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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case Nos 1035/1/1/04
1041/2/1/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22nd October 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR ANDREW BAIN
MRS SHEILA HEWITT
Sitting as a Tribunal in England and Wales

BETWEEN:

THE RACECOURSE ASSOCIATION AND OTHERS

Appellants

and

OFFICE OF FAIR TRADING

Respondent

AND

THE BRITISH HORSERACING BOARD

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Christopher Vajda QC (instructed by Messrs. Denton Wilde Sapte) appeared for the Appellants The Racecourse Association and Others

Mr. Rhodri Thompson and Mr. Julian Gregory (instructed by Director of Legal Services, Office of Fair Trading) appeared for the Respondents.

Mr. David Vaughan CBE QC and Miss Maya Lester (instructed by Messrs Addleshaw Goddard) appeared for the Appellant The British Horseracing Board.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning, ladies and gentlemen. Thank you for your patience, which has
2 given the opportunity to the Tribunal to continue its consideration of the issues in this case.
3 The first matter we have on today's agenda is to consider the case management of the issues
4 raised in each Appeal; whether the Appeals should be heard separately or together, or
5 consolidated and to consider the order in which the Appeals should be heard. I think it might
6 just help our discussion to go along if we were to give you some very provisional and
7 preliminary views that the Tribunal has formed, or is in the process of forming as to which
8 issues it feels it would like to have argued, and which issues it feels it can deal with on the
9 papers and then we can perhaps look at the procedure.

10 I will just run through the issues that we think should be the subject of oral argument
11 and then when I have done that Professor Bain will indicate to the parties one or two other
12 aspects of issues that might need to be built into what we would like to hear discussed. The
13 issues that we have at the moment, I think, are first of all the relevant product market and
14 whether there is truly a market for non-LBO book marking rights as a first and core issue. The
15 second issue is the scope of Chapter I in the particular circumstances of this case and in
16 particular whether as a result of the fact that one or more courses held a veto – the courses'
17 collective behaviour falls outside the scope of Chapter I because it was necessary to ensure that
18 any agreement for the sale of the rights took place at all.

19 The third issue is whether the collective action of the courses led to an increase in
20 price for non-LBO book making rights which I think has been described by the OFT in these
21 terms:

22 “Whether as a result of the existence of one or more veto holding courses the
23 standard conclusion that collective selling results in a higher price than that which
24 would have resulted from independent behaviour is inappropriate.”

25 Fourthly, whether the courses' collective behaviour had the effect of restricting or
26 distorting non-price competition; and fifthly, and which as we see it at the moment is probably
27 the principal issue under s.9, whether the degree of collective behaviour was indispensable to
28 achieve the acclaimed benefits flowing from the agreements in question and did not result in
29 the elimination of the competition. Within that last question is also the rather general issue of
30 what one can call in rule of thumb terms indispensability is an issue that, conceptually
31 speaking arises under s.9 or, in the circumstances of this case is effectively part of the s.2
32 analysis, i.e. it is related – is indispensability a self-standing issue that you look at when you
33 get as far as s.9, including assuming the agreement falls within s.2? Or, is it really to be looked

1 at at an earlier stage, particularly in the context of issue number 2 I have just identified, i.e. if
2 you could not have the agreement at all is there a restriction on competition in the first place?
3 It is quite an important conceptual issue because, of course, under the new regime the burden
4 of proof is on the OFT in relation to s.2 and on those claiming the benefit of s.9 in relation to
5 s.9. There are a great number of other issues in the case, including some procedural issues
6 which we will come to in later, but those for the moment are the main issues upon which, for
7 our part very provisionally, feel that the hearing could usefully concentrate on.

8 In addition to that, as we have been working through the papers various other related
9 points have occurred to us and, if I may, I will ask Professor Bain to put those matters on the
10 table.

11 PROFESSOR BAIN: Thank you, President. It does seem to be common ground that there were
12 several possible buyers of the non-LBO viewing rights, also apparently looking for exclusive
13 rights covering the greater part of British horse racing. It is the standard conclusion of
14 economic analysis that single sellers will put up the price. It comes from markets where there
15 is bidding in the market rather than bidding for the market, and it is possible in this case
16 bidding for the market would be a better kind of model to use – we have no firm view of that
17 but we would be interested in the views of the parties as to whether or not some account should
18 be taken of this in the analysis. That is the first point.

