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IN THE COMPETITION APPEAL TRIBUNAL

Competition Appeal Tribunal  
Room 309 New Court  
48 Carey Street  
London WC2

Friday 16th January 2004

Before:

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

**PROFESSOR PAUL STONEMAN  
and  
MR. DAVID SUMMERS**

B E T W E E N :

**PERNOD-RICARD SA**

- and -

**CAMPBELL DISTILLERS LIMITED**

**Applicants**

- and -

**THE OFFICE OF FAIR TRADING**

**Respondent**

**supported by**

**BACARDI-MARTINI LIMITED**

**Intervener**

MR. AIDAN ROBERTSON appeared on behalf of the Applicant.

MS. KASSIE SMITH appeared on behalf of the Respondent.

MR. JAMES FLYNN, Q.C. appeared on behalf of the Intervener.

P R O C E E D I N G S

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1 THE CHAIRMAN: Good morning, ladies and gentlemen. The  
2 primary purpose of the interlocutory hearing this morning  
3 is to sort out the situation regarding the documents that  
4 concern contacts between Bacardi and the OFT leading up to  
5 the disposal of the case by way of the assurances that  
6 were given.

7 In that connection, the Tribunal has been  
8 considering the situation. I think it might be useful if  
9 I begin by making one or two very provisional comments  
10 which are made without the benefit of having heard  
11 argument at this stage, so they must be treated as very  
12 provisional indeed and only thinking aloud on the part of  
13 the Tribunal in order to help the analysis along.

14 The first comment that we would make, which is more  
15 directed towards the OFT, is that we can understand up to  
16 a point the sensitivity of the issue with which we are  
17 faced and the OFT's desire to protect its ability to  
18 conduct negotiations with parties and matters of that  
19 kind.

20 On the other hand, the underlying exercise in which  
21 we are engaged at this stage of the case is not or not yet  
22 to do with the merits but to do with the simple question  
23 of whether or not there is an appealable decision. It is  
24 only because that is contested that the question of these  
25 documents has arisen at all.

26 To some extent, the issues that arise arise because  
27 it is the OFT who is contesting the existence of a  
28 decision and there may be circumstances in which one  
29 cannot perhaps both have one's cake and eat it, if I may  
30 put it like that.

31 We would, however, like to emphasise that at this  
32 stage of the case we are still on the admissibility issue  
33 and the documents in question are not relevant in relation  
34 to the merits of the case, that is to say, we are not at  
35 this stage trying to go into the merits at all. What, if  
36 anything, is in these documents regarding the merits is of  
37 no interest to the Tribunal at this stage: it is only to  
38 get to the bottom of whether there is an appealable

1 decision or not.

2 We then need to consider together the question of  
3 relevance, because whatever the technical position  
4 regarding without prejudice documents before the Tribunal  
5 is concerned, on any question of disclosure a preliminary  
6 point is the question of the relevance of these documents.

7 That also involves one looking again at what the  
8 arguments in the case are and to what argument or point  
9 could be relevant.

10 As we understand it, in very broad terms at the  
11 moment, the admissibility issue is argued on two bases.  
12 The first basis is that, up until the OFT accepted the  
13 assurances in question, there was implicitly a decision by  
14 the OFT that Bacardi's past conduct had infringed the  
15 Chapter 2 prohibition. On that argument, the OFT's case  
16 is that they never reached a decision that there had been  
17 a past infringement.

18 the second argument, again putting it in very broad  
19 provisional terms is that when these assurances were  
20 accepted it was implicit in the OFT position that, as long  
21 as the assurances were observed, the Chapter 2 prohibition  
22 would not be infringed and, ever since those assurances  
23 have been in place - and assuming that they have been  
24 observed - the Chapter 2 prohibition has not been  
25 infringed. That is the nature of that argument.

26 As we have understood it up till now, particularly  
27 from paragraph 108 of the draft defence, it does not seem  
28 to be seriously disputed that the OFT takes the view (to  
29 use a neutral expression) that as long as the assurances  
30 are observed the Chapter 2 prohibition would not be  
31 infringed by Bacardi.

32 On that second argument, it seems to us at the  
33 moment that there is an issue particularly of statutory  
34 construction and, in particular, whether the wording of  
35 the Act - "has been infringed" - is wide enough to cover  
36 what is, in effect, a negative clearance where the OFT  
37 says this conduct does not infringe, i.e. the difference  
38 between "has been infringed" and "does not infringe".  
39 That is an issue of statutory construction.

1           On that issue, it may very well be that it is a  
2 legal issue on which the documents (which we now know a  
3 bit more about) are unlikely to throw much further light.

4           All that said, what we now have is a list of the  
5 documents that we are talking about. We are grateful to  
6 the parties for providing us with that list, because it at  
7 least gives the Tribunal a picture of what in fact  
8 happened.

9           For the purposes of the legal question with which we  
10 are concerned, it may be for the Tribunal's purposes  
11 sufficient to look at the list and infer from the list  
12 what it is that took place, so that the Tribunal has a  
13 sufficient basis in fact for deciding the legal questions  
14 involved.

15           For example, it may be possible, looking at that  
16 list, to infer that, in this case, the OFT considered  
17 certain criteria against which it would judge the legality  
18 of the agreements in question. That is an inference that  
19 one might draw from the description of document one in the  
20 list. I will come back to document one in a moment.

21           It would then, perhaps, be apparent from the list  
22 that the OFT entered into discussions with Bacardi as to  
23 possible amendments to the agreement concerned or  
24 undertakings that would, in the OFT's view, render the  
25 contested conduct legal or non-infringing. It could then  
26 perhaps be inferred that what happened was that the OFT  
27 came to the view that if the undertakings agreed with  
28 Bacardi finally (which, of course, are in the public  
29 domain) were observed then the Chapter 2 prohibition would  
30 not be infringed.

31           On that kind of factual basis, it is perhaps  
32 possible to imagine that the Tribunal would have, as it  
33 were, enough by way of background in order to address the  
34 essentially legal points which, at this stage, this case  
35 gives rise to. We think it would probably be necessary to  
36 refine somewhat exactly what some kind of, possibly  
37 agreed, background statement of facts would say before one  
38 could be completely confident that that was a way through.

39           I mentioned a moment ago document one in the list.

1 I say at this stage in parenthesis that that does seem to  
2 us at the moment the document that it is perhaps most  
3 difficult to bring within the traditional without  
4 prejudice rules since it seems to come at a time when  
5 without prejudice discussions had not yet started and  
6 appears to be a general statement of position from the OFT  
7 as to how it views the legality of various agreements. I  
8 put that into parenthesis.

