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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1032 and 1033/1/1/04

Victoria House,
Bloomsbury Square,
London WC1A 2EB

15 June, 2004

Before:
MARION SIMMONS QC
(Chairman)
MR DAVID SUMMERS
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

APEX ASPHALT & PAVING CO. LIMITED

and

OFFICE OF FAIR TRADING

Appellant

Respondent

RICHARD W PRICE (ROOFING CONTRACTORS) LIMITED

and

OFFICE OF FAIR TRADING

Appellant

Respondent

Miss A Howard (instructed by Wright Hassall) appeared for Apex Asphalt & Paving Co. Ltd.

Mr J Price (appearing in person) appeared for Richard W Price (Roofing Contractors) Ltd.

Mr T Ward (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondent.

Transcript of the Stenographic notes of
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PROCEEDINGS

1 THE CHAIRMAN: Good afternoon. Just so that everyone knows what
2 we are, I am Marion Simmons, and Tribunal members are Dr
3 Arthur Pryor and David Summers.

4 MISS HOWARD: Madam, if I might just introduce ourselves, I
5 represent Apex. Mr John Price is appearing as a litigant in
6 person and represents Richard Price Contractors, and my
7 colleague, Tim Ward, is representing the Office of Fair
8 Trading.

9 THE CHAIRMAN: In the first case management conference in this
10 case, there was an agenda. Probably the most appropriate
11 way to proceed is for us to go through the agenda. Mr
12 Price, what we thought was probably, subject to what you
13 say, the best way of continuing today is that we deal with
14 the Apex case and then we deal with your case.

15 MR. PRICE: Yes, Madam.

16 THE CHAIRMAN: It may be that there are some things that are
17 joint that we will consider as we go through. It is quite
18 informal.

19 MR. PRICE: Yes, Madam.

20 THE CHAIRMAN: If you want to say something, I am sure nobody is
21 going to object. If you say something on the Apex case, it
22 may be that I will say to you we will deal with that
23 afterwards. Is that all right?

24 MISS HOWARD: That is fine. Thank you very much.

25 THE CHAIRMAN: So the first item on the agenda is the forum of
26 proceedings. I do not know if anybody has any submissions
27 on that. I suspect that the answer is that it is in
28 England.

29 MISS HOWARD: That is correct.

30 THE CHAIRMAN: The second item is intervenors. We have had no
31 indication. Have you had any indication? It is very
32 unlikely, is it not?

1 MR. WARD: Yes.

2 THE CHAIRMAN: So you have had no indication.

3 MR. PRICE: No.

4 THE CHAIRMAN: I think the third item is not on here, and that
5 is the amended Notice of Appeal.

6 MISS HOWARD: Would you like me to say a few words on that?

7 THE CHAIRMAN: Yes. Is there any disagreement about that?

8 MR. WARD: Yes, there is, Madam. Really the issue is whether
9 the conditions set out in Rule 11(3) have been complied
10 with.

11 MISS HOWARD: Our submission is that this is not our application,
12 and we do not seek to add a new ground of appeal. It is
13 merely developing argument for a ground of appeal that we
14 have already made clear in our Notice of Appeal, and
15 therefore the conditions of Rule 11(3) do not apply. Our
16 main head of appeal under the penalty section is that the
17 fine is excessive. We are merely trying to develop that
18 argument and give another run, or another argument or moyen
19 as to why the fine is excessive, and that is that the OFT
20 failed to take account of the fact that the infringements in
21 this case lasted for less than a year. That is following
22 the Tribunal case judgment in Aberdeen Journals. That is
23 merely an argument that does not go outside the four corners
24 of the existing Notice of Appeal. It is just further
25 developing the position that we have already taken, and
26 therefore we do not need to meet the conditions in Rule
27 11(3).

28 MR. WARD: Madam, we respectfully say it is a completely new
29 ground for contesting the decision, in the language of Rule
30 11(3). What Miss Howard said is obviously right, that the
31 general point is taken and that the fine is excessive in the
32 Notice of Appeal. But the grounds on which that is asserted

1 are completely different. Just to remind you of what is
2 said, it is mostly a challenge to the sufficiency of the
3 Office of Fair Trading's evidence. Then there is a kind of
4 technical, procedural point taken in respect of the Dudley
5 contracts. There is also a question of whether the impact
6 on consumers was properly taken into account. There is no
7 challenge at all to the quantum of the penalty or the
8 details of the manner in which it is calculated. Reading
9 the words of Rule 11(3) in the ordinary way, this is a new
10 ground. It is a completely new argument of any we have seen
11 before. Rule 11(3) is the threshold to you then going on
12 and exercising your discretion as to whether amendment
13 should be allowed under Rule 11(1).

14 THE CHAIRMAN: What do you say about that?

15 MR. WARD: We do not say we are prejudiced, or anything of the
16 kind. If you allow the ground in, we are quite able to deal
17 with it in our defence. It is a short point, and there is a
18 short answer to it.

19 MISS HOWARD: That was going to be my next point, if you were not
20 with me on the first argument. The OFT has suffered no
21 prejudice in having to put in their defence. They can fully
22 take account of this fine when they put in their defence in
23 a few weeks' time. It really should not take them much more
24 effort to answer the point.

25 MR. WARD: That is accepted.

26 THE CHAIRMAN: We do not consider that it is an 11.3 problem
27 but, if it was, then we would exercise our discretion, so,
28 leave to amend.

29 MISS HOWARD: Thank you.

30 THE CHAIRMAN: The next question is whether the cases should be
31 heard together. This is where we get into the situation
32 where we can either leave this over or we can deal with it

1 now. It may be important to deal with it now because the
2 other matter that we need to discuss may be dependent on it.
3 What do you say, Miss Howard?

4 MISS HOWARD: I am happy to deal with it now. I think that is
5 sensible. Our position is that although the two appeals
6 come out of the same decision, they raise quite dissimilar
7 issues. Our appeal, Apex's appeal, is very discrete. It
8 raises mainly conditions of law and issues on the penalty
9 whereas the Price appeal goes into much more detail about
10 the underlying facts, and concerns completely different
11 contracts. Those contracts are the Palisades Shopping
12 Centre contract in Birmingham, in which Apex does not even
13 participate and no fines have been made against Apex in that
14 context. The arguments that Price are raising are very
15 different from those that we are raising on our appeal.
16 There is not that much overlap between the two. We see no
17 reason why the two appeals should be consolidated, and we do
18 not really see why they should be heard together.
19 Obviously, from a procedural point of view, it is probably
20 convenient for you to hear them at the same time, but we
21 submit that they should be heard in parallel.

22 THE CHAIRMAN: Sequentially.

23 MISS HOWARD: Sequentially, yes, so you can hear our appeal. We
24 will make our submissions; the OFT can answer; we can
25 reply; and you can go straight into the Price appeal and
26 work with a similar layout. It would make matters of
27 procedure much less complicated. For instance, we would not
28 have to exchange Notices of Appeal and be concerned so much
29 about confidentiality issues between the two appellants. We
30 could deal with the Apex appeal completely in isolation from
31 the Price appeal. So our submission is that they should be

1 heard sequentially and in parallel, without interleaving the
2 various arguments together.

3 THE. CHAIRMAN: Is the matter of law (forget about the facts,
4 because the facts are different) which is being raised by Mr
5 Price being dealt with by you as well?

6 MISS HOWARD: We have not seen a copy of Mr Price's Notice of
7 Appeal. The only information we have is from the summary of
8 the appeal, which is on the website. So it is difficult for
9 us to draw any parallels between the two at this stage. I
10 do not know whether my learned friend could assist you more
11 on that matter, but it seemed to us that they really are
12 concerned with two completely different branches of the same
13 decision.

14 THE CHAIRMAN: Maybe we should hear what Mr Ward says, because
15 you have seen both sides.

16 MR. WARD: I certainly agree with Miss Howard that it is
17 desirable that these should all be heard in one hearing. In
18 a sense, the issue perhaps is only whether they should be
19 heard sequentially or whether they can be consolidated. The
20 first point to make on that is that to consolidate them
21 would save time in one respect at least, which is that you
22 would be faced with one set of submissions from the OFT
23 rather than two substantive sets of speeches. Of course,
24 the issue there is whether they are so dissimilar that there
25 is not any real saving of time at all. Miss Howard is
26 absolutely right that there are different contracts at issue
27 here. It is also right to say that Apex, which is legally
28 represented, has developed its argument in a legal way far
29 more so than Price. But there is undoubtedly a factual
30 parallel between what Price is saying in respect of the
31 Palisades contract and what Apex is saying in respect of the
32 Dudley contract, where in both cases it is accepted that one

1 bidder asked another bidder for prices, and then entered
2 those prices. The Apex point really is, "That does not
3 prove an unlawful consultation." Price has not expressed
4 the point in that way, but the same legal issue logically
5 arises. As you will have seen, Price essentially admits a
6 great deal about the kind of information exchange that went
7 on, and indeed those admitted facts do have a strong
8 parallel to the admitted facts in respect of Dudley. So
9 while the OFT does not have a strong position on this, we do
10 simply make the point that there will be a certain amount of
11 repetition of the OFT's submissions if the cases are heard
12 consecutively. As to the point about confidentiality, we
13 are not sure that any such issue will really arise. That
14 will depend somewhat on what you now hear about documents
15 and requests to have information withheld, and so on and so
16 forth. We respectfully suggest that it is likely that the
17 case can be decided on the basis of the public version of
18 the decision, and argument as to the consequences of the
19 facts that are found in the documents. So at this stage,
20 subject to what Miss Howard might say, I cannot see that
21 confidentiality will be the problem.