19 The second point has to do with the complementarity of the data rights controlled by
20 the BHB with the non-LBO viewing rights. The BHB does appear to be a single seller here
21 and we did wonder whether the presence of a single seller of a strictly complementary product
22 again would have any effect on the analysis with the effect on pricing of the parties selling the
23 viewing rights coming together. So again that is another piece of analysis that we would like
24 some help on from the parties.

25 THE PRESIDENT: Thank you very much. Looking at the matter in more practical terms, and
26 coming to the last part of issue1 for the Case Management Conference, which is the
27 relationship between the two Appeals, whether they should be heard together and in what
28 order, etc. I think our view at the moment is that the two Appeals should, as it were, march
29 together but in a structured way. In principle, I think the Tribunal at the moment is looking
30 probably more at a date in early March than at a date in January from the point of view of the
31 Tribunal's list and in terms of the timing and structure of the appeals. Something in the order
32 of perhaps approximately a day for the Racecourse Association, approximately half a day for
33 the BHB, a day for the OFT to reply, which is two and a half days – the best part of three days

1 – which would probably indicate a three day Appeal with perhaps a day in reserve in case it
2 went over.

3 Would you like a few moments to reflect on that, or would anybody like to react, as it
4 were, straight away. Mr. Vajda?

5 MR. VAJDA: If I could give preliminary reactions to preliminary thoughts.

6 THE PRESIDENT: Yes.

7 MR. VAJDA: For our part we welcome the idea of identifying issues to be addressed orally and
8 obviously you need to consider carefully the issues identified by the Tribunal. My submission
9 at the moment would be that these are very helpful but it may be, subject to the view of the
10 Tribunal on a reply, that one actually firms up the issues following the reply. For example, for
11 our part we think that issue 2 is extremely important – the scope of Chapter 1 in the
12 circumstances of this case – but the veto is only part of that and obviously of even more
13 importance is the critical mass point. So we are very much in favour of having oral argument
14 on issue 2 which could cover veto but would also include critical mass.

15 THE PRESIDENT: Yes.

16 MR. VAJDA: For my part I think I am broadly in agreement with what the Tribunal propose in
17 terms of identifying issues for oral argument, and I would respectfully submit that if the
18 Tribunal is minded to permit a reply that one could then perhaps finish and polish off these
19 issues at the next CMC, but this would indeed be very useful – also for the purpose of the reply
20 and also the points that Professor Bain has made, which I have noted down.

21 So far as the practicalities on issue 1 of the agenda is concerned again, for our part,
22 we would be broadly in favour of what the Tribunal has proposed, indeed having talked with
23 Mr. Vaughan we thought it is actually much better to have, as it were, separate blocks of time
24 for RCA and BHB obviously avoiding repetition rather than Mr. Vaughan popping up after ----

25 THE PRESIDENT: Rather than doing it issue by issue.

26 MR. VAJDA: And so we would be very happy with what the Tribunal proposed in terms of
27 timetable in that respect.

28 THE PRESIDENT: Thank you. Yes, Mr. Vaughan?

29 MR. VAUGHAN: I wonder if we could have just a few moments to deal with this matter?

30 THE PRESIDENT: Of course. I have not forgotten your procedural issues, but I have them mentally
31 in separate box at the moment.

1 MR. VAUGHAN: Broadly I think they are extremely helpful because they are effectively the
2 relevant product and then the relevant product market – if one includes both those then we can
3 talk about horse racing generally under one.

4 THE PRESIDENT: You have a very broad product.

5 MR. VAUGHAN: We have a broad definition of product and a very much wider definition of
6 product market where we probably come pretty close to the RCA on that. The scope of Chapter
7 I, veto rights and critical mass – probably more veto in the RCA and more critical mass in ours
8 but we assume ----

9 THE PRESIDENT: Yes, those two points are clearly central to both your Appeals.

10 MR. VAUGHAN: Absolutely. The increase in the price that is equally a very important point
11 because the OFT do not have to say what the price is, it is assumed simply because people talk
12 together – Professor Bain’s point really – or act together and therefore the price must be
13 higher. That seems to be on our side an extraordinary contention and demonstrably wrong. We
14 would use our economists on that issue probably in our reply. Their basic point is that night
15 follows day, ours is that it does not and it is a game theory or whatever you like to call it – part
16 of the analysis. The non-price competition is obviously an important matter. 5 is critical, as
17 you point out there is the difference of burden of proof. I am not sure we accept entirely the
18 whole burden of proof on exemption as opposed to the evidential burden goes on the party
19 seeking exemption but that is obviously a critical point.

