that in turn for three reasons.
35 First of all, the focus of the appeal has changed. This
36 is no longer an appeal which is concerned with the
37 possibility that this Tribunal will go on to make any
38 findings beyond saying, "We are throwing this out" or "We
39 are sending it back to the OFT." You are not being

1 invited to make any infringement finding, so the focus is
2 different and the material is not necessary for our
3 purposes, in our submission.

4 The issue is whether or not the decision is
5 sufficiently robust and, in our submission, there is
6 ample material available already for the purpose of
7 determining the answer to that question.

8 It is also the case that the applicants have had
9 access to a detailed witness statement and numerous
10 underlying documents as well as the benefit of a request
11 for further information and a reply. We suggest that
12 there is no need for a wholesale disclosure of the raw
13 data sitting underneath all that.

14 We also say this. In the light of the relief
15 sought, it is simply inappropriate at this level to seek
16 to re-work the findings of the OFT, which is essentially
17 what the other side are trying to do as part of the
18 exercise here.

19 That was an approach which this Tribunal deprecated
20 in any event at a time when it was part of the other
21 side's case to invite a finding of infringement at this
22 level. So the point I am trying to make here is an a
23 fortiori case, because that is no longer sought to be
24 done.

25 The next point under this heading is the fact that
26 the pleaded case at the moment is already very, very
27 full, as you have indicated earlier in an exchange with
28 my learned friend Mr Green.

29 The primary reason which was advanced for disclosure
30 at the earlier hearings on 9th June and 2nd September was
31 that it was necessary to enable the applicants to plead
32 their case. You will remember that that was the focus of
33 the debate at that stage. But now they have been able to
34 produce a significantly enhanced document to the extent
35 that they are now the victims of their own success, so to
36 speak. They have produced a 98 page application and 90
37 pages of expert material.

38 The idea that they need this material in order to
39 plead their case is ludicrous, as demonstrated by their

1 own behaviour. So, in our submission, it is all entirely
2 unnecessary or, alternatively, what they are really doing
3 is changing the basis for the application and it was, in
4 a sense, the original application in any event. So we do
5 respectfully suggest that there is no need for the
6 further disclosure.

7 Then the third point under this heading is that the
8 disclosure will not significantly advance the case. Here
9 I would just like to look at some of the items that have
10 been mentioned in a little more detail.

11 First of all, having access to the full Competition
12 Commission report would not advance the contention which
13 is made by the appellants that the OFT failed to pay
14 sufficient regard to its methodology. It is true that
15 certain figures are redacted from the report, but the
16 fact is that it is possible to detect from the report
17 what the Commission's methodology was.

18 Insofar as the attack is to be made - as we
19 understand it will be made - upon the methodology, the
20 suggestion that they need further information in order to
21 detect what that methodology was is not seriously to be
22 argued, in our submission. It is plain for all to see.

23 Next in this context, Mr Lawrie, in his witness
24 statement, sets out his understanding of the key elements
25 of the Commission's finding. Again, it should be
26 possible to determine whether this understanding is
27 misconceived without violating Wiseman's confidences.

28 THE CHAIRMAN: How would we do that?

29 LORD GRABINER: It ought to be possible to do that through an
30 understanding of what Mr Lawrie says is the way that the
31 process happened without actually looking at the
32 underlying raw data. In other words, what arises here
33 are questions of principle as to the methodology rather
34 than the underlying figures. The debate is already
35 expanded in the defence in any event.

36 So they have got that material from which it ought
37 to be possible to conduct the exercise without the
38 underlying material.

39 The other point that one must not forget is that

1 there was a divided decision in this particular case, so
2 that it may be that you cannot get as much out of the
3 decision in any event as might otherwise perhaps be the
4 case.

5 Turning to the trunking and dairy costs as well as
6 pricing for customers, this is all set out in the
7 attachment to the letter of 29th November. Our
8 disclosure of that material, in our submission - and this
9 does give rise to a serious concern - would allow the
10 applicants to have a great insight into our business
11 without at the same time - which is perhaps more
12 important, because, in theory, these should be the two
13 balancing considerations - furthering the other side's
14 capacity to review the OFT's process.

15 This is highly confidential information which is not
16 historical. I will explain why that is so. First of
17 all, wholesale prices essentially track raw milk prices,
18 so adjusting only for that there are unlikely to have
19 been any great price differences between then and now, so
20 that knowledge of Wiseman's prices in 2001 would allow a
21 serious competitor such as Express in this case to
22 calculate current prices without too much difficulty.