22 THE CHAIRMAN: The point of law, therefore, is the same in both
23 cases?

24 MR. WARD: Yes, as to these admitted facts.

25 THE CHAIRMAN: Yes, whatever the facts are; and they may be
26 different in both cases. But do they give rise to --

27 MR. WARD: -- concerns of practice.

28 THE CHAIRMAN: Yes.

29 MR. WARD: That requires you to consider a certain amount of
30 well-known case law in the European Court of Justice.

31 THE CHAIRMAN: We do not at the moment know how much of the
32 facts are agreed and not agreed.

1 MR. WARD: We know this much, Madam. Apex has not put in any
2 witness statements, nor have Price. In truth, in their
3 Notices of Appeal, most of the central facts are not
4 disputed. There is one minor issue of fact raised by Apex
5 in respect of the FHH contract, namely, at whose request was
6 the fax sent, but we submit that that is irrelevant in any
7 event. Even at its highest --

8 THE CHAIRMAN: -- that is the only fact in dispute.

9 MR. WARD: It is the only factual dispute in the case.

10 THE CHAIRMAN: We will hear from Mr Price, but there is probably
11 not any factual dispute in his case.

12 MR. WARD: No; and indeed in the Notice of Appeal, a full
13 positive averral is made about the contact that took place
14 between Price and Rio and the information that was
15 exchanged. The OFT will the relying heavily on those
16 admissions.

17 THE CHAIRMAN: I wondered whether there could be a compromise
18 over these two extremes, and that would be that they were
19 heard recently. Mr Price was here during the first hearing
20 and therefore heard what was being said.

21 MR. WARD: Yes.

22 THE CHAIRMAN: He received the various relevant documents that
23 were exchanged before, so that he would see what was being
24 said and so that, when it came to his turn, he would be able
25 to rely on whatever had been said by Apex, insofar as he
26 agreed with it. If there are differences, then he will be
27 able to tell us what the differences are. That seemed to be
28 fair. We will hear what Mr Price says, but that seems to be
29 a position that would give Mr Price, who is un-represented,
30 the same benefit and would also give you the benefit,
31 because everybody would see everybody else's, that you would
32 be able to look and see whether you needed to make

1 submissions. Of course, if it is all one point of law and
2 two different cases, we are going to look at both, and you
3 are going to need to think about that to make sure that you
4 put your case in a way that is going to support Mr Price,
5 and vice versa. Do you see what I mean?

6 MISS HOWARD: Yes, I do. Can I just refer to my instructing
7 solicitor and take instructions? (Pause) I am instructed
8 that that would seem to be a sensible idea. We do not have
9 any huge concerns. Obviously, there could be a concern
10 about confidentiality because there is no legal
11 representation, if matters of a confidential nature were
12 being raised.

13 THE CHAIRMAN: We will deal with the confidentiality problem.
14 But it is a public hearing.

15 MISS HOWARD: Yes; that is right.

16 THE CHAIRMAN: We will come in a moment to sorting out the
17 confidentiality problem. There is another problem with
18 confidentiality in this case because of other parties to the
19 decision, which are not here, so we have to be very careful
20 with confidentiality. What we will do is hear them
21 sequentially. We have not heard Mr Price on this. Mr Price,
22 are you happy with what we have suggested? You do not have
23 to get up, if you do not want to. Barristers are used to
24 standing up and do very much better when standing.

25 MR. PRICE: As they prove.

26 THE CHAIRMAN: They are not very good when they sit down.

27 MR. PRICE: I thank the Bench for the chance to obviously listen
28 to counsel. I have no objection whether the cases are heard
29 separately, sequentially, in parallel, or whatever. My
30 case, I think, is very, very simple.

31 THE CHAIRMAN: Yes. It will give you a chance to hear what is
32 being said.

1 MR. PRICE: Yes, Madam.

2 THE CHAIRMAN: We will try and organise it so that you at least
3 get a break so you can think about it, not a long break, but
4 some sort of break either overnight or whatever so you can
5 think about what is being said.

6 MR. PRICE: Fine.

7 THE CHAIRMAN: Then you can tell us whether you agree with what
8 is being said.

9 MR. PRICE: Yes, Madam.

10 THE CHAIRMAN: You do not have to say very much; only where you
11 do not agree and want to say something else, or you have
12 different facts that you want The Tribunal to take into
13 account. Is that all right?

14 MR. PRICE: That is fine. Thank you.

15 THE CHAIRMAN: That means you will have sat in and listened to
16 what Mr Ward says on behalf of the OFT, and will be able to
17 say, "I repeat what I said in the other case", and take it
18 as said, unless you want to expand your reasons because the
19 two cases are different. Is that all right?

20 MR. PRICE: Yes.

21 MISS HOWARD: Could I just clarify one point? Would Apex have an
22 opportunity after Mr Price has made his submissions, not to
23 comment on them; but if they felt it necessary and there
24 was something they needed to clarify in front of their
25 appeal, they have that right? That is all I wanted to say.

26 THE CHAIRMAN: Hopefully, because we will deal with them totally
27 separately. But I suppose if the situation was that we
28 interfered with your case, then we would have to give you an
29 opportunity. Hopefully, that will not happen because we
30 will try and keep it narrow.

1 MISS HOWARD: That is fine. I just wanted to raise that
2 possibility at this stage rather than dealing with it later
3 when matters had already solidified.

4 THE CHAIRMAN: We hopefully will keep them as two different
5 cases. Mr Price will be present in yours, but he will not
6 actually say anything. He will just remember what he wanted
7 to say.

8 MR. PRICE: Thank you.

9 THE CHAIRMAN: So, similarly, you will be welcome to be in his,
10 but unless there was something that you really needed to
11 raise.

12 MISS HOWARD: Thank you.

13 THE CHAIRMAN: So that deals with whether they should be heard
14 together. The fourth question concerns the issues. Can I
15 combine this with number nine, which is agreed or non-agreed
16 facts, because I think they run somewhat together. You have
17 said what the issue is, but it is not clear, if I can say,
18 that the three parties here would all express it in quite
19 the same way. So it is important that we know, especially
20 because we are here to run this case in the way that we have
21 agreed, that each knows what the issue is, and, if there is
22 a difference between you, what the difference is. Do you
23 want to say something about this?

24 MISS HOWARD: What I have done is to break down the issues and
25 divide it into different types of contract, which might be
26 an easy way of looking at the two appeals together. We
27 firstly have the FHH contract and then we have the Dudley
28 contract, and then we have the Birmingham Palisades
29 contract, which would be the Price appeal, and then the
30 penalty issue. Under the FHH contract, I have four main
31 issues.

32 THE CHAIRMAN: Yes.

1 MISS HOWARD: One is whether the facts are strong and compelling
2 evidence of a concerted practice. Whether the fact that the
3 faxes were sent at Briggs' request or not is material to a
4 finding of consultation. Then whether there has been an
5 error of law in categorising an attempt to reach an
6 agreement as a concerted practice, and then fourthly, the
7 adequacy of the Office's reasoning.

8 THE CHAIRMAN: Yes; that is FHH?

9 MISS HOWARD: That is the FHH contract. If I can move on to the
10 Dudley contract, I have three heads of issues. One again
11 overlaps. It is the strong and compelling evidence point.
12 Secondly, there is the reasoning point and then, thirdly,
13 the breach of Apex's procedural rights.

14 THE CHAIRMAN: That is the Rule 14 point.

15 MISS HOWARD: That is the Rule 14 Notice point.

16 THE CHAIRMAN: Which actually comes first, I suppose.

17 MISS HOWARD: Yes. Then under the penalty, we have one argument
18 that the fine is excessive. That breaks down into two sub-
19 arguments: whether the Office failed to take account of the
20 fact that there was no adverse effect on consumers, and
21 whether the Office failed to take account of the short
22 duration of the infringements. That concludes the issues
23 under the Apex appeal. It might be for Mr Price to
24 summarise his issues.