20 THE PRESIDENT: There are obviously issues there to be ----

21 MR. VAUGHAN: To be discussed, yes. But obviously one of our main complaints is that they have
22 put everything into 9 when they should have dealt with it under 2, and that is one of our main
23 complaints.

24 THE PRESIDENT: Yes.

25 MR. VAUGHAN: Then that ties back into our long legal analysis, which I am certainly not going to
26 repeat, of *Vouters* and all those other cases. We very much welcome Professor Bain’s points
27 on that. But I wonder, could we possibly have five minutes?

28 THE PRESIDENT: Yes, I will see what Mr. Thompson says and then we will perhaps rise for a few
29 minutes.

30 MR. VAUGHAN: Also we could perhaps give you dates we could do in March – I am afraid we
31 rather concentrated on January, but we could then possibly tell you dates that would be
32 convenient in March from our point of view, because that would be sensible, I suspect. We
33 have to check also with our client.

1 THE PRESIDENT: Well a certain amount can be done in that respect behind the scenes. We do not
2 necessarily have to do it in court.

3 MR. VAUGHAN: We can at least give you a start on that, but after Mr. Thompson has dealt with
4 things I would like to have five minutes with my clients in order to see whether we want to
5 make further points.

6 THE PRESIDENT: Absolutely. Yes, Mr. Thompson?

7 MR. THOMPSON: Yes. I think I can be extremely brief. In terms of the issues that the Tribunal has
8 put forward, they correspond quite closely to the OFT list, although I think the issue of s.9 is
9 perhaps dealt with slightly more briefly in the Tribunal list than in the OFT list and the
10 additional issue of product market definition which we have not seen as appearing particularly
11 clearly from the Notices of Appeal – those have clearly been put forward by the Tribunal and
12 we take that on board and, in particular we obviously take on board the two quite specific
13 issues raised by Professor Bain which we will do our best to address either in further written
14 submissions or at the hearing, so that is very helpful.

15 In terms of the timetable for the hearing, in our submission that is almost exactly what
16 the OFT had in mind and so we welcome that as well. So I think I can stop there.

17 THE PRESIDENT: Thank you, Mr. Thompson. We will rise until at least 11.15, and give everyone
18 a chance to think about it.

19 (Short break)

20 THE PRESIDENT: Yes, Mr. Vaughan?

21 MR. VAUGHAN: First of all, we are extremely grateful for these points. Just to be clear, on item 1,
22 the relevant product market, as I said we interpreted that as including “the product” and the
23 relevant market i.e. the British racing product – what is the relevant market? Would it include
24 things like market power in that part, and in order to try and define the market and the SNNIP
25 test aspects, and the econometric matters they rely on in the Decision but never seemed to
26 repeat it again.

27 Item 2, with Mr. Vajda’s addition of critical mass that seems fine. Item 3 – whether
28 collective action led to any increase I think we see that as also including if it did so what, in
29 conventional terms? Did it automatically lead to an increase in price, is it anti-competitive –
30 firstly as an economic exercise and then obviously as legal exercise we come into the co-
31 operation part. As I pointed out, the OFT do not present the counterfactual price at all and so it
32 is difficult to see an increase in price when there is no counter factual, but anyhow that is

1 argument. Those are probably the main matters on your six points that we would like raise just
2 for our understanding of what they are – we do not need an elaboration of it all.

3 THE PRESIDENT: Just before you go on, Mr. Vaughan ----

4 MR. VAUGHAN: Professor Bain has an economic question for me?

5 THE PRESIDENT: Well he may well have, but just to signal that we have had quite a lot in writing
6 on the idea of British racing as an idea, so it is up to you but you may not want to take too
7 much of your oral time further developing that because it is very fully argued.