23 So the fact that this is historical, on the face of
24 it, does not actually answer the question. If it were
25 purely historical and irrelevant, we would not be
26 concerned about it.

27 THE CHAIRMAN: That is the price/cost matrix you are
28 referring to there, is it?

29 LORD GRABINER: It covers both. It covers that as well as the
30 relationship between wholesale and raw milk pricing.

31 Next, prices are likely to be in the same bandings,
32 so that prices in the middle ground tend to be set by
33 reference to supermarket prices and supermarket prices
34 tend to operate as the benchmark. The differential
35 between prices in supermarkets on the one hand and
36 various small retailers does remain constant or fairly
37 constant, so that your knowledge of earlier prices will
38 result in current prices being transparent or becoming
39 transparent.

1 Similarly, in relation to public service contracts,
2 by which I mean things like schools, health care and so
3 on, there tends to be little movement in prices over
4 time, so that earlier information is likely to be even
5 more revealing of the current position.

6 All of this is well known to the other side and, of
7 course, this is why they want the information (at least
8 in part) and this is a fishing exercise.

9 The confidentiality ring which is relied on can only
10 take you so far. The Tribunal is, of course, aware of
11 the potential for human error and of a leak. If I may
12 add this as well, the trouble with having a vast amount
13 of confidential information available to you is that, on
14 the whole, you tend to remember the information but you
15 tend to forget that you received it in confidence. With
16 the best will in the world, this is what happens with
17 confidential information. That is why it is very
18 important indeed to be very careful before, so to speak,
19 unleashing it.

20 The other point is - and it is a point which I have
21 never really understood - in ordinary conversation one
22 talks freely about Chinese walls. The point about a
23 Chinese wall is that it is exceedingly thin, but there is
24 no doubt whatsoever that the simple assertion of the
25 Chinese wall is easily said but in practice one has to
26 ask oneself, "Is it really going to work?", especially in
27 this particular environment where you are talking about
28 parties who are commercially at odds, to put it mildly.

29 In any event, in short, common sense suggests that
30 the more information that is disclosed the harder it is
31 for those advising Express to be able to disassociate
32 what is confidential and what is not. Advisers will have
33 to get their instructions and will endeavour to do so, I
34 am sure in good faith and doing the best that they can,
35 but it is extremely difficult to contain and to
36 compartmentalize these matters.

37 Questions, for example, that may be put in all
38 innocence actually can convey some very important
39 fundamental commercial information to a client, and we

1 know this is how the world is in reality, so that is why
2 you must be, in our submission, very cautious indeed
3 about unleashing this.

4 You have mentioned the price/cost matrix, but the
5 same concerns apply to the price/cost matrix insofar as
6 it goes beyond what has been said already; and also the
7 information received by the OFT from Wiseman during the
8 course of monitoring the voluntary assurances.

9 I should add this as well. My learned friend Mr
10 Green on two or three occasions this morning has said to
11 you, "We now think we know how it all worked in front of
12 the OFT." He cannot, consistently with saying that,
13 contend that he needs this discovery in order to
14 understand what the OFT was doing. He really has said to
15 you that he understands how it works, but, at the same
16 time, he wants this material.

17 If I was standing where he is standing, I would want
18 the material as well, because I know my clients would
19 want to get their hands on it. But that, I am afraid, is
20 not a proper justification for this request.

21 So far as the meeting notes are concerned, that is
22 really a matter for the OFT, rather than for me. The
23 only point that I would make about the meeting notes - by
24 which I mean internal OFT documents which take the form
25 of personal notes and records etc - as I understand the
26 position, they would not even be disclosed under the
27 Director's administrative procedure to somebody on whom
28 he was considering imposing a penalty. So why should
29 they be disclosed in a case like this? I would
30 respectfully suggest that it is not appropriate. There
31 is no reason why Express in this case should be in a more
32 privileged position than a person in that position.

33 Coming to the third point, which is that in the
34 balancing exercise we do respectfully suggest that the
35 balance is in favour of the maintenance of
36 confidentiality. I emphasise the points, insofar as I
37 have made them already or make them now if they are new
38 points, as follows.