25 THE CHAIRMAN: Let us turn to Mr Price's letter.

26 MISS HOWARD: That is fine.

27 THE CHAIRMAN: Is this agreement on what is a concerted
28 practice, for this purpose?

29 MISS HOWARD: No, I do not think we can say, subject to anything
30 that Mr Ward has to say.

31 THE CHAIRMAN: So before we get to your three, and you have very
32 helpfully set them out, there is something above that, which

1 is whether there is an agreement as to the elements which
2 are required for a concerted practice in competitive
3 tendering, and, if there is not an agreement, what are the
4 differences?

5 MISS HOWARD: Yes. I think that will take some considerable
6 legal argument on the question.

7 THE CHAIRMAN: So we need a sort of summary that sets it out,
8 and then that would be very helpful for Mr Price as well in
9 his case, so that he knows what the OFT is saying and he can
10 either adopt what you are saying or do something
11 differently.

12 MISS HOWARD: That sounds sensible.

13 THE CHAIRMAN: Yes. I was not saying necessarily now, but so
14 that it can be elucidated a little bit. The question as to
15 whether there is an agreement as to what is a concerted
16 practice, I would be very surprised if the parties disagreed
17 on what are the main cases and which are the important
18 passages of those cases. That much is obvious.

19 THE CHAIRMAN: There may be a disagreement as to what the cases
20 say.

21 MR. WARD: Indeed.

22 THE CHAIRMAN: That is why I think it would be useful if we
23 actually set that out.

24 MR. WARD: I was going to propose that, once we have served our
25 defence, I can talk informally to the advocate or advocates
26 for Apex, and we can see if we can agree some kind of short
27 formulation that would assist the Tribunal. I think it is
28 right that we should put our defence in first, and we are
29 going to address the case law to some extent and point out
30 what we think is wrong with the way that the test has been
31 propounded in the Notice of Appeal.

1 THE CHAIRMAN: Then, having done that in Apex (I know we are
2 trying to deal with this separately) it would be helpful to
3 Mr Price that you then provide whatever it is that you have
4 done in Apex, so that he can then see how it is put and he
5 can make whatever representations he wants to on that.

6 MR. WARD: Yes.

7 THE CHAIRMAN: I am not sure that it is going to be possible to
8 agree it with Mr Price because it may be very technical and
9 put in a way that needs to be aired in court.

10 MR. WARD: Yes. I think this will inevitably be an issue that
11 will take up a considerable amount of the Tribunal's time at
12 the hearing. There is no getting away from that. To the
13 extent that it can be agreed without spending hours and
14 hours on fruitless drafting sessions, it will probably be
15 necessary to put it at a relatively high level of generality
16 and relatively simplistically. If it is going to be any use
17 to you over and above the pleading, it will have to be in
18 that form anyway. I am happy to agree something that we can
19 supply to Mr Price as well.

20 THE CHAIRMAN: I think what is important is what is agreed and
21 what is not agreed.

22 MR. WARD: Yes.

23 THE CHAIRMAN: Because, if we are going to try not to have an
24 extensive argument on the matters so that we can do it
25 within, say, a day, it is important that we focus on the
26 real issues.

27 MR. WARD: Yes.

28 THE CHAIRMAN: And that we know what are the real issues before
29 we start, so that we do not have to explore around in order
30 to find really what everyone is saying. I think it is
31 helpful, and I do not think it is not proportionately cost-
32 effective if you deal with that before and see whether you

1 can agree so that we know exactly what the issues are and so
2 that the submissions go to the real issues, having accepted
3 everything that is agreed.

4 MR. WARD: No. I dare say that my clients will be happy to go
5 along with that course. What I would say is that the proper
6 course is for us to serve our defence and allow the
7 appellant time to think about it, and then allow
8 representatives on both sides to have some informal
9 discussion to try and produce an agreed document.

10 THE CHAIRMAN: It is "agreed" and "not agreed".

11 MR. WARD: Agreed and not agreed, yes. Quite.

12 THE CHAIRMAN: Are you happy with that?

13 MISS HOWARD: I am. I think that is a sensible suggestion. My
14 only concern is that the area of dispute is likely to be the
15 application of case law, so, although we could produce an
16 agreed summary of the relevant cases and the relevant
17 passages, there is still likely to be considerable debate at
18 the formal hearing taken before you as to how they apply to
19 the facts in this case.

20 THE CHAIRMAN: Absolutely.

21 MISS HOWARD: We may need extra time, because Mr Price is not
22 legally qualified, to explain for him how those work in his
23 case as well, so we may run over a day. We are anticipating
24 everything, but, if we have an agreed statement, we will
25 still have to take you to cases and explain how to apply the
26 particular facts of this case. So a day's estimate may be
27 over-optimistic.

28 THE CHAIRMAN: Over-optimistic for both cases, do you mean?

29 MISS HOWARD: That is right.

30 THE CHAIRMAN: No; I accept that. I was suggesting that
31 possibly the Apex case could be done in a day, so that all

1 that was explored in the Apex case and then we would see how
2 much was left.

3 MISS HOWARD: I think my original estimate was that we would be a
4 day and a half to two days.

5 THE CHAIRMAN: Just for Apex?

6 MISS HOWARD: Just for Apex, if we can clear some of the mines
7 out of the way in this statement.

8 THE CHAIRMAN: Because we have to consider very carefully
9 proportionality and cost. I appreciate that the issue is
10 very important for the parties, but, on the other hand,
11 there is a balance in being cost effective.

12 MISS HOWARD: Yes. I think my instructing solicitors are very
13 conscious of that.

14 THE CHAIRMAN: So if we could do Apex within a day. I think
15 this might help, if we are not trying to sort this out in a
16 Tribunal, that you have sorted it out before and we know
17 what the issues are. That means that we can focus properly
18 at the hearing.

19 MR. WARD: We would be very content with that. I respectfully
20 submit that we can deal with Apex on its own in a day.

21 THE CHAIRMAN: Yes.

22 MR. WARD: The issues are not simple, but they are actually
23 quite narrow, in truth.

24 THE CHAIRMAN: I suspect they are, if one sits down and really
25 thinks about it. I think that must be worth it. That raises
26 the question of agreed facts. You have raised the question
27 of the application of the facts. There were three stages:
28 one, what is the law, two, what are the facts, and three,
29 can we apply the law to the facts? Applying the law to the
30 facts is a matter for the Tribunal, and a matter for your
31 skeletons. What we need, though, is the agreed facts or the
32 non-agreed facts. Far from what we were saying before, it

1 looks as if the facts are agreed and there will not be very
2 much evidence, except the one point that you mentioned, so
3 we could have a statement of agreed facts.

4 MISS HOWARD: As far as I am instructed, we are not intending to
5 take the facts beyond those in the decision. We are not
6 providing any witness evidence or any other statements of
7 fact. The only matter that is not agreed is the origin of
8 the facts and the relevance of any request from one party to
9 another, so we could just rely on the decision as a
10 statement of the facts.

11 THE CHAIRMAN: Because it may be in different paragraphs, it
12 would be helpful to have one sheet, which has the agreed
13 facts on it, so that everyone knows that is what it is and
14 that is where we are starting, and the non-agreed facts.

15 MISS HOWARD: That would be sensible. Could I maybe suggest that
16 the Office prepares a statement? Because they have got the
17 decision on the soft version, it might be more cost
18 effective for them to do that.

19 MR. WARD: That would be acceptable.

20 THE CHAIRMAN: To take it off and then agree it?

21 MR. WARD: Yes.

22 THE CHAIRMAN: That leaves us with the non-agreed fact, and the
23 question of how the non-agreed fact is going to be proved.

24 MISS HOWARD: We are happy to submit a witness statement for
25 proof of that point.

26 THE CHAIRMAN: A witness statement; and then see whether that
27 evidence is agreed or whether you are going to have to call
28 the witness. Is it one witness?

29 MISS HOWARD: Yes.

30 THE CHAIRMAN: Are you happy with that?

31 MR. WARD: Yes, in the sense that that is undoubtedly the logic
32 of my friend's position. It is unavoidable. We must point

1 out, of course, that that should have been done with the
2 Notice of Appeal, if it was going to be done at all. The
3 way things stand at this moment, of course, is that what has
4 been challenged is the sufficiency of all of the OFT's
5 evidence, which includes transcripts of interviews with
6 various lettered individuals, from the parties who claim
7 leniency. Of course, the logic of the appellant's position
8 must be that it needs to cross-examine and it needs to call
9 those witnesses to be cross-examined, too, if it wants to
10 challenge the version of events they are putting forward,
11 unless the extent of challenge is only as to inferences that
12 may properly be drawn from what they are saying. But if
13 they want to challenge head-on the truthfulness of what is
14 asserted then inescapably now in logic the position of the
15 OFT, which is still as set out in the decision, is that none
16 of this matters at all. Where one is talking about
17 concerted practice, it does not matter at whose instigation
18 the consultation occurs. Nevertheless, it seems to be the
19 appellant's case that this does matter. If that fact is
20 being put in issue then the Tribunal will simply have to
21 decide it as a primary fact-finder. If that is indeed, on
22 reflection, the course that they wish to adopt then
23 consideration must be given to whether or not the OFT's
24 informant needs to be called, too, for cross-examination.