9 All that said, if the Tribunal does need to go into  
10 the question of the disclosure of without prejudice  
11 documents, it does seem to us that that is quite an  
12 important issue and it would need to be fully argued. We  
13 understand that the parties are in a position to argue it  
14 today if it becomes really necessary, but we would like in  
15 due course to hear the parties on the question of whether  
16 it is necessary for us in this case to determine those  
17 issues.

18 Behind the case as it is presently proceeding, three  
19 is a further issue which I should mention, which is of  
20 some concern to us, which is the question of on what legal  
21 basis are these undertakings accepted in the first place.

22 We note in the draft defence that there are apparently  
23 proposals to introduce some more specific power to accept  
24 commitments. What is the existing power under which the  
25 commitments at issue in this case were accepted is a  
26 question in our minds at the moment.

27 A further question in our minds is, in a case like  
28 the present, what if any relevance is to be attached to a  
29 consideration of the parallel provisions that arise under  
30 European Community law which give complainants, so it  
31 seems to us at the moment, much clearer rights to receive  
32 decisions and to challenge those decisions than is perhaps  
33 the case at the moment under the 1998 Act.

34 We have in mind in that connection that, on 1st May,  
35 modernisation will come into force in which the EC regime  
36 and the domestic regime will exist side by side. Although  
37 we are fully conscious that this case must be decided  
38 under the existing law, it does not seem to us entirely  
39 realistic to close our eyes to the forthcoming changes

1 that are on the horizon on the EC front.

2 With those introductory remarks, what we would  
3 probably prefer to do is to allow an initial opportunity  
4 for the parties to respond and it may be convenient for us  
5 then to rise for a short time to enable what we have just  
6 indicated to be absorbed and for instructions to be taken.

7 As regards the future progress of the case, bearing  
8 in mind that this is, at this stage, simply a skirmish in  
9 the development of the case as a whole, we are still of  
10 the view, as we said in our letter of 18th November, that  
11 the issues upon which we would like to hear argument at  
12 the substantive hearing are the two questions as to  
13 whether this is an appealable decision and whether we are  
14 in the presence of an appealable decision; secondly,  
15 whether, if we are, there are any procedures that should  
16 have been followed in this case but were not followed that  
17 might affect the legality of the decision. That is as far  
18 as we wish to go at this stage of the case at the next  
19 hearing.

20 The hearing, as we understand it, has been listed  
21 for the 27th of this month. It was earlier suggested to  
22 us that that date might have to be vacated because of a  
23 clash of diaries with another hearing in the Court of  
24 Appeal on that day. We have since understood that, in  
25 fact, the relevant Court of Appeal hearing will take place  
26 somewhat later, in early February, and, as far as we are  
27 concerned, at the moment we do not see any strong reason  
28 to vacate the existing date that we have got set for the  
29 hearing, that hearing to be limited to the two issues  
30 which I have just outlined.

31 Professor Stoneman reminds me that we had fixed the  
32 date of the 26th with the possibility of going over to the  
33 27th.

34 We have indicated our provisional view at some  
35 length in an attempt to help this case along. It is  
36 probably convenient if I stop there and just briefly go  
37 round the table to see whether there are any first  
38 reactions from the parties. I think it is probably for  
39 the applicants to go first.

1 MR. ROBERTSON: Sir, on the first point - "Why are the  
2 documents relevant?" - our submission on that is that it  
3 is unsatisfactory for the Tribunal to proceed purely on  
4 the basis of inferences. The best evidence is available;  
5 the best evidence is the documents themselves, redacted  
6 if necessary to remove confidential business information.  
7 That may be relevant not only to the issue as to the  
8 interpretation of the Act but also to the other issue on  
9 which the Tribunal wishes to hear submissions on the 26th  
10 and 27th, namely, the procedure that should have been  
11 adopted, because the contents of the discussions between  
12 Bacardi and the Office may well throw light on the extent  
13 to which it was necessary, firstly, for the Rule 14 notice  
14 and an appropriate non-confidential version to have been  
15 disclosed to the complainant for its comments; secondly,  
16 whether the assurances in draft form should also have been  
17 disclosed to the complainant and, indeed, other third  
18 parties for comment.

19 THE CHAIRMAN: Why would it be that this correspondence might  
20 throw light on that issue?

21 MR. ROBERTSON: Because it may be the case that once we see  
22 the content of the discussions between Bacardi and the  
23 Office it will become immediately obvious to the  
24 complainant that Bacardi was trying to, in colloquial  
25 terms, pull a fast one on the Office, that in fact it was  
26 offering assurances that, in reality, did not meet the  
27 competition concerns that arise in the reality of this  
28 market.

29 THE CHAIRMAN: That could be argued on the basis of the public  
30 version of the assurances that we have already got, could  
31 it not?

32 MR. ROBERTSON: But if one is looking at whether this is a  
33 satisfactory procedure or not, then it may very well be  
34 relevant to see a party under investigation putting  
35 forward a version of events in response to the initial  
36 assurances, the initial draft assurances, which, if that  
37 were disclosed to the complainant, would make it perfectly  
38 obvious to the complainant what game was being played by  
39 Bacardi. It would point out that the Office of Fair

1 Trading necessarily does not have as deep a knowledge of  
2 the market that, say, a participant in the market does  
3 have. Therefore, it is not in a position to appreciate  
4 that what might seem on the face a sensible proposal in  
5 reality would not be sufficient within the market itself.

6 We say for that it would be very helpful for the  
7 Tribunal and the parties to see the procedural history of  
8 what has actually happened, so that the Tribunal does have  
9 the full facts before it.

10 As to the without prejudice issue, the Tribunal has  
11 got the benefit of our outline submissions on that and I  
12 am not going to take the Tribunal through the case law.  
13 We say this is simply not the sort of case where without  
14 prejudice arises and, even if there was any question of  
15 it, the public interest in maintaining a competitive  
16 economy would certainly dictate that these communications  
17 be disclosed. If there are issues about confidential  
18 business information, that can be dealt with by suitable  
19 orders as to confidentiality and redaction.

20 As to the two other substantive points upon which  
21 the Tribunal will wish to hear argument on the 26th and  
22 27th, that is, the power of the Office to accept  
23 commitments and the impact of modernisation, I do not  
24 think there is anything I need to say at this stage, save  
25 to say that those are important issues that merit full  
26 submissions which I do not think the Tribunal has yet seen  
27 from any of the parties. That may have an impact on the  
28 timing of the hearing on the 26th/27th, though I note the  
29 Tribunal's obvious desire to keep those dates open.