39 First of all, the information sought is highly

1 confidential. Secondly, Express clearly wishes to have
2 sight of everything on the OFT's file and I would remind
3 this Tribunal that on the file is included matters such
4 as details of individual customer accounts, including
5 post codes, names and, insofar as the post code does not
6 get you there, locations.

7 Bearing in mind the long history of this complaint
8 and the background of the on-going commercial rivalry -
9 again putting it as mildly as I can, because there are
10 quite deep differences between these parties, as I am
11 sure you know - our suggestion is that extensive
12 disclosure of information of this kind is entirely
13 inappropriate and, more to the point, unnecessary for the
14 purposes of coming to the decision which you are invited
15 to reach.

16 So it is a balancing exercise and what they are
17 seeking does not or would not, in our submission,
18 significantly advance matters. That really tips the
19 scales, we would suggest, in our favour and against them.

20 The only other point I want to mention just in
21 passing is the position of the expert report. We only
22 received the OFT defence on Monday, as you know, and we
23 have not really had time to consider whether or not we
24 want to put in an expert report or any other evidence.
25 We want to reserve our position on that, but otherwise
26 all I would say is that we take much the same position in
27 relation to Mr Haberman's report as my learned friend.
28 We may wish to cross-examine him, but we would like to
29 reserve our position on that because we simply have not
30 come to a final view about it, because we have not had
31 time to do so. So that is all we would want to say about
32 this issue.

33 THE CHAIRMAN: Thank you, Lord Grabiner. The first question
34 for us, Mr Green, is whether we are intending to decide
35 anything today. On that question, we have not yet
36 decided anything. The second question is, were we to
37 decide anything today what it would be that we would
38 perhaps decide. So that is where we are. Do you want to
39 just leave it there or would you like to take the

1 opportunity to reply briefly?

2 MR GREEN: On the hypothesis that (a) you might decide
3 something and (b) require disclosure of something, I had
4 better make my position clear.

5 THE CHAIRMAN: I think probably, yes, just to complete the
6 note.

7 MR GREEN: I will start with Mr Peretz. They had our letter
8 of 19th March some two weeks ago. Their reply was ----

9 THE CHAIRMAN: They were too busy.

10 MR GREEN: They have had two weeks in which to think about
11 this. It is not that complicated. Mr Peretz barely
12 deals with the question of relevance. He took you to a
13 completely misleading section of the notice of
14 application, paragraph 4.16 and he said, "It is all in
15 the Ernst & Young report", but he did not read 4.15.
16 Paragraph 4.16 says, "This is further considered by the
17 expert" and it is further to 4.15, which makes the very
18 points which he says are not pleaded: they are pleaded.
19 They are pleaded in 4.15, 4.16 - they say "It is the
20 nature and consequences of the OFT's failings in respect
21 of the assessment of ABC", which are previously
22 summarised and, indeed, previously dealt with at some
23 considerable length. They are considered further, and
24 you are then referred to two paragraphs of the Ernst &
25 Young report, which themselves make cogent and hitting
26 criticism of the OFT's analysis.

27 They can plead to this. There is no difficulty in
28 pleading to it. All we have, with respect, in the
29 defence is a broad brush statement, "It is all within our
30 discretion. We do not understand it." We know they do
31 not understand it, but that is hardly the point.

32 The pleading is too big. All right, read it more
33 carefully. It is not enough to just simply make an
34 assertion that they do not understand the pleading when
35 the point is there.

36 As to Mr Haberman's report, if my learned friend
37 wishes to apply to strike it out then he ought to do so:
38 he either puts up or he shuts up on that one. If he
39 wants to make submissions in due course as to weight, no

1 doubt he will do so. Mr Haberman is an expert
2 accountant; he is a forensic accountant; he has given
3 evidence in a number of anti-trust cases; he is
4 experienced in these matters; his evidence is that this
5 was a woefully inadequate procedure. You will decide
6 whether it was woefully inadequate by reference to a
7 standard that you will then decide upon and give his
8 expert report due weight.

9 So far as the relevant matters are concerned, my
10 friend simply says he awaits particulars of which part of
11 the RNA these go to. Again, we set it out in the letter
12 of the 19th March: it is very plain. Even in paragraph
13 4.152 and onwards of our notice of application we have
14 set out a detailed summary of the failure to take
15 relevant steps to reach minimum investigative standards
16 and give reasons. We have referred to the Ernst & Young
17 report and the reply. These matters are described, they
18 are gone into. Again, it is up to my learned friend to
19 make submissions. He understands or should understand
20 what we have said in our pleadings.