25 THE CHAIRMAN: You probably have not considered this.

26 MISS HOWARD: No, we had not, because we were trying to restrict
27 it to just an argument of law rather than of the underlying
28 facts.

29 THE CHAIRMAN: If you are going to pursue this point, then, if
30 your evidence contradicts the evidence of one of these un-
31 named witnesses of the OFT, you have a dispute between two
32 witnesses, which is going to have to be resolved.

1 MISS HOWARD: That is correct.

2 THE CHAIRMAN: It is quite an important point.

3 MISS HOWARD: May I just confer with my instructing solicitor?

4 (Pause) Madam, it may assist. We would be happy if the

5 appellant wants to take time to think about this. This

6 could be done with letters to the Tribunal that will be in

7 effect legal submissions, rather than try and resolve issues

8 today.

9 THE CHAIRMAN: Apart from what is in the decision, do you have a

10 written statement?

11 MR. WARD: There are transcripts of interviews carried out with

12 the informants, which are exhibited to the Rule 14 Notice.

13 THE CHAIRMAN: Is there an anonymity problem?

14 MR. WARD: That, I do not know.

15 THE CHAIRMAN: The answer is to leave this over, and that you

16 both go and consider it and we try and resolve it in

17 correspondence. If we do not resolve it in correspondence

18 then we will have to come back and have another case

19 management conference.

20 MR. WARD: We would be very happy with that course.

21 THE CHAIRMAN: Are you happy with that course?

22 MISS HOWARD: Yes, we are happy with that course as well.

23 THE CHAIRMAN: I think it needs to be resolved sooner rather

24 than later, and we must put a time limit on resolving it, so

25 when I get to the timetable, I can do that. On the issue of

26 the facts, what further documents are necessary? Are there

27 going to be any other documents besides those in the bundle

28 that have been supplied?

29 MR. WARD: What we had envisaged was to produce a bundle, which

30 contained various documents connected to the Rule 14 Notice,

31 and which are referred to in the relevant attachments

1 | dealing with these particular contracts, because there are
2 | huge swathes of material that relate to other contracts.
3 | THE CHAIRMAN: Which I am going to come to in a minute.
4 | MR. WARD: In this way, I hope we can get down to one pretty
5 | slim bundle; and the OFT is happy to produce that.
6 | THE CHAIRMAN: Is it a chronological bundle?
7 | MR. WARD: I am not sure if that would be of most assistance.
8 | It would appear in the order in which the documents are
9 | referred to in the decision.
10 | THE CHAIRMAN: Since we effectively look at it again, then the
11 | fact that it is in the order of decision may not be the most
12 | convenient. Do you agree with that? Do you think that is
13 | right?
14 | MR. WARD: I am entirely in your hands, Madam, as to what would
15 | be most helpful to the Tribunal.
16 | THE CHAIRMAN: I think a chronological bundle is most helpful.
17 | MR. WARD: Interweaving three different sets of contracts.
18 | THE CHAIRMAN: Or shall we deal with each contract separately?
19 | MR. WARD: Each contract separately, but chronologically within
20 | that contract.
21 | THE CHAIRMAN: Because each contract is a separate topic.
22 | MR. WARD: It really is.
23 | THE CHAIRMAN: It does not have to be three bundles, but it
24 | should be each contract, with the chronological documents in
25 | each of the bundles, or tabs, or whatever.
26 | MR. WARD: Yes.
27 | THE CHAIRMAN: Because there are not very many bundles, are
28 | there?
29 | MR. WARD: It will be a slim bundle.
30 | MISS HOWARD: It might assist if the index is cross-referenced to
31 | documents so that it would be easier to draw connections.

1 THE CHAIRMAN: Possibly the documents could be marked with the
2 paragraphs in the decision and in the Rule 14 Notice,
3 because that would be a very difficult job to do. You will
4 have to do it anyway for your own preparation, so you can
5 mark it on the document and on the index. But I think
6 chronological, and earliest date first?

7 MR. WARD: Yes.

8 THE CHAIRMAN: The other bundle is going to be a short bundle,
9 and I think we have agreed on the chronology before. I
10 think I will leave it to you for the most convenient order.
11 It is all a bit difficult.

12 MR. WARD: Can I ask whether you would find a correspondence
13 bundle helpful for all the parties' correspondence that is
14 copied in, or whether you can find it yourselves?

15 THE CHAIRMAN: I do not think we need an inter partes bundle.
16 We do not need it, because it is compiled here.

17 MISS HOWARD: Yes.

18 THE CHAIRMAN: We can save you that. Do you have any additional
19 documents that you would wish to put in?

20 MISS HOWARD: No, Madam.

21 THE CHAIRMAN: We now come to confidentiality. Can we make sure
22 before we start that we understand what has happened so far?
23 We think that the decision we have is the confidential
24 version, and that the confidential version has been provided
25 to all parties. All parties (not the parties here, but the
26 parties to the decision) have received the confidential
27 information of all the other parties; is that right, Mr
28 Ward? (Pause)

29 MR. WARD: I understand the position is this. At the Rule 14
30 stage, the parties were asked to identify what information
31 they might consider to be confidential. The version of the
32 decision which was sent out had removed from it any

1 information that any of the parties had said to be
2 confidential, but all the parties received the same
3 document.

4 THE CHAIRMAN: So what is on the website, or whatever, on the
5 decision is not this document, or is this document?

6 MR. WARD: I will check. Just a moment. (Pause) The answer is
7 that after the decision had been sent to the parties, there
8 were further representations about confidentiality and there
9 was a further round of redaction. The version on the
10 website is that redacted version.

11 THE CHAIRMAN: So we have two stages of confidentiality,
12 effectively?

13 MR. WARD: Yes.

14 THE CHAIRMAN: Confidentiality between all the parties and then
15 public confidentiality?

16 MR. WARD: Yes.

17 THE CHAIRMAN: We have at least two considerations here, because
18 we have both the Rule 14 document and the decision that went
19 between the parties, which is the un-redacted final version.

20 MR. WARD: Yes.

21 THE CHAIRMAN: Therefore, we have some confidential information
22 not only of Apex and Price but of all the other parties.
23 The question is how to deal with that first, although we may
24 need for various reasons, probably penalty, the confidential
25 information about other parties. I do not know if it is
26 relevant or not, but it could be. That would have to be
27 dealt with and ring-fenced.

28 MR. WARD: Yes.

29 THE CHAIRMAN: And not made public, because otherwise we are
30 giving away confidential information of people who are not
31 here at all.

32 MR. WARD: Yes.

1 THE CHAIRMAN: There is no public here today, is there?
2 THE CLERK OF THE COURT: We are in public, but there is no
3 public here.
4 MR. WARD: May I make a suggestion, Madam?
5 THE CHAIRMAN: Yes.
6 MR. WARD: We wondered if in the bundles we could provide the
7 public version of the decision, and if at any stage any
8 party wanted to refer to the private version, you could hear
9 argument about it and hear the terms on which the Tribunal
10 would consider it, and decide how best to preserve the
11 remaining confidentiality in that document.
12 THE CHAIRMAN: Are you going to rely on any of the confidential
13 parts?
14 MR. WARD: Off the top of my head, I cannot quite see how or
15 why, but it would be helpful if the ability to do so were
16 somehow built into the procedure.
17 THE CHAIRMAN: I appreciate that. I wanted to know from you at
18 the moment. I am not holding you to it.
19 MR. WARD: No.
20 THE CHAIRMAN: But you cannot see how you would need
21 confidentiality?
22 MR. WARD: It may depend on how arguments on the penalty and the
23 breadth of review are undertaken.
24 THE CHAIRMAN: At the moment, do you need confidentiality?
25 MISS HOWARD: Not at the moment, although, taking a percentage of
26 redaction, just as a matter of language, going through.
27 THE CHAIRMAN: Probably going between everyone?
28 MISS HOWARD: Exactly. My client's direct competitor will be
29 here in the room listening to that information as well.
30 THE CHAIRMAN: Has he seen this information?
31 MISS HOWARD: He has seen it in the inter partes version.
32 THE CHAIRMAN: You think the Rule 14 information might be?

1 MISS HOWARD: There is not any penalty information in Rule 14. I
2 do not think we will need any kind of third-party
3 information.

4 THE CHAIRMAN: You will not at all.

5 MISS HOWARD: There is no allegation of distinction made in the
6 treatment of different parties.

7 THE CHAIRMAN: So we could use the public version and then
8 insofar as any party wants to put in anything that is not in
9 the public version, we can hear submissions on that and
10 decide how to deal with it.

11 MISS HOWARD: I was taking instructions, so I missed your
12 question, Madam. My instructing solicitor was just telling
13 me that there are matters in the Rule 14 submission that we
14 made that may include confidential information that at the
15 moment we do not propose to rely on. But we would like the
16 opportunity in the Court, should the appeal go off and we
17 need just to leave that.