30 THE CHAIRMAN: Thank you very much, Mr. Robertson. It is for  
31 the OFT next, I think.

32 MS. SMITH: Sir, the OFT would, with your permission, like to  
33 make submissions on disclosure in this case and to seek  
34 guidance from the Tribunal on the rules to be applied not  
35 just to this case or cases in similar circumstances  
36 involving informal settlement negotiations but generally.

37 THE CHAIRMAN: Is this now on the limits of the duty of the  
38 public authority to disclose or is this now on the status  
39 of without prejudice discussion or both?



1 MS. SMITH: Sir, the points on which I would like to make  
2 submissions to you and your colleagues is the question of  
3 relevance, the test to be applied and the public interest  
4 points that apply that should be balanced against the  
5 obvious public interest in disclosure and openness of  
6 proceedings.

7 I understood from your initial comments that there  
8 was question as to whether you wanted to hear full  
9 submissions on those points. The position of the OFT  
10 would be that we would prefer the Tribunal to hear full  
11 submissions on those points and we are hoping that the  
12 purpose of today would not be limited simply to  
13 considering what is required in this present case, in  
14 these present circumstances but, as I set out in the final  
15 paragraph of my outline submissions, the OFT is very keen  
16 to get broader guidance on the principles which should be  
17 applied with regard to disclosure, both as regards  
18 relevance and as regards the balancing of public interest,  
19 which has been touched upon already in the Umbro case.

20 Sir, my question is whether you and your colleagues  
21 want to hear my full submissions on that.

22 THE CHAIRMAN: We have got a bit of a dilemma here, Ms. Smith.

23 We are very anxious to be as helpful as possible to all  
24 the parties, including the OFT, which has very important  
25 public duties to perform. It is, on the other hand,  
26 somewhat difficult - and very often risky - to try to give  
27 general indications beyond the confines of a particular  
28 case. The natural instinct of any tribunal is to deal  
29 with the matter it has actually got in front of it and not  
30 venture too far, because of the possibility that it might  
31 be opining on things without having fully foreseen all the  
32 eventual combinations of circumstances that may arise in  
33 the future. That is the dilemma. How one resolves it, I  
34 am not sure at the moment.

35 MS. SMITH: Sir, yes. The position of the OFT, as you will  
36 have seen from our submissions, is that we are bound by  
37 Part 9 of the Enterprise Act not to disclose specified  
38 information, which would include, in our view, what is  
39 contained in the documents the subject of the application,

1 unless one of the situations in Part 9 is fulfilled. We  
2 do not have Bacardi's consent to disclose documents at the  
3 moment and we do, on our interpretation of the  
4 legislation, require a tribunal order before those  
5 documents can or should be disclosed.

6 As such an order will have to be made in this case,  
7 we say, we are also very keen that there are a number of  
8 public interest concerns that need to be considered by the  
9 Tribunal before making that order.

10 THE CHAIRMAN: If we had to make an order, we would have to  
11 hear your submissions.

12 MS. SMITH: Sir, yes.

13 THE CHAIRMAN: The question we were putting on the table is  
14 whether we need to make an order in this case in this  
15 sense: are these documents sufficiently relevant to the  
16 immediate issue we have to decide in order to require an  
17 order or are there other ways of arriving at the same  
18 situation?

19 MS. SMITH: Our position is that they are not relevant or  
20 required to deal with the issues that the Tribunal is  
21 going to consider. We have already given voluntary  
22 disclosure, as you are aware, of those documents we  
23 consider are relevant on 12th November and 2nd November.

24 As regards the test of relevance, there has been an  
25 indication in the correspondence of a test of potential  
26 relevance. We say that that is difficult to apply and is  
27 potentially very far-reaching. We suggest an alternative  
28 test, as set out in our written submission, of actual  
29 relevance determined objectively, having regard to the  
30 issue to be decided. We say that test is in line with the  
31 general principle set out in the Civil Procedure Rule,  
32 that is, that disclosure should first be limited to the  
33 documents relevant to the issues and, secondly, it should  
34 be proportionate.

35 The applicants say in their written submission that  
36 potential relevance is the correct test because neither  
37 the parties nor the Tribunal can know at present what the  
38 final issues would be in the case. We say that is not so.

39 As indicated by the Tribunal, the live issue is whether

1 the OFT has made an appealable decision.

2 In other cases, we say the Tribunal can and should  
3 identify what the issues are with regard to which  
4 disclosure is ordered whenever it makes such an order. It  
5 then will be for the parties and their legal advisers to  
6 consider which documents they are required to disclose;  
7 they can consider the content of the documents and issues  
8 identified and apply a test of actual relevance, seeing  
9 the documents themselves. That is the usual procedure  
10 that is gone through in all civil litigation. Sir, we say  
11 that is the test that should be applied and that that is  
12 in line with the general principles in the CPR.

13 As regards relevance and the application of that  
14 test in the present case, the documents essentially (as  
15 you will see from the list) record the successive drafts  
16 of the assurances and the details of discussions between  
17 Bacardi and the Office on the contents of the assurances.

18 We say that is not relevant to the admissibility issue.

19 The reasons why we say that are as follows. The  
20 question that the Tribunal will be asking itself ----

21 THE CHAIRMAN: If I may say so, Ms. Smith, it is useful to get  
22 it down quite shortly at the moment. We are not really  
23 embarking on the argument.

24 MS. SMITH: That is why I am trying to juggle my submissions.

25 THE CHAIRMAN: I know, and you have been very helpful so far.

26 MS. SMITH: Sir, that is our position., In any event, we say  
27 they are not relevant and I can expand my submissions on  
28 that. We say they are not relevant to the admissibility  
29 issue, nor are they relevant to the two procedural issues,  
30 nor are they required for the Tribunal to properly  
31 consider each of those issues.

32 We also say, moreover, that there are serious  
33 countervailing public interest reasons against disclosure  
34 in cases such as the present, and those have been set out  
35 in our submissions.

36 I think that is as far as you will need my  
37 submissions to go at the moment. I can develop all the  
38 various other points if and when you require.

39 THE CHAIRMAN: You do not need to necessarily have taken a

1 view yet on this, but would it be, in your submission,  
2 feasible to arrive at a reasonable statement of what  
3 inferences can be drawn as to the course of events by  
4 looking at the list, so that one has at least a factual  
5 substratum for deciding what the factual background to the  
6 procedural issues was?