21 So far as the meeting notes are concerned, I hope I
22 made it clear at the outset. We are only concerned with
23 establishing to the Tribunal's satisfaction and the
24 applicant's satisfaction there are no further notes which
25 contain relevant facts. We are not concerned about
26 internal exchanges of view or otherwise, we want
27 confirmation that there are no other notes of meetings
28 such as in relation to the April 2nd letter, which
29 contained relevant facts.

30 THE CHAIRMAN: What do you mean by "relevant facts"?

31 MR GREEN: For example, in the April 2nd meeting we have Mr
32 Lawrie's recollection of it, which, as I explained on the
33 last occasion, was in any event indirect and hearsay. We
34 then get Miss Pope's note of it. That was Wiseman's
35 explanation of certain relevant matters on which the OFT
36 relied. That was a fact relevant to the investigation.
37 The OFT relied upon the explanations of how costs
38 operated, their eyes were opened and they said, "Bingo,
39 this is non-infringement."

1 We do not know what the OFT did; we do not know
2 what other meetings they did or did not have. We are not
3 interested in internal documents properly so defined: we
4 simply want to have confirmed that there are no other
5 notes of meetings which contain facts which are relevant
6 to the investigation or analyses relevant to the
7 investigation which led the OFT to come to its decision.

8 It may be there are none, in which case we would be
9 perfectly satisfied with that as an explanation.

10 So far as Lord Grabiner is concerned, he made a
11 number of points. First of all, he said the material is
12 unnecessary, but he simply asserted that it was not
13 necessary. Mr Lawrie refers to the vast majority of
14 these documents in his witness statement, they are
15 relevant. With respect, Lord Grabiner has not responded
16 to the merits points. It is not enough simply to say
17 that this is wholesale disclosure we are seeking. It is
18 quite targeted disclosure for specific reasons. The
19 documents are with the OFT, they are not with Wiseman.

20 To suggest there could be any leakage because of
21 confidentiality is just simply an unjustified complaint.

22 You will recollect that the confidentiality ring does
23 not extend to clients. We have worked with confidential
24 documents in this case now for many months without
25 anybody suggesting there is even a hint of leakage out of
26 the ring to any third party. The advisers are
27 experienced in dealing with these matters. There is no
28 risk whatsoever.

29 We have had a lot of this information already. The
30 information we seek is not of a materially different
31 quality or character. The point about confidentiality is
32 simply a bad one.

33 Points made by my learned friend as to the relevance
34 of some of this information - the points made are points
35 which are suggested by Lord Grabiner on his feet, off-
36 the-cuff. They constitute assertions, for example, that
37 the information - I quote him, I think accurately - "not
38 likely to be helpful". With respect, I do not think we
39 should be obliged to accept Lord Grabiner's explanation

1 of why a category is or is not relevant. It was referred
2 to by Mr Lawrie, it was part of their investigation. We
3 have explained why it is relevant. For example,
4 wholesale prices. They tracked raw milk prices. This is
5 important. It assumes constant margins. It is highly
6 relevant to targeting.

7 Lord Grabiner says that his rendition of the facts
8 is well-known to us. With respect, that is just not
9 true. These are documents which go to particular points
10 and we should, with respect, be entitled to see them.

11 It is no answer to our criticism to say, "We think
12 we know what the OFT did." We have played Sherlock
13 Holmes and we have put together as best we can what the
14 OFT did. We have reasonable confidence that we can
15 identify what they did, but we do believe we are entitled
16 to verify that the inferences we have drawn are fair and
17 reasonable ones, either against us or for us. If they
18 are bad points, we want to drop them; if they are good
19 points, we want to put them to the Tribunal.

20 It is no answer to say that we have had a lot of
21 documentation and we should not have the final few pieces
22 of the jigsaw.

23 Finally, balance. These are documents largely
24 referred to in the witness statement, they were relied
25 upon by the OFT. You have got parts. There is no reason
26 why we should not see the rest. There is no risk of
27 leakage through the confidentiality regime.

28 Those are my submissions.

29 THE CHAIRMAN: Thank you, Mr Green. I think the best thing
30 to do is this. We will reflect over the short
31 adjournment what we should do about this. I do not think
32 that we can quite conclude this case management
33 conference now, because we still have to think about the
34 conduct of the appeal and timetable and matters of that
35 kind, all of which are quite important.