18 THE CHAIRMAN: Can we leave aside what information you may want
19 to rely on in the future which is confidential and just
20 restrict ourselves to the public version for the purposes of
21 up until you make those submissions?

22 MR. WARD: We would be very happy with that.

23 THE CHAIRMAN: So that anything that is not in the public
24 version one has to rather mark that this is confidential.

25 MISS HOWARD: That is right.

26 THE CHAIRMAN: And how we are going to treat it.

27 MISS HOWARD: That is right.

28 THE CHAIRMAN: That is all right.

29 MISS HOWARD: We are very happy with that.

30 THE CHAIRMAN: I think on this point, we should ask Mr Price
31 whether he has any submissions to make.

1 MR. PRICE: I cannot see anything in my appeal that is in any
2 way confidential to us. I do not know whether anything will
3 appear after reading, but I have no submissions to make.
4 THE CHAIRMAN: But are you happy that we will use the public
5 document?
6 MR. PRICE: Yes. No problem.
7 THE CHAIRMAN: Which has all the confidential information taken
8 out.
9 MISS HOWARD: On the confidential version, I do not object.
10 THE CHAIRMAN: The idea is to use the public document so we do
11 not make a mistake.
12 MR. PRICE: Fine.
13 THE CHAIRMAN: If anybody wants to use any information in the
14 other document that you have seen or use any information
15 that you have supplied, if you identify it, and say, "I want
16 to talk about some information that is not in the public
17 document."
18 MR. PRICE: Yes. Right.
19 THE CHAIRMAN: Then we will know how to use it.
20 MR PRICE: That is fine. Thank you.
21 THE CHAIRMAN: If it is your information and you waive any
22 confidentiality, that is fine. But if it is Apex's
23 information or one of the other parties' information that
24 you happen to have knowledge of because it is in the
25 confidential decision, you have got to put up your hand.
26 MR. PRICE: Maybe.
27 THE CHAIRMAN: We will see how we deal with it to keep it
28 confidential, save in between the parties and us.
29 MR. PRICE: Okay. Thank you very much, Madam.
30 THE CHAIRMAN: You understand it is very important that we do
31 not expose any confidential information that belongs to
32 anyone who has not yet waived it.

1 MR. PRICE: Yes.

2 THE CHAIRMAN: That actually leads on to the next point on
3 confidentiality, which Miss Howard raised to start with,
4 which is the pleadings and the correspondence between the
5 parties and the court in the Apex case and the Price case.
6 If we could come to the same sort of agreement as we have
7 just agreed in relation to confidentiality in those
8 documents, then they could again be passed between all
9 parties, which would help Mr Price because it is going to be
10 very difficult for Mr Price unless he has seen the pleadings
11 in the Apex case and the submissions that are made in
12 writing, and the agreed statements, et cetera. Is that
13 going to be possible? Do you have a problem with that?

14 MISS HOWARD: I am not sure if you have a copy of the letter we
15 sent through on the 28th of May. We can redact our
16 pleadings in line with that and give Mr Price a redacted
17 version.

18 THE CHAIRMAN: Are all those things that are going to come out?
19 They are not in the public documents.

20 MISS HOWARD: There are redactions to be made in our Notice of
21 Appeal. I think these follow the public version of the
22 decision, so my understanding is that these do reflect it.

23 THE CHAIRMAN: The Annex 1 decision of the OFT is dated the 16th
24 of March, and therefore I assume all of those things will
25 come out of the public decision.

26 MISS HOWARD: They are out of the public decision. It is really
27 the Rule 14 Notice.

28 THE CHAIRMAN: Now that is not in the public decision, I think,
29 but I suspect they are going to come out of the public
30 decision. So if they come out of the public decision, they
31 come out of yours.

32 MISS HOWARD: Yes. Exactly.

1 THE CHAIRMAN: And for the Rule 14 Notice, again the same thing,
2 if it comes out of the bundle, there would not be a problem.
3 MISS HOWARD: They can make the necessary redaction.
4 THE CHAIRMAN: Are you happy with that?
5 MR. WARD: Yes.
6 MISS HOWARD: Yes, that is fine.
7 THE CHAIRMAN: So that in future, if you want to rely on
8 anything confidential, then one would need to specifically
9 state it and ring-fence it.
10 MISS HOWARD: Yes.
11 THE CHAIRMAN: Or provide a special copy for Mr Price. Is that
12 all right?
13 MISS HOWARD: And likewise Mr Price giving us exact copies of his
14 pleadings.
15 THE CHAIRMAN: Yes, so you all see exactly the confidential
16 matters.
17 MR. PRICE: Yes, Madam.
18 THE CHAIRMAN: You are quite right. You do not need to take out
19 vis-a-vis Mr Price the decision in your Annex 1, because he
20 has already seen it.
21 MISS HOWARD: That is right.
22 THE CHAIRMAN: It is Rule 14.
23 MISS HOWARD: That is right. So we just supply a redacted
24 version.
25 THE CHAIRMAN: That is correct. But it may be helpful in future
26 in pleadings, and that sort of thing, if you highlight
27 matters that are confidential in the pleadings, so nobody
28 makes a mistake.
29 MISS HOWARD: We will use the customary square brackets.
30 MR. WARD: The 'C' afterwards.
31 THE CHAIRMAN: Has that been done so far?
32 MISS HOWARD: I do not think so today.

1 THE CHAIRMAN: So you could produce another copy with that?
2 MISS HOWARD: We do not want the Tribunal to rely on it.
3 THE CHAIRMAN: To make a mistake.
4 MISS HOWARD: Yes; that is fine.
5 THE CHAIRMAN: Mr Price, you will see everything in the Apex
6 case, save insofar as there is confidential information that
7 they gave in the Rule 14.
8 MR. PRICE: Yes, Madam.
9 THE CHAIRMAN: Similarly, if you use any information which could
10 be confidential to anybody.
11 MR. PRICE: Just cut it out.
12 THE CHAIRMAN: You either cut it out, or you put it in square
13 brackets.
14 MR. PRICE: Yes, Madam.
15 THE CHAIRMAN: Thank you. That means that in all the
16 correspondence that occurs hereafter between the parties,
17 the list in which everything goes can include Mr Price, so
18 that everybody is copied in with everything. Is that all
19 right?
20 MR. PRICE: Yes.
21 THE CHAIRMAN: All right. Eight is witnesses, and we have dealt
22 with that. It has to be left over. Nine, we have dealt
23 with, and so we get to the timetable. Looking at our
24 diaries, and appreciating that it would possibly be
25 difficult to organise a hearing in August, we have
26 provisionally put in our diaries the 14th and 15th of
27 September, a Tuesday and a Wednesday.
28 MR. WARD: Madam, I am afraid I did not come with my dates to
29 avoid, although I am certainly back from my holiday by then.
30 THE CHAIRMAN: You know the practice of this Tribunal.
31 MR. WARD: I know. I am well aware.

1 MISS HOWARD: I am sorry to spoil matters, but Daniel Beard, who
2 is instructed on this matter, is unavailable on those days,
3 and both the client and my instructing solicitor are away
4 for those dates in September as well.

5 THE CHAIRMAN: That is going to cause a problem because those
6 are the only dates we had. (Pause) This is getting
7 terribly complicated. If the solicitors are not around
8 either, we are going to have to find another date. If we
9 did it on the 22nd, 23rd or 24th, would that be all right?

10 MISS HOWARD: I think so.

11 THE CHAIRMAN: I do not want to go ahead if we are not sure that
12 we can.

13 MISS HOWARD: I think those dates are fine.

14 THE CHAIRMAN: The 22nd, 23rd and 24th are fine. So the 23rd
15 and 24th, and then the following week, so it would only be
16 the 23rd and 24th.

17 MISS HOWARD: I just need to correct that. Both instructing
18 solicitors are away on the 23rd and 24th.

19 THE CHAIRMAN: Do we need them? Sorry to say that, but it is
20 not the counsel's diary.

21 MISS HOWARD: We will need someone who is a solicitor to take
22 instructions from a client.

23 THE CHAIRMAN: No. Absolutely. Will it be sorted out?

24 MISS HOWARD: Yes.

25 THE CHAIRMAN: I think we have to check the diaries here to see
26 whether the 23rd and 24th can be agreed. We will adjourn
27 for a few moments in order to do that. Before I adjourn,
28 can I just set out a timetable and you can then consider
29 while we adjourn for a few moments. What we were thinking
30 before, in order to make the 14th of September, I do not
31 think it really makes any difference if it goes off to the
32 next week. The OFT defence is the 30th of June. I have not

1 heard any submissions as to whether or not that is
2 appropriate. Just assuming it is, the reply, 14th of July,
3 with these agreed statements or not agreed statements of
4 issues and facts, the 28th of July, the same for the witness
5 statements, depending on how that gets resolved. The
6 bundles and the skeleton arguments, the 1st of September.
7 I am not sure if I have left anything out there. If we
8 adjourn for a few minutes while you consider this, we can
9 consider the diary.