8 MR. VAUGHAN: That is right, we have to economise on time. We are a bit unhappy with the half
9 day. We would suggest something less than one day – three quarters of a day if you can have
10 three quarters of a day – because there is quite a lot to cover which the RCA at the moment
11 does not cover, apart from the legal issues which it covers briefly. I do not think either of us
12 need to go into the legal issues, but there are quite a number of these issues which are distinct
13 so I think we would ask for three quarters of a day – whatever that means – being less than one
14 day but more than half a day. I think that is the main thing we would want to say on that.

15 THE PRESIDENT: Yes, I think in principle probably a bit more time is not unreasonable so long as
16 we can make every effort to try to finish within four days in total.

17 MR. VAUGHAN: I am used to dealing shortly with things in the European field. We may not have
18 shown that to be true.

19 THE PRESIDENT: Well, maybe we are a bit too generous compared with our colleagues in
20 Luxembourg, I do not know.

21 MR. VAUGHAN: Well I do not want to discourage it. The CFI, as you know, were sometimes
22 quite long. Also, because the OFT make the point it is very much a law based case – we say
23 obviously it is law based but it is also intensely factual based, but they do not seem to
24 understand that as well. So it is a mixture of the two. You have to get the facts right before
25 you can start on the law, and we say they got it wrong. Those are the main things I want to say
26 on this.

27 THE PRESIDENT: Thank you very much. I think we may have signalled that we had in mind 14th
28 March for the hearing and possibly the afternoon of 10th January for a further Case
29 Management Conference, if we need a further Case Management Conference.

30 MR. VAUGHAN: Can we come back on those dates?

31 THE PRESIDENT: Yes.

32 MR. VAUGHAN: I think counsel can do the 14th, but we want to make sure that the clients can do
33 that. If we can come back on that and also on 10th January point?

1 THE PRESIDENT: By all means come back but we have to juggle our Tribunal diaries as best we
2 can.

3 MR. VAUGHAN: Of course, but the CMC is probably not so difficult, it is the hearing when I am
4 sure our economists and our chief executive will want to be here for that.

5 THE PRESIDENT: Well those are the dates we have in mind at the moment.

6 MR. VAUGHAN: Yes, well we will put off racing for the day!

7 THE PRESIDENT: Racing day or not.

8 MR. VAJDA: Could I just say 14th March, as I have indicated, is absolutely fine and we would be
9 happy for the Tribunal to fix that. I have a difficulty on 10th January because I have
10 a residential JSB seminar. I do not have a Junior here, and given that one is going to be having
11 a hearing on 14th March that one would have a CMC on a date that I could do.

12 THE PRESIDENT: I think the best thing to do is to see what could be sorted out behind the scenes,
13 Mr. Vajda, thank you. Monday 17th January is an alternative date from the Tribunal's point of
14 view.

15 MR. VAJDA: That would not cause me a problem.

16 THE PRESIDENT: Shall we provisionally say Monday, 17th at 2 o'clock?

17 MR. VAUGHAN: I am sorry, this one took us by surprise. Can we come back?

18 THE PRESIDENT: Yes absolutely. You can all come back behind the scenes; I am just giving you
19 possibilities at the moment while I am looking over the Registry diary. Yes, Mr. Thompson?

20 MR. THOMPSON: I think we have no problem about dates as far as I am aware. In relation to the
21 slightly creeping expansion of the BHB submissions, our only real point is that the OFT does
22 think that it will need a day and that any expansion of the BHB submissions should not be at
23 the expense of the OFT. Overall our submission is that a day and a half should be ample for
24 the appellants to put their case. If Mr. Vajda is somewhat shorter and Mr. Vaughan somewhat
25 longer that is fine, but we are doubtful that the BHB actually requires more than half a day in
26 addition to the RCA, given the indications from the Tribunal, but obviously that is a matter for
27 the Tribunal. We would be very happy to deal with any further submissions, for example, on
28 British Racing, that Mr. Vaughan may be advised to put in in writing, but we are doubtful it
29 would be a good use of court time to hear further issues on that, particularly given the
30 indication that the Tribunal has given this morning.