36 Unless anyone has any strong objection, we will rise
37 now until five-past two. We will by then have formed a
38 view as to how we are going to approach this issue and
39 then we will finish off the agenda at that point. Thank

1 you very much.

2 (The luncheon adjournment)

3 THE CHAIRMAN: As perhaps foreshadowed by our discussion just
4 before lunch, we do not feel that we are in a position to
5 decide the issue of further disclosure today. In
6 particular, we do not feel we should decide that without
7 having fuller submissions from the OFT, who have asked
8 for more time to consider it. That inevitably means that
9 that application will have to go over to another day.
10 The day that we have in mind, having considered the
11 Tribunal's diary, is Friday, 30th April, approximately
12 four weeks' time.

13 We would have thought, Mr Peretz, that it would be
14 useful in the meantime for the OFT to take the
15 opportunity to consider its position in more detail and,
16 insofar as the application for disclosure is resisted as
17 far as the OFT is concerned - as, plainly, it is resisted
18 as far as Wiseman is concerned, but as far as the OFT is
19 concerned - if, on reflection it is still resisted, then
20 we think it probably would advance matters for the 30th
21 if we have a short skeleton argument beforehand in
22 writing.

23 MR PERETZ: If I may just add that part of our difficulty is
24 that we are not quite sure what arguments to respond to.

25 There is a letter of 19th March, but it would be of
26 great assistance to us - and doubtless to the Tribunal -
27 to have a reasoned application from the applicant setting
28 out, in particular, what parts of their pleadings these
29 matters are said to go to and precisely what difficulties
30 they are suffering as a result of not having it.

31 Part of the difficulty as one trawls through this
32 extensive revised notice of application for indications
33 of problems that they have suffered is that they are - I
34 would not say thin on the ground because I cannot
35 immediately lay my hands on one, but doubtless I will be
36 directed to some slight mention, but it is certainly not
37 a leitmotif of their pleading, if I can put it in that
38 way.

39 THE CHAIRMAN: What I am just wondering is whether you

1 actually need more than Mr Green indicated in the course
2 of his submissions this morning. That plus the letter
3 are the grounds upon which the disclosure is sought and
4 that is what you have to meet, basically. Is that not
5 right, Mr Green?

6 MR GREEN: Yes, sir.

7 THE CHAIRMAN: You have made your pitch.

8 MR PERETZ: I can certainly study the transcript of today
9 and see where we are. I suppose if we still feel that
10 the case for disclosure is unclear that is a point one
11 can make in a skeleton argument and the applicants can,
12 if they wish to, either clarify or not as the case may
13 be.

14 Our position is as I have said: we think the boot
15 is somewhat on the other foot, but if the Tribunal feels
16 differently we will do what we can.

17 MR GREEN: Sir, can I make a suggestion? Having spoken to
18 my instructing solicitor, we will, in the course of the
19 next few days, send a more detailed letter dealing with
20 those. I do not think it is necessary, but it may speed
21 matters up if we do set things out more fully. It can be
22 responded to both by Lord Grabiner and by Mr Peretz as
23 they see fit in good time for the hearing, if it becomes
24 necessary. We make that offer, if it helps.

25 THE CHAIRMAN: Yes, Lord Grabiner?

26 LORD GRABINER: Thank you, sir. Our statement of intervention
27 is due on 4th May.

28 THE CHAIRMAN: We do need to discuss your statement of
29 intervention.

30 LORD GRABINER: What I would respectfully suggest is that it
31 would be sensible to have that further CMC after we have
32 served the statement of intervention and in time for
33 others to have digested it, because it may have some
34 bearing on this debate; in fact, it is quite likely that
35 it will.

36 THE CHAIRMAN: Perhaps we had better come back to the
37 timetable. Mr Peretz, what we were trying to say was
38 this. It may be that I misunderstood the submissions,
39 but I had not understood you to say you had not

1 understood why they wanted the documents: you had not
2 simply had time to consider it properly.

3 MR PERETZ: I think the answer is both. I hope I made
4 clear, and if I did not it is my fault. When I went
5 through the issues on quite a rapid basis with you, sir,
6 this morning I hoped I had made it clear that part of our
7 problem was understanding to what extent the documents
8 sought were now relevant to their case as pleaded. If
9 you remember, sir, I took you to a passage in the Ernst &
10 Young report which is relied on as a matter to which the
11 information goes and identified that, from our point of
12 view, we were not sure to what extent that bit of the
13 report was in the pleadings or not. I do not want to re-
14 visit that territory, but that was our concern.