10 (An adjournment followed)

11 THE CHAIRMAN: The 23rd and 24th is all right, and that is at
12 10.30.

13 MISS HOWARD: Can I just say thank you for accommodating us, as I
14 know it is very difficult for Tribunals to get everybody
15 together and co-ordinating your diaries, and it is
16 appreciated. On the other dates, subject to my client
17 getting instructions about the availability of the client
18 for attending as a witness, I think those dates are
19 acceptable as well for him.

20 THE CHAIRMAN: He has until the 28th of July, so I do not think
21 there should be a problem.

22 MISS HOWARD: No. It is really for the date of final hearing,
23 but I am sure he will make himself available.

24 THE CHAIRMAN: I see. Yes. Are you saying that he may not be
25 able to attend on the final hearing?

26 MISS HOWARD: I think he will make himself available.

27 THE CHAIRMAN: Oh right. Now the only thing that I did not give
28 you a date for in the timetable is in relation to the
29 problem about whether a witness is going to be called. We
30 need to have some directions as to when that is going to be
31 sorted out. I would have thought that by the time of the

1 | reply, it ought to be sorted out, or could it be sorted out
2 | before? Do you need to know for the defence?

3 | MR. WARD: I am happy to plead the defence on the assumption of
4 | the case that we currently meet. It is obviously more
5 | efficient to know if there is going to be a change in that
6 | case before I plead to it, but it is not practical, in
7 | truth, because the compass of that point is so short. It
8 | will affect at most one or two paragraphs in the defence. I
9 | am really not going to stand on that. Just on a related
10 | point, if I may, Miss Howard was suggesting that there would
11 | be some redactions in the Notice of Appeal before it was
12 | served. In my respectful submission, it might well be
13 | helpful if I have it well before serving the defence so that
14 | we do not perpetuate any breaches of confidence in the
15 | defence.

16 | THE CHAIRMAN: Yes, so that you will know what are the
17 | redactions.

18 | MR. WARD: We can infer them, but it would be helpful if they
19 | told us what they were.

20 | THE CHAIRMAN: There is no problem with serving that document.
21 | It could probably be served before next Tuesday, the 22nd.

22 | MISS HOWARD: That is fine, yes.

23 | THE CHAIRMAN: That will give you time.

24 | MR. WARD: Yes.

25 | THE CHAIRMAN: So, redacted application, 22nd of June, and by
26 | the 14th of July. How are we going to deal with sorting out
27 | the witness problem?

28 | MR. WARD: What I had envisaged was talking to my learned
29 | friends and seeing if we can reach an agreement between us
30 | and, if need be, my writing to the Tribunal as a direction
31 | and as a very last resort having to come back before you to
32 | ask for further direction.

1 THE CHAIRMAN: How long is that going to take you to do?
2 MR. WARD: Not long.
3 THE CHAIRMAN: No, not long.
4 MR. WARD: I am somewhat in my friend's hands.
5 THE CHAIRMAN: Could you do it by the 22nd of June?
6 MR. WARD: We are open to discussion with the other side. I
7 very much hope we can. I do not see why that should be
8 difficult.
9 MISS HOWARD: I see no problem with doing it before the 22nd. We
10 would revert to you by the 22nd, if we were unable to agree.
11 THE CHAIRMAN: So redaction and application, and position in
12 relation to oral evidence?
13 MR. WARD: Yes.
14 THE CHAIRMAN: That will deal with it, by the 22nd of June. Does
15 that deal with everything in the Apex case?
16 MR. WARD: I was going to raise two matters, Madam, if I could,
17 one on the timing of the defence. If I could explain our
18 position, we are quite happy to meet the deadline for the
19 30th of June for Apex. We had in mind before coming here
20 today to try and serve a kind of consolidated defence
21 dealing with Apex and Price. The deadline on the defence in
22 Price is, of course, the 8th. I am not at all seeking an
23 extension of time. What I thought I would make clear is if
24 we can serve a consolidated defence by the 30th of June, if
25 that would assist the Tribunal, we can do so.
26 THE CHAIRMAN: I am not sure it is a good idea to try and go to
27 a consolidated defence. I think we should keep the two
28 actions separate.
29 MR. WARD: That is fine. Should I just mention my other point
30 briefly?
31 THE CHAIRMAN: Yes.

1 MR. WARD: The timetable you proposed was originally with a view
2 to hearing on the 14th and 15th of September, and we had
3 indicated bundles and skeletons by the 1st of September. As
4 the hearing has gone back a week, would there be any harm in
5 pushing back that deadline a week as well, simply bearing in
6 mind that August is always difficult for getting hold of
7 people for instruction and approval?

8 THE CHAIRMAN: The 8th of September; there is no problem with
9 that, is there?

10 DR. PRYOR: No.

11 MISS HOWARD: Can I just verify that you want the skeletons to be
12 served simultaneously rather than sequentially, one party
13 first and then the other going through, because you could
14 allow, say, the OFT to put in their skeleton first, and we
15 could put in a response skeleton two days afterwards?

16 THE CHAIRMAN: Usually, they are put in at the same time.

17 MR. WARD: I know it is usual.

18 THE CHAIRMAN: Sometimes, that can help you. It is a question
19 of which way is the most efficient.

20 MR. WARD: I think here, as we are going to have full pleadings
21 including a reply, and the issues are reasonably narrow,
22 simultaneous skeletons are unlikely to pose any problem in
23 practice. There will of course be time for a yet
24 supplemental skeleton, if either party felt a need.

25 THE CHAIRMAN: One can be fairly distracted by serving
26 supplemental skeletons, which I think is why the general
27 rule is simultaneous, and if there is anything to be
28 answered, that can be dealt with, and that is dealt with in
29 a little compartment. I think that is the better way to do
30 it in this case.

31 MISS HOWARD: That is fine.

1 THE CHAIRMAN: So it is bundles by the 8th of September, and
2 skeleton arguments by the 8th of September, and then the
3 hearing on the 23rd and 24th. There will be a timetable,
4 which is usually produced here, as to how the hearing will
5 be dealt with. So there are those particular timings, but
6 it will be much easier to do that when all the information
7 is in, so we know how much there is to argue and how much
8 has been agreed. Is there anything else?

9 MR. WARD: No, thank you, Madam.

10 THE CHAIRMAN: Mr Price, let me just change files. Do you have
11 the agenda in front of you so that we can deal with it in
12 the same way?

13 MR. PRICE: Yes, I do, Madam.

14 THE CHAIRMAN: Please interrupt me, if I you think I am going
15 too fast, or if you do not understand something. Because it
16 is the second one, it is easy, and I just sort of pass over
17 it; and I do not intend to.

18 MR. PRICE: Okay.

19 THE CHAIRMAN: Do you understand about the forum of the
20 proceedings, so that is England?

21 MR. PRICE: Yes, I do.

22 THE CHAIRMAN: Intervenors. It does not look as if anything is
23 going to intervene. Whether the appeal should be heard
24 together, et cetera, we have dealt with that.

25 MR. PRICE: Yes.

26 THE CHAIRMAN: And you are happy with the way we are dealing with
27 it?

28 MR. PRICE: Yes. Fine. No problems.

29 THE CHAIRMAN: The questions about the issues and the facts, you
30 heard the discussion we have had?

31 MR. PRICE: Yes.

1 THE CHAIRMAN: Subject to what everyone says, you are going to
2 receive the result of whatever transpires between the OFT
3 and Apex.
4 MR. PRICE: Yes.
5 THE CHAIRMAN: As we understand it, you may not be running all
6 the points that Apex are running?
7 MR. PRICE: Yes.
8 THE CHAIRMAN: But you are running at least one of them?
9 MR. PRICE: Yes.
10 THE CHAIRMAN: When you have seen that document, that will help
11 you to work out what you are facing.
12 MR. PRICE: Yes, Madam.
13 THE CHAIRMAN: Running, and not running. Right. So it seems to
14 me, but I am happy for you to tell me otherwise or for Mr
15 Ward to tell me otherwise, because I suppose it is really
16 between you two now.
17 MR. PRICE: Yes.
18 THE CHAIRMAN: When you have received those documents and we
19 will have a timetable for it, you could say what you
20 supported and what was your case out of those documents, and
21 whether you had any additional points.
22 MR. PRICE: Yes.
23 THE CHAIRMAN: Because the likelihood is, I suspect, and tell me
24 if I am wrong, that you are probably effectively following
25 what is being submitted by Apex, because one wants to,
26 probably.
27 MR. PRICE: I think so, yes.
28 THE CHAIRMAN: Unless you think up something else.
29 MR. PRICE: Yes, of course.
30 THE CHAIRMAN: But it would be helpful if you do think up
31 something else.
32 MR. PRICE: Of course.