7 MS. SMITH: I would have to take instructions on that, sir.

8 THE CHAIRMAN: I indicated three possible inferences, but it  
9 may need further thought.

10 MS. SMITH: Sir, as regards the further issues that you have  
11 indicated and the issues that you have indicated should be  
12 dealt with at the preliminary hearing, first of all  
13 whether there is an appealable decision, secondly whether  
14 there are any procedures that have not been but should  
15 have been followed, I think modernisation falls within the  
16 second of those points.

17 You have also indicated a third question, as I see  
18 it, that troubles the Tribunal, which is the question on  
19 what legal basis those undertakings were accepted in the  
20 first place, which I think is really a third and different  
21 question.

22 The OFT's submissions on questions two and three,  
23 firstly, would be that those are issues that cannot be  
24 considered by the Tribunal until it has decided whether or  
25 not it has the jurisdiction to consider this case. So  
26 that the question as to whether it is an appealable  
27 decision is logically prior to dealing with each of those  
28 questions.

29 On that basis, we question whether it is sensible to  
30 try to deal with them all at the same hearing, first of  
31 all from the point of view that if Bacardi prepare  
32 arguments on two and three it rather undermines the  
33 position that it is not within the Tribunal's jurisdiction  
34 in any event. Secondly, from a practical point of view,  
35 costs will be incurred which may simply be rendered  
36 unnecessary if the Tribunal's decision is that this case  
37 is not within its jurisdiction.

38 As regards the hearing on the 26th and 27th January  
39 and the timing of that hearing, obviously a great deal

1 will depend on whether or not the documents are disclosed  
2 in this case. If the Tribunal takes the view that the  
3 documents should be disclosed, I submit that it would be  
4 difficult for the parties to be able to prepare  
5 sufficiently or properly for that hearing. The documents  
6 will need to be redacted for confidentiality before they  
7 are disclosed but they will also need to be considered by  
8 the parties to see if, as my learned friend for the  
9 applicant submits, they bring up issues on which they want  
10 to focus in arguing whether or not this was an appealable  
11 decision.

12 Sir, I am very much in your hands on the 26th/27th  
13 January hearing, but if there is going to be some  
14 discussion on the issues to be heard at that hearing that  
15 will have an impact on whether one could keep to those  
16 hearing dates. If we are going to be dealing with the  
17 three issues that you have indicated trouble the Tribunal,  
18 realistically, the third of those being an issue that has  
19 not appeared in the pleadings before now, that is, the  
20 legal basis upon which the undertakings were accepted,  
21 then ----

22 THE CHAIRMAN: It cannot be a very difficult or big point, I  
23 would have thought.

24 MS. SMITH: Sir, I have not taken instructions on that.

25 THE CHAIRMAN: Either there is a basis or not. Perhaps it is  
26 just implicit.

27 MS. SMITH: Sir, I have not taken instructions on that, but I  
28 am aware that time might be very tight. There are only  
29 five working days between now and the 26th.

30 THE CHAIRMAN: Thank you. Yes, Mr. Flynn?

31 MR. FLYNN: Sir, members of the Tribunal, it is obviously not  
32 for the Intervener to suggest that the Tribunal should  
33 hear argument on wide issues that may not be relevant.  
34 Our submission is and has been that the description in the  
35 list attached to the Office of Fair Trading's letter is  
36 sufficient for these purposes and that disclosure of the  
37 documents is not necessary.

38 If disclosure of the documents is not necessary,  
39 then it is not necessary for the Tribunal to hear argument

1 from me or Ms. Smith as to why we persuade you not to make  
2 such an order.

3 THE CHAIRMAN: May I say in parenthesis there, Mr. Flynn,  
4 something I should have said earlier. This question of  
5 disclosure could cut either way. It could be seriously  
6 useful to the position that you adopt or the position the  
7 OFT adopts or it might not be. It is not intended to go  
8 in any particular direction. It is intended to know what  
9 happened.

10 MR. FLYNN: I fully recognise that, sir. Bacardi's position,  
11 as you know, is that the documents are covered by without  
12 prejudice privilege and therefore whatever they say,  
13 helpful or unhelpful to Bacardi or to anyone else, should  
14 not feature in proceedings before this Tribunal or the  
15 court.

16 THE CHAIRMAN: That is on the substance. What we are  
17 grappling with at the moment is a procedural issue.

18 MR. FLYNN: You are grappling with the admissibility issue.

19 THE CHAIRMAN: Yes.

20 MR. FLYNN: Yes, but it is possible that there are elements in  
21 the documents which are relevant to that that, in our  
22 submission, if without prejudice privilege applied, fall  
23 to be withheld.

24 THE CHAIRMAN: Are you telling us that there are things in  
25 these documents that are relevant?

26 MR. FLYNN: I am explaining that Bacardi believes that they  
27 are covered by without prejudice privilege and they have  
28 taken every step they can to ensure that that privilege is  
29 not waived by Bacardi. That includes not disclosing what  
30 is in the documents, because if I were to tell you what  
31 was in them that would be a waiver by Bacardi of that  
32 privilege.

33 Sir, our submission is that there is a sufficient  
34 description for the purposes of, certainly, admissibility,  
35 which is the issue on which the Tribunal is focusing, in  
36 the list attached to the Office of Fair Trading's letter  
37 and it is not necessary to go behind that to determine the  
38 admissibility issue.

39 Mr. Robertson is trying to persuade you that there

1 are other issues, even at the preliminary stage, to which  
2 they might be relevant. My understanding of what he said  
3 is that that all went to the substance of whether what was  
4 agreed was a put up job by Bacardi and the OFT was  
5 hoodwinked. He said that Bacardi was pulling a fast one  
6 over the Office of Fair Trading. That is a matter that  
7 could only arise in the substance of the case, not on the  
8 admissibility point; nor, indeed, if the Tribunal were to  
9 be considering whether, in principle, having confidential  
10 discussions - not to put it on any other basis - with the  
11 party being subject to an investigation was an appropriate  
12 procedure for the Office of Fair Trading to follow. That  
13 also can be approached on an abstract basis and does not  
14 require the disclosure of the substance of the  
15 discussions.