15 A similar point I hope I have made, albeit briefly,
16 on the other parts of the application. But I am
17 perfectly content with Mr Green's suggestion which, if I
18 may say so, seems to be an entirely practical and
19 sensible way forward. If they wish, having heard the
20 points that I have made just now and this morning and on
21 further reflection, to expand a bit on what they say
22 these matters go to, that will assist everybody. I
23 willingly accept their offer. It seems to me helpful and
24 practical.

25 THE CHAIRMAN: From the discussion we have had this morning,
26 it is obviously important for all sides to consider what
27 is relevant or the issue of relevancy, as we should call
28 it in the Scottish parlance which we must use, rightly in
29 a Scottish case, and from the applicant's point of view
30 the necessity for this disclosure, as they see it, and
31 from the Office's point of view how far this disclosure
32 in fact played a part in the investigation. And, if it
33 did, whether there are strong grounds for resisting.
34 Those are the issues. I think they are fairly
35 straightforward.

36 If we can park that there for the time being, I
37 think we ought now, perhaps, as Lord Grabiner suggests,
38 look at the question of timing generally and the future
39 structure of the case as a whole. It is probably high

1 time we tried to grip where this case is going.

2 The reason that we had indicated the 30th April for
3 this particular interlocutory exercise is that after that
4 date the Tribunal's own timetable becomes somewhat
5 difficult and it is, in particular, difficult to find an
6 open date in the Tribunal's calender until the end of May
7 if we miss the end of April.

8 You might submit or Lord Grabiner might submit that
9 that is not necessarily a bad thing because, despite
10 everybody's understandable desire to get on with this
11 case as fast as possible, everybody does need a certain
12 amount of time to absorb the rather complicated arguments
13 that are now being put forward. There perhaps is some
14 merit in de-accelerating a bit and leaving a certain gap
15 between the statement of intervention and the resolution
16 of the confidentiality issues, if we need to resolve
17 them.

18 With those observations, if we park that there for a
19 moment and then think about the substantive hearing, we
20 have not got between ourselves provisional dates in mind,
21 but in all probability we are looking at some dates in
22 either late June/July for the substantive hearing, seeing
23 how things are going. In this case, we would endeavour
24 to have the substantive hearing before the summer break
25 and we would need to liaise amongst ourselves and through
26 the usual channels as to what convenient dates we are
27 working towards.

28 That is, roughly speaking, the framework of it, so,
29 working back, what we need to do is to make sure that all
30 remaining interlocutory issues are resolved in good time
31 to meet that framework and that we have left ourselves
32 enough room for manoeuvre for unexpected eventualities.

33 MR PERETZ: If I can make a suggestion, I gather from what
34 Mr Green has said that he does not regard the issue of
35 these confidential documents as being - if I can put it
36 in this way - right at the heart of his appeal. As he
37 has described it, it is a relatively discrete issue. It
38 seems to me, therefore, that, though it would be
39 desirable to resolve it now, the key is to make sure it

1 is resolved in sufficient time before the final hearing
2 for any implications it may have on the applicant's case
3 and then if they change their case or if we plead on ours
4 and Wiseman's case - and if we are looking at a July
5 date, speaking for myself, I would have thought that a
6 confidentiality backstop at the end of May is something
7 that we could all live with. It may also be possible to
8 take advantage of that date in other respects, because
9 there will be, doubtless, various issues which need to be
10 dealt with at a pre-hearing review. It should all be
11 dealt with then, along with confidentiality, which I
12 hope, particularly if there are written submissions,
13 should not take the Tribunal too long to decide anyway.
14 We have gone over this ground, to some extent, before.

15 THE CHAIRMAN: What one would not want to happen is for there
16 to be some further disclosure and then, three weeks
17 before the hearing, some hugely additional expert report
18 to turn up, raising a whole lot of things that require
19 responses, further work and all the rest of it.

20 MR PERETZ: Mr Green can speak for himself, but I did not
21 understand him to be saying that that was a possibility.
22 Obviously, he cannot completely rule it out, but it does
23 not sound an overwhelmingly likely prospect, although he
24 may wish to expand on what he says.

25 MR GREEN: Sir, it is hard to know what to say without the
26 documents. One hopes it will just be supplemental, if
27 anything, but it is hard to know. We certainly do not
28 want to spring anything on anyone at the last moment.