31 THE PRESIDENT: Well let us see how we get on. I do not think we are going to make a strict
32 timetable, but anything the Appellants can do between them to keep their allotted time within
33 the order of a day and a half or a bit more is to be welcomed bearing in mind that we have a lot

1 of written material and what we really want to do is to concentrate on the main points and use
2 the hearing for that purpose.

3 Now does that take us on to questions of witnesses and possibly questions of
4 disclosure of documents? I think this is mainly you, Mr. Vaughan.

5 MR. VAUGHAN: If I can deal with disclosure against the OFT first. We have put in a draft order.
6 First of all we are very grateful the OFT have effectively given us virtually all the outstanding
7 material.

8 THE PRESIDENT: The OFT have given you virtually all?

9 MR. VAUGHAN: Virtually everything, apart from the meetings they had with the ATR and
10 I understand also bookmakers. Apparently they have given it subsequently to the RCA and we
11 would like to see that. My understanding is that it would show the ATR (initially anyhow)
12 supporting the notification and then maybe changing its tune. The problem is that the ATR
13 never put in a defence, never had an oral hearing and so the only way we can tell their position,
14 and when it changed is from the meetings. We do know it did change because of the
15 documents in 2003 and when they were saying things totally contrary to what they said in the
16 notification, as we will have shown. We would like to see basically the ATR documents, there
17 are two classes – one is the scheduled documents, which they have put in their index but not
18 shown us; and the second is the meetings. The first class the RCA saw right at the beginning.
19 The second class is the meetings which the RCA subsequently have got pursuant to a request,
20 and we would like to see those.

21 THE PRESIDENT: So you say that the RCA have some documents that you have not got?

22 MR. VAUGHAN: That is right. They have the two classes. One is the scheduled documents,
23 namely those documents appearing in the index which disclose meetings and correspondence
24 with the ATR companies. The second group are the meetings which the OFT had with the
25 ATR companies and I understand also bookmakers, and these are documents which we are not
26 in the index but which the OFT have recently given to the RCA.

27 THE PRESIDENT: Do we know why these documents are not in the index?

28 MR. VAUGHAN: This is the point we made in our submissions. It is in para.152 of our Notice of
29 Appeal, but as a matter of practice they never include meeting notes in the index. This is our
30 Appeal, I think it is para. 152. In a letter to Addleshaw Goddards, those instructing me, they
31 were ----

32 THE PRESIDENT: I am sorry, Mr. Vaughan ----

33 MR. VAUGHAN: Our Notice of Appeal, 152, 151 really.

1 The disclosure index does not reveal any meetings with the ATR companies” Then
2 we say this is extraordinary, and then say that they told us that as a matter of policy they do not
3 intend to include any notice of meetings unless they intend to rely upon them. This is the old
4 *Soda Ash* fallacy which they still pursue.

5 THE PRESIDENT: This is the exculpatory stuff, is it not?

6 MR. VAUGHAN: Yes. We say they should be produced now, they have been produced to the
7 RCA. First of all, the position they have adopted there is wrong in law; and secondly, anyhow
8 they have given them to the RCA and we should see those because they were co-notifiers who
9 swore that this agreement was all right and a good thing, and also asked for exemption from
10 the agreement, and what they say cannot be confidential from the RCA or from ourselves in
11 that respect. Those are really the OFT documents. If I could deal with ATR? Our problem is
12 that certainly the questions that you have identified do not raise those sorts of issues. Our
13 problem is that the decision itself places great reliance upon, and relies upon what the ATR
14 companies said in 2003, i.e. that they did not need 70 per cent. whereas in the notification they
15 were saying they did need 70 per cent. The OFT said that people do not always tell the truth in
16 notifications and now they say that what they said is immaterial. I do not think that that can be
17 right. Our problem is that if they continue to rely upon anything that the ATR companies said
18 other than in the notification we need to see it. If they say they are not relying on it, then ---

19 THE PRESIDENT: Is that going to be in what you think is going to turn up in these documents, the
20 first class of documents?