16 In short, sir, we do think there is a possible way  
17 forward that involves the parties co-operating on an  
18 agreed statement of facts and we do not see why that  
19 should not be done. Our submission is that that will be  
20 sufficient for the Tribunal to determine the admissibility  
21 issue. If, in fact, that cannot be agreed, regrettably I  
22 will be forced to make submissions to the Tribunal as to  
23 why we consider that the documents should not be disclosed  
24 on the without prejudice basis.

25 Sir, as to the hearing date, we are very much in  
26 your hands. We were working towards being there, but if  
27 it proves difficult for others we will not oppose that.  
28 As things stand, we were prepared and working towards  
29 addressing the issue the Tribunal had indicated back in  
30 November at that hearing.

31 THE CHAIRMAN: If the parties were to discuss amongst  
32 themselves or perhaps agree with the Tribunal or the  
33 Tribunal were to indicate what kind of inferences or  
34 factual background it was likely to draw from the list, I  
35 suppose if anybody seriously disagreed with those  
36 inferences, if that party was Bacardi or the OFT, it would  
37 be up to Bacardi or the OFT to show why that is not a  
38 proper inference, which might involve going into more  
39 detail as to what actually did happen. Do you follow?

1 MR. FLYNN: Yes, I do. That is a bridge we would cross if we  
2 came to it. I can see circumstances in which that would  
3 happen, in which case we might again be applying to the  
4 Tribunal to make the submissions that I am ready to make  
5 today should they be necessary.

6 Sir, on a preliminary basis and without  
7 instructions, I do not think there is much more that I can  
8 say, unless you have any further questions of me.

9 THE CHAIRMAN: I think not at this stage, thank you. Yes,  
10 Mr. Robertson, you can come back on those and then we will  
11 need to have a little break and think where we are.

12 MS. SMITH: Sir, there are only two things on which I want to  
13 come back. One is the suggestion that the parties draw up  
14 a statement of background issues. This places the  
15 applicants in a very difficult position because two of the  
16 parties know what is in the documents and the other does  
17 not. It could not be agreed by you, I think, but also we  
18 might find ourselves in the position whereby we say that  
19 there are inferences that may be drawn where the other  
20 parties are then drawn into a position where they are  
21 going to have to disclose the documents.

22 This takes me back to my initial submission, which  
23 is that this is just an unsatisfactory way of proceeding  
24 when the best evidence is available. This is a tribunal  
25 that has indicated in the past that it is not happy to  
26 proceed on an abstract or a hypothetical basis and, in my  
27 submission, that is what we are in danger of falling into  
28 if we are going to take this short cut. In my submission,  
29 we have to grasp the nettle and see whether these  
30 documents are indeed without prejudice. If not, they  
31 should be disclosed, suitably redacted if necessary, and  
32 then we can proceed on the basis of the facts as they are.

33 THE CHAIRMAN: You may be right and we may have to grasp the  
34 nettle, but grasping the nettle would, in this case,  
35 involve hearing the argument and giving a judgment on that  
36 point, which may or may not be the subject of a further  
37 appeal, which I think would lose the immediate date of the  
38 26th.

39 MR. ROBERTSON: Sir, the applicants are prepared to accept



1 that. All the parties have recognised in correspondence  
2 that the date of the 26th/27th might be a bit optimistic,  
3 given that there are only five working days between now  
4 and then. If this is a major point of principle which  
5 will arise elsewhere, the nettle is going to have to be  
6 grasped at one point or another.

7 THE CHAIRMAN: The difficulty in this case is that it arises  
8 not in the context of examining, at this stage, the merits  
9 but simply in the context of determining whether there is  
10 an appealable decision. That comes back to the basic  
11 question of relevance.

12 MR. ROBERTSON: We have a concession by leading counsel for  
13 Bacardi that it is possible that there is material in  
14 these documents which is relevant to the admissibility  
15 issue.

16 THE CHAIRMAN: I do not know whether he did actually concede  
17 that or not.

18 MR. ROBERTSON: He conceded it was a possibility.

19 MR. FLYNN: Just to make it clear, sir, Bacardi is not waiving  
20 privilege over these documents and that involves not say  
21 what is in them, so everything I am saying is on a  
22 necessarily hypothetical basis. The description the  
23 Tribunal has is in the OFT's list. It really is not for  
24 me, on the instructions of my client, to say what is or is  
25 not in the documents. You put to me that they could be  
26 helpful to us as well as unhelpful. That is a proposition  
27 with which I agree, but all of that is not by reference to  
28 what is or may be in the documents.

29 MR. ROBERTSON: Sir, that vividly illustrates the danger of  
30 proceeding on hypothetical issues.

31 The second point I would make in response to counsel  
32 for the OFT's suggestion that we salami slice this case  
33 and deal with admissibility only if we do proceed to a  
34 hearing on the 26th and 27th, the other two points -  
35 procedure, the power to accept undertakings - are points  
36 that ought to be taken together with admissibility. They  
37 are not going to lengthen those proceedings greatly and  
38 the Tribunal has already indicated in the course of these  
39 proceedings that it is unwilling to separate out

1 interlocutory skirmishes on admissibility alone, unless  
2 that is definitely going to be a necessary and sensible  
3 way of disposing of the case.

4 THE CHAIRMAN: We, for our part, would like to rise now at  
5 this stage to consider the position that we are in. It is  
6 probably worth just inviting the parties, notwithstanding  
7 Mr. Robertson's very forcefully expressed reservations,  
8 just to reflect for a few minutes on our initial opening  
9 statement - we have had your first reactions to it - just  
10 to see whether there are emerging from the combined wisdom  
11 of those present other suggestions or more detailed  
12 suggestions for how we should address the problems with  
13 which we are faced in this case.

14 We will rise for 15 minutes to consider the  
15 situation on our side and if you wish to profit from that  
16 adjournment to consider the situation further on your side  
17 we would be glad if you would do so. We will rise and  
18 then we will see whether you have got anything further to  
19 add when we come back and then we will see where we are on  
20 our side.

21 (A short adjournment)

22 THE CHAIRMAN: Yes, Mr. Robertson?

23 MR. ROBERTSON: Sir, we have had various discussions during  
24 the adjournment as to how to come up with an agreed  
25 statement of facts and we still come across the  
26 insuperable problem that they are in possession of the  
27 facts and we are not.