29 THE CHAIRMAN: No. Do you have a proposition, Lord Grabiner?
30 I can see the sense of what you are suggesting. I take
31 it from your indication that you feel you are able to
32 meet the date when the intervention is due.

33 LORD GRABINER: We anticipate being able to meet the date and
34 your suggestion that the next CMC should be towards the
35 end of May would accommodate the point completely,
36 because it would mean that people could digest it and see
37 what effect that had on the definition of the issues -
38 because I am sure that it will - to assist in reaching
39 any decisions that have to be taken at that CMC. It

1 would also mean that that would probably be the last CMC
2 before the hearing. As far as we are concerned, the
3 sooner we have a substantive hearing the better.

4 THE CHAIRMAN: Absolutely. Thank you.

5 LORD GRABINER: The only suggestion I make - I float it - in
6 order to get the question of disclosure done and dusted
7 sooner rather than later is that it be done entirely in
8 writing with a much shorter timetable. Then the Tribunal
9 could rule on it without oral submissions, because there
10 is difficulty in getting a date. Certainly, it is common
11 ground that it would be undesirable for disclosure to be
12 produced later rather than sooner and for any
13 consequential expert's report or anything to rest upon
14 that.

15 If we do have the next CMC in May with a hearing six
16 to eight weeks after that, time does begin to get tight
17 as we would not get disclosure until after that hearing,
18 so the accountants would not get to address it until
19 after that hearing. I float that as a suggestion; it
20 depends on whether it is convenient to the Tribunal.

21 THE CHAIRMAN: Our view is that it would be better for this
22 matter to go off to the next CMC if it cannot be resolved
23 in the meantime. There may be ways of resolving it. It
24 may be that either the statement of intervention or the
25 OFT's reflections or the applicant's reflections do
26 narrow the scope somewhat. We will, if we may, adjourn
27 the application to the next CMC and, as far as dates are
28 concerned, if it goes off to the end of May our diary
29 would be free on the 24th or 25th May. I do not know if
30 anybody has any bids to make. I myself would vote for
31 the 25th, unless there was a strong dissenting voice.

32 MR GREEN: I am in Luxembourg for the whole of that week.

33 THE CHAIRMAN: What suggestion do you have, Mr Green? That
34 makes it quite difficult. You are in a case that is
35 going on the previous two weeks of the Tribunal, I
36 believe.

37 MR GREEN: Yes. The trouble with that week is that it is a
38 merger case and I have got hearings on the Tuesday and
39 the Thursday and having a day off in between, so it means

1 spending the whole of the week. Then there is a CMC on
2 the 4th and there is a bank holiday in between that. It
3 would really be the second week in June.

4 THE CHAIRMAN: The week beginning the 7th. That is making it
5 pretty tight if we want to have a serious hearing in the
6 second half of July. I cannot remember whether you have
7 a junior instructed in this particular case.

8 MR GREEN: No. I am just asking whether or not it is
9 possible for someone else to attend in the week at the
10 end of May.

11 THE CHAIRMAN: We have had the bulk of your submissions and
12 we are fairly well seized of the points you make.

13 MR GREEN: We can accommodate the last week of May and if I
14 cannot do it I cannot do it.

15 THE CHAIRMAN: You have got very experienced instructing
16 solicitors, if the worst comes to the worst.

17 MR GREEN: They are OK.

18 THE CHAIRMAN: Quite seriously, there is no particular reason
19 why we need leading counsel on every single occasion. I
20 hope everybody heard that!

21 LORD GRABINER: That is not going to look good on the
22 transcript!

23 THE CHAIRMAN: Shall we say the 25th for the next CMC? If we
24 could ask for skeletons in reasonable time before that.
25 Would an OFT skeleton by the 11th be unreasonable, Mr
26 Peretz?

27 MR PERETZ: No, that could be arranged.

28 THE CHAIRMAN: And any skeletons in reply, including
29 interveners' skeletons, by the 18th, so that we have time
30 to prepare ourselves for the 25th.

31 MR PERETZ: I would have a slight preference for the 24th,
32 but it is a preference that can be over-ridden. I have a
33 training commitment with the Government Legal Service on
34 the 25th. That could be put off, but I would prefer the
35 24th.

36 THE CHAIRMAN: We are quite neutral. We can accommodate you,
37 Mr Peretz, and, unless there is any objection, we will
38 make that the 24th.