1 THE CHAIRMAN: And it would be helpful for Apex to know that,
2 because you may want to row together.

3 MR. PRICE: Yes, of course.

4 THE CHAIRMAN: Even though you are being kept totally separate.

5 MR. PRICE: Right. Yes.

6 THE CHAIRMAN: So if you could provide, and we will set this
7 into the timetable, what you are taking out of and what you
8 are adopting from the documents that have been provided. We
9 will call them the statements.

10 MR. PRICE: Yes, of course.

11 THE CHAIRMAN: And any additional points that you have.

12 MR. PRICE: Yes, of course.

13 THE CHAIRMAN: Then in relation to the facts, are you accepting
14 the facts in the decision?

15 MR. PRICE: Most of them.

16 THE CHAIRMAN: There are some facts that you might not be
17 accepting?

18 MR. PRICE: Basically regarding the fine, first of all, which is
19 the point we are appealing.

20 THE CHAIRMAN: Yes.

21 MR. PRICE: And also the requirement.

22 THE CHAIRMAN: The amount of the fine?

23 MR. PRICE: The amount of the fine.

24 THE CHAIRMAN: What about the basis on which they reached it?

25 MR. PRICE: Difficult.

26 THE CHAIRMAN: Is it fact or is it principle? Can you
27 understand?

28 MR. PRICE: It is very difficult because our principal trading
29 area is not in the areas that this investigation took place.
30 According to their formulation, they cannot find it, as they
31 have Apex, and so they have come up with an arbitrary
32 figure.

1 THE CHAIRMAN: That is what I call principle.
2 MR. PRICE: Yes, exactly, Madam.
3 THE CHAIRMAN: But the fact that you do not trade in this area
4 is, I assume, agreed?
5 MR. PRICE: Pretty much so, I believe.
6 THE CHAIRMAN: That is what I am talking about. Are there any
7 sort of facts, like where you trade, how much your turnover
8 is, what involvement you have, and what faxes went between
9 you?
10 MR. PRICE: I do not believe there is anything that the OFT
11 have.
12 THE CHAIRMAN: Since the OFT are going to produce a list of the
13 facts, if they produce a list of facts in your case and you
14 have a look at it and see if you agree it, if you do not
15 agree it then you can tell us that you do not agree it.
16 MR. PRICE: Thank you very much.
17 THE CHAIRMAN: Is that all right?
18 MR. WARD: Yes.
19 THE CHAIRMAN: So that is the issue on the facts. Documents. I
20 suggest that the OFT does the same in your case as they are
21 going to do in Apex, which is to produce a little bundle of
22 the documents relied on.
23 MR. PRICE: Thank you.
24 THE CHAIRMAN: You are probably not going to rely on anything
25 else?
26 MR. PRICE: No.
27 THE CHAIRMAN: So there will be a chronological bundle produced
28 by the OFT.
29 MR. PRICE: Yes.
30 THE CHAIRMAN: And, if you think they have got it wrong, you
31 tell us.
32 MR. PRICE: Okay.

1 THE CHAIRMAN: And it will get sorted out.
2 MR. PRICE: Okay. Fine.
3 THE CHAIRMAN: On the law, they are going to produce a bundle of
4 authorities, because the question of the principle of what
5 amounts to an infringement, et cetera, is a matter of law.
6 MR. PRICE: Yes, of course. Yes.
7 THE CHAIRMAN: And there are authorities about that. It may be
8 helpful that the OFT produces that for you so that you can
9 have a look at it. Have you looked at the law on this
10 subject?
11 MR. PRICE: Briefly.
12 THE CHAIRMAN: I just wonder what help we can give you with
13 that.
14 MR. PRICE: Obviously I accept the OFT is going to stand for a
15 legal standpoint. If they are prepared to accept the fact
16 that I have stated the fact that a concerted practice was
17 what was going on, fair enough. I will just argue my case
18 from my point of view. I accept the fact that they have
19 counsel and obviously have an awful lot better understanding
20 of law than I will ever even grasp. Just to get them to
21 photocopy out laws and Acts for me to plough through, I do
22 not think is going to help me.
23 THE CHAIRMAN: They are going to do that anyway.
24 MR. PRICE: Fine.
25 THE CHAIRMAN: If they want to push 'two' instead of 'one' on
26 the photocopying machine, they will do that.
27 MR. PRICE: Thank you.
28 THE CHAIRMAN: Mr Ward.
29 MR. WARD: We have a suggestion, although whether or not it is
30 helpful, I do not know.
31 THE CHAIRMAN: Yes.

1 MR. WARD: You have directed, of course, in Apex that there be a
2 kind of agreed and disagreed, where there is agreement on
3 the law and where there is disagreement. Obviously that
4 copy is going to go to Mr Price, if he would find it helpful
5 with that, or, having read the copies of authorities within
6 it, we would be of course happy to make those available to
7 him.

8 THE CHAIRMAN: You are going to do that in any case with the
9 agreed bundle.

10 MR. WARD: This would be in advance of the agreed bundle. If,
11 when he has read that, he feels there is any way in which we
12 can help, we are happy to do so.

13 THE CHAIRMAN: Would it be worthwhile helping him, because you
14 do have a duty, to give him the relevant passages in one of
15 the textbooks?

16 MR. WARD: Of course, yes. If it would be of help to include
17 with the defence a chapter from Bellamy and Child, not a
18 whole chapter but passages dealing with what a concerted
19 practice is, of course we would be very happy to.

20 THE CHAIRMAN: Because Bellamy and Child is actually what Miss
21 Howard, or Mr Pitt, has relied on.

22 MR. WARD: Yes, if we enclose the relevant passages of Bellamy
23 and Child dealing with what a concerted practice is.

24 THE CHAIRMAN: And if Mr Price has any questions on the law
25 perhaps you would ask?

26 MR. PRICE: Yes, by all means.

27 THE CHAIRMAN: If you want any more material, the OFT will help
28 to provide you with material.

29 MR. PRICE: That is most kind.

30 THE CHAIRMAN: Is that all right?

31 MR. PRICE: That is fine. Thank you.

1 THE CHAIRMAN: They have a duty, or their counsel has a duty, to
2 show us not only what is in their favour but what is against
3 them.
4 MR. PRICE: Yes, of course.
5 THE CHAIRMAN: But of course, Miss Howard or her team are going
6 to be doing that anyway, so hopefully you should be in a
7 transparent position, if I use the modern language, in
8 relation to what the law is.
9 MR. PRICE: Yes. Fine. Thank you.
10 THE CHAIRMAN: Unfortunately the law is there, and you have to
11 apply your facts to the law. You have got to be within the
12 law.
13 MR. PRICE: Yes, of course.
14 THE CHAIRMAN: So once you have seen the Apex statements on
15 that, then I think you will probably be a bit further
16 forward.
17 MR. PRICE: Fine. Thank you very much.
18 MR. WARD: I am perfectly happy with that, Madam.
19 THE CHAIRMAN: Yes. When I said an agreed bundle of
20 authorities, that will be agreed in order that we will have
21 one bundle not two bundles.
22 MR. WARD: Yes.
23 MISS HOWARD: Yes.
24 THE CHAIRMAN: Good. Disclosure of documents, we have dealt
25 with, because they are all going to. The confidentiality
26 problem is going to be sorted out. Everybody will be on our
27 one mailing list to consider whether there is any issue
28 relating to confidentiality. We have dealt with that, and
29 you are happy with that.
30 MR. PRICE: Yes, Madam.
31 THE CHAIRMAN: You have not got any witnesses?
32 MR. PRICE: No, I have not.

1 THE CHAIRMAN: Agreed facts, we have dealt with because the OFT
2 will provide you with something and you will say whether you
3 agree?

4 MR. PRICE: Yes, of course.

5 THE CHAIRMAN: So that leaves us with the timetable. The OFT
6 have to put in a defence, and the date for the defence is
7 the 8th of July. Are you suggesting you might be able to do
8 it earlier or to run them together?

9 MR. WARD: I hope so. There obviously is a substantial
10 similarity. We would be a bit resistant to an actual
11 direction containing a time, but I cannot see at the moment
12 any obstacle to producing a defence by the 8th of June. We
13 are probably willing to use our best endeavours.

14 THE CHAIRMAN: It is probably useful for you to do it all
15 together.

16 MR. WARD: Yes, in truth.

17 THE CHAIRMAN: So shall we leave it as the 8th of July?

18 MR. WARD: I would prefer that.

19 THE CHAIRMAN: You can then put in a reply, the 22nd of July,
20 which gives you two weeks. Is that all right?

21 MR. PRICE: That is fine. Yes.

22 THE CHAIRMAN: You may have more than two weeks, because they
23 may put their defence in earlier.

24 MR. PRICE: Okay.

25 THE CHAIRMAN: The next thing is the statements of issues and
26 facts, in the way that we have discussed. You are going to
27 receive the ones in Apex on the 28th of July.