28 THE CHAIRMAN: I see that, yes, indeed.

29 MR. ROBERTSON: We have looked at the inferences that the  
30 Tribunal might draw from the list of documents and  
31 obviously that goes some way to giving a view of how the  
32 course of negotiations evolved between the Office and  
33 Bacardi. We say that it is important to have as much  
34 detail about this as possible, because it is relevant to  
35 understanding the issues, the extent it is satisfactory to  
36 have a bipartite approach to negotiating assurances  
37 without those assurances, at the end of the process, being  
38 put out for third party comment. That is where this goes  
39 to. It is on this point and this point only. So we do

1 not wish to take this out of proportion and we appreciate  
2 that this is not an issue that goes to the substance of  
3 the case. We are still very much at the admissibility  
4 procedural stage.

5 We are in the difficulty that we do find that the  
6 list of correspondence and meetings is very short on  
7 detail and our proposal, which has not been accepted, is  
8 that the Office and Bacardi put together either separate  
9 witness statements or, more probably, a joint agreed  
10 statement giving more detail as to how the assurances  
11 evolved from what was first proposed to what ultimately  
12 came out at the end of the process. That is what we think  
13 would be helpful for the Tribunal to see.

14 THE CHAIRMAN: I think we more or less asked for something of  
15 that kind originally, did we not?

16 MR. ROBERTSON: That is our aim. My learned friends at this  
17 stage I do not think intend to go much beyond agreeing the  
18 inferences or, at least, having the inferences put to them  
19 by the Tribunal that were put to them this morning. We  
20 think that is just a bit on the Delphic side.

21 THE CHAIRMAN: What we asked for, to go back to the original  
22 letter of the 18th November, was "the correspondence  
23 passing between the parties, any notes of any meetings  
24 between the parties taking place in that period, the note  
25 of --" The particular note referred to I think we have  
26 got. And, "-- an explanation of the steps taken by the  
27 OFT to verify that the assurances offered by Bacardi  
28 removed the competition problem, together with any  
29 relevant documentation." And we sought a witness  
30 statement. What then happened was that objection was  
31 taken.

32 I just remind myself of the course of events. The  
33 OFT wrote back, saying, "You have got it all in the  
34 defence and we have not got anything to add so far as the  
35 steps taken to verify are concerned." Then we got onto  
36 the without prejudice issue and that is more or less where  
37 things stopped. That is what has happened so far.

38 MR. ROBERTSON: If we are in a position where all we are going  
39 to be presented with is these very limited inferences

1           accepted by the OFT and Bacardi, then we would reserve our  
2           position to make inferences upon those inferences and the  
3           fact that they are so limited.

4   THE CHAIRMAN: Which is legitimate from your point of view.

5   MR. ROBERTSON: Sir, those are our submissions.

6   THE CHAIRMAN: Yes, thank you. Yes, Ms. Smith?

7   MS. SMITH: Sir, perhaps I could deal first with the position  
8           as regards the witness statement. The OFT's concern with  
9           regard to that witness statement - the request from the  
10           Tribunal - was that, in the OFT's view, the content of the  
11           assurances that were actually finally agreed and the  
12           detailed reasons why the OFT felt it was appropriate to  
13           accept them and then close the file are, in my submission,  
14           set out in the draft defence.

15           Just to remind you of that, if you have the draft  
16           defence to hand, the facts leading up to the negotiations  
17           are set out in paragraphs 22 through to 43. They  
18           basically set out the position that the OFT had reached by  
19           the time of the Rule 14 notice; the representations they  
20           received from Bacardi that undermined the facts contained  
21           in that notice; then in 44 the fact that at that time in  
22           the investigation the informal negotiations commenced.

23           Sir, we then set out in paragraph 101 the general  
24           reasons why the OFT felt it was sensible to accept  
25           assurances. Then, from paragraph 116 onwards, we set out  
26           the particular criticisms of the assurances and deal with  
27           those.

28           Sir, the OFT finds itself in the difficult position  
29           that it has set out, in its view, the detail, explaining  
30           why it accepted the assurances it felt it was appropriate  
31           to do so. The only point that was made in the OFT's  
32           letter of 25th November is that on instructions we have  
33           nothing to add to that, but, of course, if ordered to by  
34           the Tribunal we would put it in the form of a witness  
35           statement. And that there were no further documents that  
36           were, in our view, relevant to the admissibility issue.

37           So, sir, you have those facts in the draft defence.

38           You now have the list of 9th August, which sets out,  
39           effectively, what happened between the two dates which we

1 accept are not dealt with in the defence. But we say if  
2 you want to go any further than that list we inevitably  
3 will get into the content of those documents.

4 As regards the suggestion of the Tribunal to draw  
5 inferences, if the inferences the Tribunal is seeking to  
6 draw are the three limited points that were mentioned this  
7 morning, then, in our submission, those really are a  
8 matter of argument, in effect, on the question of  
9 admissibility. If the Tribunal wishes to reduce those  
10 three inferences to writing, then the OFT can consider  
11 those together with Bacardi and agree or not. We would be  
12 very happy to do that.

13 However, if the Tribunal wants to draw any deeper  
14 inferences, as has been suggested by my learned friend, in  
15 our submission, it would be very difficult to see how that  
16 could be done without entering into a discussion on the  
17 content of the documents. That then brings us back to our  
18 submission that if the Tribunal wants to take that next  
19 step it is necessary for the Tribunal to grasp the nettle  
20 of deciding whether or not to disclose the documents.

21 If some inference is going to be drawn as to the  
22 development of the negotiations with regard to the  
23 substance of what was developing, the substance of the  
24 assurances and the thoughts of the parties as those  
25 assurances were developing and being negotiated, we are  
26 then in the realm of the content of the documents.

27 THE CHAIRMAN: Just thinking aloud, it is difficult at this  
28 stage for the Tribunal to be at all precise on what  
29 inferences might be drawn from the list, because we have  
30 not, among other things, heard argument on what those  
31 inferences should be. The initial and provisional  
32 indication I gave earlier of some first suggestions of the  
33 kind of inferences one might draw ----

34 MS. SMITH: Sir, we submit that the Tribunal is able to draw  
35 inferences as to, in effect, what went on between the  
36 parties.

37 THE CHAIRMAN: The question is whether we need more  
38 information in order to deal with the admissibility point.

39 MS. SMITH: And you have heard our preliminary submissions on

1 that: that the content of those documents is not relevant  
2 to that admissibility issue.

3 Sir, to sum up, our position is that the OFT has  
4 made real efforts to put all the facts that it considers  
5 are relevant before the Tribunal in the draft defence as  
6 well as the letter of 9th January. We say that that is  
7 what is necessary to consider and to deal with the  
8 admissibility issue. If the Tribunal feels it would be  
9 useful to draw specific inferences from that to put to the  
10 parties or to ask a specific question on the points that  
11 are set out in the draft defence, then of course the OFT  
12 will deal with that. But we think going further draws us  
13 then into the difficult question of whether you should  
14 disclose them or not.