39 I am not sure whether there is anything very much

1 that we can usefully do beyond that. I do not suppose
2 people have had the chance to consider the question of
3 whether anyone is going to adduce any further expert
4 evidence and/or whether we are going to have any witness
5 evidence in this case. I rather got the impression that
6 the OFT thought it was going to be no to both questions.

7 MR PERETZ: It may be a matter that we can explore in
8 correspondence, but we have already flagged it up in
9 correspondence. We would be grateful for some
10 clarification, if I can put it in this way, of precisely
11 what expert issues in the Haberman report, that is to
12 say, issues on which the views of an accountant are
13 likely to assist the Tribunal, the applicants propose to
14 rely. It is a very long expert report, it deals with a
15 whole range of matters, comments on history etc., which
16 are plainly not matters upon which the evidence of an
17 accountant is called for, although it may have been put
18 in as helpful. We would find that clarification useful.
19 We can then decide whether we would wish to adduce any
20 expert evidence of our own, though our position may well
21 be, even in relation to - quote - "expert issues", as an
22 expert regulator, we are perfectly happy to deal with it
23 by way of submission. I suspect it is unlikely that we
24 would wish to cross-examine Mr Haberman.

25 THE CHAIRMAN: You need to come to a view on those things
26 fairly quickly if we are going to keep to the timetable.
27 I suppose, Lord Grabiner, you have not had a chance to
28 come to a final view on those two matters yet.

29 LORD GRABINER: No, sir, we are thinking about that, but as
30 soon as we have come to a view we will communicate.

31 THE CHAIRMAN: Thank you very much. We will leave those open
32 and we will communicate behind the scenes for the dates
33 of the final hearing. At the moment, it is a two to
34 three day estimate; is that right?

35 MR GREEN: Assuming there is no cross-examination. It
36 rather depends upon whether the interveners in particular
37 wish to put in evidence. I had understood that the
38 defence of the OFT was in and we should have the expert
39 evidence. If there is going to be expert evidence which

1 is contested, then it may be longer. Without it, I think
2 two to three days would be adequate.

3 THE CHAIRMAN: Very well. We will plan on that basis. Are
4 there any other submissions, observations or applications
5 anyone wants to make at this stage?

6 MR PERETZ: There is one further matter relating to dates.
7 I flagged in my letter. The Tribunal will be aware of
8 its guidance at paragraph 10.5 that: "The expert's
9 report should, in particular, set out the material facts
10 and all material instructions on the basis of which it
11 was written." As we have flagged up in our letter of
12 30th March, the report referred at paragraph 1.5 to
13 information provided to us by Express and "our own
14 independent research". We would request that the
15 applicant can now disclose what that information was and
16 what that research consisted of and what its roots were.
17 It may be they will point us to things that are already
18 in the report, but it is not entirely clear. I can do no
19 more than flag that point up.

20 THE CHAIRMAN: You should pursue that with the applicants and
21 come back to the Tribunal for an order if you need one.

22 MR GREEN: I think he just needs to read appendix 2, where
23 there is a list of documents referred to in the report is
24 set out.

25 LORD GRABINER: Sir, there is just the point that I mentioned
26 much earlier in the day. That was about the Chapter 1
27 infringement. You gave a pretty strong indication of
28 where the Tribunal were coming from, but our position on
29 this is that it really ought to be off the table. It is
30 in paragraph 1.2(c) of the revised notice and is raised
31 in ground 17 of the application. In our submission, for
32 the reasons I indicated earlier, it is simply not an
33 appropriate issue to be on the table for the Tribunal.

34 THE CHAIRMAN: We have already indicated that the Tribunal is
35 in difficulty in taking on board an allegation about a
36 Chapter 1 infringement in a situation in which an
37 investigation of a possible Chapter 1 infringement is
38 still continuing and we do not know the outcome. I do
39 not think we need to make any further order on that

1 point.

2 LORD GRABINER: I am sure the message has gone out. Let us
3 hope it has, otherwise it will be on the agenda for May
4 24th.

5 THE CHAIRMAN: The position is reasonably clear.

6 THE CHAIRMAN: We do not want to have too many swords of
7 Damocles hanging over us, Lord Grabiner. I hope it has
8 been satisfactorily indicated. Thank you all very much
9 indeed.

10 (Adjourned to 24th May 2004)