28 MR. PRICE: Yes.

29 THE CHAIRMAN: Shall we say that on the 28th of July you will do
30 the draft list of agreed facts?

31 MR. WARD: Yes.

1 THE CHAIRMAN: So by the 28th of July to produce a list of facts
2 from the decision. Would it be possible by, say, the 11th
3 of August that you can say whether you agree the statement
4 of facts they are going to prepare, and, if you have got any
5 facts that they have not included, to say what they are?
6 MR. PRICE: Yes, Madam.
7 THE CHAIRMAN: Then we can sort it out, or you can sort it out.
8 MR. PRICE: The 11th of August.
9 THE CHAIRMAN: Since you are going to receive the issues
10 document on the 28th of July, then, by the 11th of August,
11 could you say what you are adopting?
12 MR. PRICE: Yes.
13 THE CHAIRMAN: And if you have anything in addition; is that
14 all right? You are not going to have any witness
15 statements?
16 MR. PRICE: No.
17 THE CHAIRMAN: I wonder in this case whether it would be helpful
18 to have sequential skeletons, if Mr Price does a skeleton at
19 all.
20 MR. WARD: Who did you envisage going first, Madam?
21 THE CHAIRMAN: Who is going first?
22 MR. WARD: If we are envisaging sequential skeletons.
23 MR. PRICE: I ask, what do you have in mind?
24 THE CHAIRMAN: Does Mr Price have a skeleton at all? I had in
25 mind that you could put in a skeleton, which he could then
26 see.
27 MR. WARD: What I would prefer to do is put my skeleton in on
28 the same day as Apex. Whether Mr Price does one before or
29 after, I am more content to leave to you. I understand the
30 point you are making. What I am not keen to do is put in a
31 skeleton earlier than the one for Apex.

1 THE CHAIRMAN: I see that, because you want to run them both
2 together at the same time.

3 MR. WARD: Exactly. But I am happy to leave that to the
4 Tribunal.

5 THE CHAIRMAN: Mr Price, it has become the practice of lawyers
6 to effectively sit down well before they actually stand up
7 in court and to write down in a document, effectively
8 sometimes in summary form, what they are going to say. In
9 other words, when we prepare a case in order to stand up in
10 court, we do quite a lot of preparation beforehand and we
11 write it all out. That is now the practice. It never used
12 is be the practice. In the last few years, the practice is
13 that we prepare a document, which effectively is our script.

14 MR. PRICE: The bones of the argument.

15 THE CHAIRMAN: The bones of the argument. Mr Ward, are you
16 happy with that representation of a skeleton?

17 MR. WARD: Of course, Madam.

18 THE CHAIRMAN: It is the bones to the argument, and effectively
19 the way that we would say it in court, so it is in the
20 order. In fact, what then happens is that the Barrister
21 stands up and has a document in front of him. The Judge has
22 the same document in front of him. The Judge has read it
23 beforehand, and they go through it in that order, so it
24 gives an agenda for the hearing.

25 MR. PRICE: Yes, of course.

26 THE CHAIRMAN: We have got used to that, and Judges and
27 advocates find it a very helpful way of making sure that
28 everything is said and that it is understood. Because the
29 Judges can read it beforehand, they can think, "I wonder
30 what this point is, or that point is", and they can start
31 thinking about what questions they might ask, or whatever it

1 is. So you will see that happening, hopefully, in the Apex
2 case.

3 MR. PRICE: Yes, of course.

4 THE CHAIRMAN: Whether that is a helpful way for someone who is
5 not used to appearing and is not doing it all day is really
6 a matter for you.

7 MR. PRICE: I understand exactly what you are saying. If it
8 would help you, I am happy to sit down and write my argument
9 out. But I feel my case is relatively simple.

10 THE CHAIRMAN: Absolutely.

11 MR. PRICE: I mean, possibly. I have not read Apex's appeal.

12 THE CHAIRMAN: What I suggest we do, and I think this is what I
13 was intimating, is to ask the OFT to prepare their skeleton
14 by the 8th of September so that they have a skeleton in Apex
15 and they have a skeleton in your case.

16 MR. PRICE: Yes.

17 THE CHAIRMAN: Because the Apex skeleton may be wider. It will
18 probably be only a push of a button and a couple of
19 corrections. But the Apex one may be wider than yours
20 because they are applying different laws.

21 MR. PRICE: Yes, of course.

22 THE CHAIRMAN: And on penalties, it will be a bit different.
23 Therefore if they do that by the 8th, they are doing it at
24 the same time. You will then see both, and Apex's skeleton,
25 so you will know what they are saying and how they are going
26 to put it.

27 MR. PRICE: Yes.

28 THE CHAIRMAN: A usual practice is that they will get up and
29 they will follow what they are saying, so it will give you
30 an idea of how it all works.

31 MR, PRICE: Yes.

32 THE CHAIRMAN: You will have the OFT one in yours.

1 MR. PRICE: Yes.

2 THE CHAIRMAN: Then you can decide whether you think it might be
3 helpful to do that.

4 MR. PRICE: Yes.

5 THE CHAIRMAN: You might feel that it is helpful for you to do
6 it for your own purposes but do not want to show it to
7 anyone.

8 MR. PRICE: Yes, of course.

9 THE CHAIRMAN: Or you might feel that you do want to show it to
10 everyone. You take it as you find it when you get to that
11 situation.

12 MR. PRICE: Thank you very much.

13 THE CHAIRMAN: Is that all right?

14 MR. PRICE: Yes, that is fine. I perfectly understand.

15 THE CHAIRMAN: If you do, it would helpful to us to have it a
16 few days before.

17 MR. PRICE: When would you like it?

18 THE CHAIRMAN: I am not going to make an order because I am
19 going to leave it flexible for you. I do not want to state
20 that you have to do it by the 15th, and you are up all
21 night. So do not treat this like an exam.

22 MR. PRICE: Yes, Madam.

23 THE CHAIRMAN: I am not going to make an order. But if you
24 would like to do one, it would be helpful if we could have
25 it a week before, or if it was a few days before, if that is
26 all you can do. If it is the night before, so be it.

27 MR. PRICE: Okay. Fine. Thank you very much.

28 THE CHAIRMAN: But when you do it, you should provide a copy to
29 the OFT.

30 MR. PRICE: To both parties.

31 THE CHAIRMAN: I suspect it will be helpful if you provide it to
32 Apex, but you do not need to because it is in that.

1 MR. PRICE: Okay. Fine. Yes.

2 THE CHAIRMAN: What we will do is this. Apex is going to take a
3 day, which is the 23rd, so you will hear the whole of Apex's
4 case. I assume you will want to be here and hear it?

5 MR. PRICE: Yes, of course.

6 THE CHAIRMAN: You can then have the night, a nice sleepless
7 night, when you can see what you want to say next morning.

8 MR. PRICE: Yes.

9 THE CHAIRMAN: Then we can hear you on the morning of the 24th.
10 Is that all right?

11 MR. PRICE: That is fine.

12 THE CHAIRMAN: We will send a short timetable as to how that
13 will proceed, because the OFT will want to say something.

14 MR. PRICE: Yes, of course.

15 THE CHAIRMAN: We will know much more about how that transpires
16 when we know what the issues are, and what is in dispute and
17 what is not in dispute. Is that all right?

18 MR. PRICE: Yes. Fine.

19 THE CHAIRMAN: Even if we finished earlier on the 23rd, if we
20 went short on the 23rd, then we would not expect you. If you
21 were represented, we would expect the Barrister to get up
22 there and then and deal with your case. But we will not
23 expect you to do that. We will go over to the next day
24 unless it transpires on the day that you want to get up. We
25 will let you have a break to have your thoughts because
26 various things happen during the day. You might like to
27 think how you put it, and it might be differently or it
28 might not be.

29 MR. PRICE: Okay. Thank you.

30 THE CHAIRMAN: I think that deals with everything. Is there
31 anything else?

32 MISS HOWARD: No.

1 MR. WARD: No.
2 THE CHAIRMAN: The costs get reserved.
3 MISS HOWARD: I assume there is a standard practice.
4 THE CHAIRMAN: Do you understand about costs in this Tribunal?
5 MR. PRICE: No.
6 THE CHAIRMAN: You know about it, I imagine; that there will be
7 some costs to pay. At the end of the hearing, depending on
8 who wins and who loses, there may be applications about
9 costs.
10 MR. PRICE: Yes.
11 THE CHAIRMAN: If you won, you would apply to have your costs
12 paid by the OFT, whatever those costs are. If they win,
13 they may apply to have you pay their costs, and then we will
14 have to consider the application.
15 MR. PRICE: Okay.
16 THE CHAIRMAN: You understand that?
17 MR. PRICE: Yes, of course.
18 THE CHAIRMAN: Do you understand the level of costs that might
19 be asked?
20 MR. PRICE: They are costs.
21 THE CHAIRMAN: They are costs. And then we have to decide
22 whether or not it is appropriate.
23 MR. PRICE: Okay.
24 THE CHAIRMAN: Thank you very much.
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