15 THE CHAIRMAN: How far do you, as a public authority in this  
16 situation, have some kind of duty to consider these  
17 specific documents and form a view as to their potential  
18 relevance or actual relevance - to accept your submission  
19 - their relevance to the issue of admissibility with which  
20 we are grappling? Making all allowances for seeking to  
21 protect the without prejudice nature of the exchange, it  
22 may be that that is not an absolute rule, even if it  
23 exists at all - about which there may be some argument -  
24 and it may be that if, at some point, you had a plain  
25 admission of a serious infringement of one of the  
26 prohibitions would it really be covered without prejudice?

27 One does not know, but do you have any duty towards the  
28 Tribunal to expand a little bit on what is in the  
29 documents from the point of view of their relevance to the  
30 procedural issue with which we are grappling?

31 MS. SMITH: Sir, of course we accept that we have a duty to  
32 provide the full facts relevant to the issue to the  
33 Tribunal and it is the OFT's position that we have done  
34 that. The OFT has considered the documents and has come  
35 to the conclusion that they are not relevant to the issue  
36 of admissibility; that is the first argument on which we  
37 rely.

38 The second difficulty in which the OFT finds itself  
39 is the provisions of Part 9 of the Enterprise Act under

1           which the OFT has a strict duty not to disclose the  
2           specified information unless we get consent from Bacardi.  
3           It is Section 2.376 - pursuant to an order of the  
4           Tribunal. That is why we are here, because we do not feel  
5           that we are statutorily allowed to disclose the  
6           information unless either of those two requirements are  
7           fulfilled.

8           Even if the OFT came to the conclusion, which it  
9           does not, that the documents were relevant, we still feel  
10          we would be restrained by Part 9.

11        THE CHAIRMAN: But there is a potentially different situation  
12          between a situation in which the OFT is advised that the  
13          documents are relevant but cannot be disclosed because of  
14          confidentiality or without prejudice and a situation where  
15          the OFT has considered the documents and has, on advice,  
16          decided that they are not relevant.

17        MS. SMITH: Yes.

18        THE CHAIRMAN: You are informing the Tribunal that we are in  
19          the second of those situations, are you not?

20        MS. SMITH: Yes, we are. That is our preliminary point.

21        THE CHAIRMAN: Can the Tribunal assume that that position is  
22          reached on advice either by the OFT's in-house advisers or  
23          by counsel?

24        MS. SMITH: It is a matter that has been considered by the  
25          whole team, but I do not think I can give any details of  
26          the legal advice that was given.

27        THE CHAIRMAN: I do not want to know what the advice was, I  
28          just want to know on what basis you are ----

29        MS. SMITH: We can reassure you that, yes, that is an issue  
30          that has been considered by the whole team involved in the  
31          case.

32        THE CHAIRMAN: Thank you. Yes, Mr. Flynn?

33        MR. FLYNN: Sir, certain things have been suggested as a way  
34          forward. The Tribunal indicated possible inferences might  
35          be drawn; there might be further inferences to be drawn.  
36          It seemed to Bacardi that those inferences were fairly  
37          drawn.

38        THE CHAIRMAN: The ones we provisionally indicated?

39        MR. FLYNN: The ones you provisionally indicated and if the

1 Tribunal were to put written inferences to Bacardi as well  
2 as to OFT, naturally that is something to which Bacardi  
3 would respond and with which they would comply.

4 As far as a statement of facts is concerned,  
5 Ms. Smith says there may be difficulties in going further  
6 without disclosing the content of the discussion. It is  
7 Bacardi's position that that is something that could be  
8 explored and, indeed, should it be thought helpful, since  
9 it is we who are saying that there is a problem about  
10 disclosure, we could try to expand on the description the  
11 Tribunal has from the OFT's draft defence and the list  
12 attached to the letter of 9th January. In a desire to be  
13 helpful to the Tribunal, that is something Bacardi would  
14 attempt to do. That might meet some of Mr. Robertson's  
15 concerns. I hear from Ms. Smith that that would not be a  
16 course that the OFT would follow and it might be a Bacardi  
17 only position. Obviously, I would not be seeking to  
18 commit anyone else on that.

19 THE CHAIRMAN: You are the party whose interests are fairly  
20 closely affected by these proceedings and, making all  
21 allowances for the sensitivity of the situation in which  
22 Bacardi finds itself, it is obviously useful for the  
23 Tribunal to make as much progress as it can on this kind  
24 of issue. It is perhaps in the interests of your clients  
25 to go so far as they feel they reasonably can to find  
26 solutions to the sort of problem that we have got here.

27 MR. FLYNN: That is an effort which Bacardi will certainly  
28 make.

29 THE CHAIRMAN: Thank you.

30 MR. ROBERTSON: I do not think we come back at this moment to  
31 the question of the hearing date, but there are steps to  
32 be taken towards the hearing that will inevitably take  
33 time, but we will do anything the Tribunal wishes with all  
34 expedition.

35 THE CHAIRMAN: On the hearing date, it is possibly useful to  
36 revert to that. We are quite anxious to keep that date if  
37 we can. This appeal was introduced in July and we are now  
38 in January of the following year and we are still at the  
39 stage of admissibility. We need to press on. I know it



1 is getting increasingly difficult for the Tribunal to keep  
2 to its deadlines with the existing caseload, but we would  
3 be sorry to lose the date.

4 MR. FLYNN: My position, as I said before the adjournment, is  
5 that Bacardi will be available for that hearing. If there  
6 are things that need to be done before that, they will be  
7 done.

8 THE CHAIRMAN: I would not have thought that expanding on the  
9 description in the way you have indicated is a major,  
10 major task. It may require a certain amount of thought,  
11 but it is probably the sort of task that could be done.

12 MR. FLYNN: That is right. It is something that could be  
13 accomplished in a relatively short space of time and  
14 hypothetically available for the other parties in the  
15 early part of next week - without entering into legal  
16 submissions.

17 THE CHAIRMAN: Yes. Mr. Robertson?

18 MR. ROBERTSON: The other parties have made their positions  
19 clear. We are obviously still in the invidious position  
20 that we are not going to get the full factual picture that  
21 the Tribunal asked for last November and the other parties  
22 are asking us to proceed on that basis. We will have to  
23 do the best that we can, but we reserve the right to make  
24 submissions on the inferences they seek to draw and on the  
25 statements that they put forward. I do not think that  
26 there is anything else I can do.

27 THE CHAIRMAN: That is right, Mr. Robertson. You have made  
28 your position very clear. We have had helpful submissions  
29 from everybody. Mr. Flynn, the hearing is due to start on  
30 Monday week. I do not know whether the kind of expanded  
31 description you would be in a position to provide could be  
32 provided by, say, Wednesday of next week, which would give  
33 two working days.

34 MR. ROBERTSON: Sir, could I ask for Tuesday evening? He said  
35 the early part of next week. It just gives Mr. Green and  
36 myself three working days.

37 THE CHAIRMAN: We will haggle over the revised timing in a  
38 moment.

39 MR. FLYNN: I would offer Tuesday evening unless that proved

1 insuperably difficult. Tuesday evening was the sort of  
2 thing I had in mind by "early next week".

3 THE CHAIRMAN: The Tribunal is grateful to Bacardi in that  
4 respect.

5 I think, Mr. Robertson, the conclusion the Tribunal  
6 is coming to - we can give a judgment if you want us to -  
7 is that, as far as today is concerned, we should simply  
8 make no order on the disclosure of these documents on  
9 Mr. Flynn's undertaking to use best endeavours - no more  
10 than that - to provide the Tribunal with Bacardi's factual  
11 account of the main course of events between 13th December  
12 2002 and 29th January 2003, insofar as those events are  
13 relevant to the issue of admissibility, with a view to  
14 giving the Tribunal a fuller factual background on which  
15 to address the issues of admissibility that arise. On  
16 that undertaking, we will make no order at this stage.

17 That theoretically leaves us open to the possibility  
18 that if, for one reason or another, the further  
19 information that is provided does not take the matter any  
20 further forward, Mr. Robertson still has the opportunity  
21 to make a further intervention if he so wishes, but at  
22 this stage our provisional view is that a procedure along  
23 those lines is probably a sufficient and a more  
24 proportionate approach to the issue of disclosure than  
25 would be going into a full-scale argument on the scope of  
26 without prejudice discussions, the duty of the OFT as a  
27 public authority to make disclosure and, in both cases,  
28 the relevance of the general principles to the particular  
29 facts of this case.

30 In our view the overall interests of justice, from  
31 the point of view of the appellant as well as the  
32 Intervener are probably, at this stage of the case, better  
33 served by proceeding along those lines. We are not today  
34 taking any final position on the issues that have been  
35 canvassed before us.

36 I hope that makes the position sufficiently clear to  
37 everybody.

38 On that basis, we will simply adjourn the case  
39 management conference at this stage. We will await events

1 in the expectation that Bacardi will do its best to be  
2 helpful and that we will be able to proceed with the  
3 hearing on the 26th as agreed.

4 I think I should just say, Ms. Smith, that we do  
5 think that not only the question of admissibility but the  
6 other procedural issues are linked in various ways, legal  
7 and otherwise, and that it would be convenient and in the  
8 general interests of justice to hear argument on those  
9 issues on the same occasion, which does not in the least  
10 mean that we are going to reach a decision. It does not  
11 imply any inference as to what decision we will finally  
12 reach on the admissibility question.

13 MS. SMITH: Sir, you have indicated the three issues upon  
14 which you would like to hear submissions on the 26th and  
15 27th. It might be of assistance to the Tribunal and/or  
16 the parties if you were able to reduce those into writing  
17 so that everyone is starting from the same point. I have,  
18 of course, taken down a note of what you said today, sir.

19 THE CHAIRMAN: There is our letter of the 18th November, in  
20 which we indicated that the issues were the issue of  
21 whether there is an appealable decision and, if it was,  
22 whether there are any particular procedures that OFT  
23 should have followed before taking that decision. The  
24 only thing that we have added today, which I think is  
25 really a background matter, is whether it is of any  
26 relevance to consider the comparable position of a  
27 complainant to the European Commission either as the law  
28 stood at the date of the alleged decision, which would be  
29 January 2003, or in the light of modernisation which takes  
30 place on 1st May 2004.

31 MS. SMITH: That is the total?

32 THE CHAIRMAN: That is it.

33 MS. SMITH: Simply because you, sir, suggested the point of  
34 the legal basis on which the undertakings were given.

35 THE CHAIRMAN: Yes, that is true. Thank you for reminding me.  
36 It is obviously a matter that crosses one's mind.

37 MS. SMITH: Is it a matter on which you wish to hear  
38 submissions on the 26th?

39 THE CHAIRMAN: We would like to be better informed on that

1 issue.

2 MR. FLYNN: I wonder whether there need to be any directions  
3 for the hearing as to skeleton arguments or whether the  
4 parties know what the issues to be addressed are and can  
5 put in a further document should they consider they are  
6 not already raised on the pleadings.

7 THE CHAIRMAN: If we just look at the hearing in the light of  
8 our discussions, I think we have got quite a lot of  
9 argument already. We have the great advantage of a team  
10 that does know its way around the issues.

11 I would have thought, first of all, that with a fair  
12 wind we have a reasonable chance of completing matters on  
13 the 26th without going on to the 27th. That is something  
14 that the Tribunal would be pleased to do if it could be  
15 done in fairness to everybody. That is the first thing.

16 Secondly, I would have thought - and I will hear, of  
17 course suggestions - that if there were any further  
18 written submissions that the parties wished to make or  
19 particular authorities, perhaps, they wanted to draw to  
20 our attention, if that were done in writing by close of  
21 play on Friday, that is, just before the hearing - I would  
22 have thought in this case a simultaneous rather than a  
23 sequential exchange - as long as it is done in time for us  
24 to have a chance to absorb it or to start to absorb it  
25 over the weekend, that would be helpful. It is up to you  
26 to decide whether you want to give us something further or  
27 not.

28 MR. FLYNN: That is very helpful, sir.

29 THE CHAIRMAN: Then I would have thought, as a matter of the  
30 structure of the day, if we said in principle or as an  
31 opening shot, as it were, one was thinking in terms of  
32 about an hour for the appellant, about an hour for the OFT  
33 and perhaps half an hour for the Intervener, that is the  
34 kind of indication one might give about the shape of  
35 speeches on Monday. I think we will leave it there then,  
36 if we may. Thank you all for your help today.

37 (The hearing adjourned until Monday, 26th January 2004)