21 MR. VAUGHAN: Yes, because the first class of documents will show effectively them being
22 extremely happy with the agreement. They have a good price, and basically what they said in
23 the notification will show that as being right. There was then clearly a change when the ATR
24 arrangements went wrong, and we have explained why they went wrong – they have the
25 technology wrong, they got it late. Effectively people watched the races on ATR and bid at a
26 better price on a competing bidder – better betting facilities – and so they got better odds by
27 going to somebody other than ATR, and so their returns were minimal compared to what they
28 wanted in the business plan – the OFT rely upon the business plan in the Decision. Providing
29 it was understood that consistently what they said (apart from the notification) is irrelevant,
30 then we are perfectly happy and do not need to see much more. But if they are going to be
31 running the case that the ATR companies wanted to get only the non-LBO rights and not the
32 other rights, and that was the whole basis of it all, we need to see these documents.

1 THE PRESIDENT: Can you just for my note, Mr. Vaughan – I am sorry, because it is probably in
2 the papers – can you just pin down the passages in the Decision that are under challenge from
3 this point of view?

4 MR. VAUGHAN: Well, I think we put in that note last night?

5 THE PRESIDENT: It may be that we have not always had a chance to read things that came in late
6 last night, so if you can take me to it so I can make sure I have not missed anything.

7 MR. VAUGHAN: Yes, it is called “References to reliance on ATR factual matters”.

8 THE PRESIDENT: Yes, it is at the back of what came in last night.

9 MR. VAUGHAN: I am afraid it was us trying to identify where they do rely upon these things. In
10 para. 97 for example, they rely upon the ATR business plan.

11 THE PRESIDENT: I have just got the Decision in front of me, and just to get a flavour of the point
12 I am just going to one or two of these references just to get the Tribunal in the context. So
13 I have para.97 of the Decision.

14 MR. VAUGHAN: And that in the footnote ----

15 THE PRESIDENT: Yes, that is the business plan.

16 MR. VAUGHAN: They rely upon the business plan, which we have always got.

17 THE PRESIDENT: So what is it in 97 – just to take 97 as an example, that is contested? That is
18 what they said at the time.

19 MR. VAUGHAN: Well that is what is said at the time.

20 THE PRESIDENT: So we know all that.

21 MR. VAUGHAN: But what one has to do is one looks at the words “volte-face” – the “face” bit is
22 the beginning, what they said initially in the notification in the business plan.

23 THE PRESIDENT: Well where is the volte-face.

24 MR. VAUGHAN: Well the “face” is the first bit, the “volte” comes later under section. C. This is
25 the one one needs to look at, it is probably more helpful. There is a long list of references to
26 the letters written in 2003.

27 THE PRESIDENT: Can you just take me to a paragraph?

28 MR. VAUGHAN: 276 at the beginning, that is helpful to our point of view. 298 is quite a good
29 example.

30 THE PRESIDENT: 276 does not seem to be too controversial.

31 MR. VAUGHAN: No, but they really build on each other. 278 – footnote 294 – they rely upon ATR
32 saying that there were no veto rights, for example.

33 THE PRESIDENT: Are the documents referred to in 294 available?

1 MR. VAUGHAN: 294, yes, we have the letters – they were in the RCA bundle.

2 THE PRESIDENT: yes.

3 MR. VAUGHAN: The basic point is that what they said in 2003 is very considerably different from
4 what they said in the notification.

5 THE PRESIDENT: Yes, but to what extent is this decision relying on that? Where are the particular
6 paragraphs in the Decision?

7 MR. VAUGHAN: 294, for example:

8 “The OFT considers that the Courses collectively could exercise the market power
9 that they do not hold individually. The fact that Attheraces and Carlton did not
10 increase their bids is not relevant to whether or not those bids were above the
11 competitive level.”

12 Then it goes on at that point Arena making separate offers. Then 298, footnote 327:

13 “Arena stated that Attheraces ‘*and its shareholders are the victims of the unlawful*
14 *behaviour identified by the Office*’ ...”

15 and they rely upon the Freshfield letter. In the notification, for example, they accepted entirely
16 that there was nothing anti-competitive about the agreement. So the whole thing completely
17 changes, and the reason for the change is pretty obvious – everything went pear shaped in the
18 Agreement.

19 THE PRESIDENT: Yes, well you can make that point – and you do make that point – very
20 powerfully. What I am not completely sure at the moment is what further material you need in
21 order to be able to make that point.

22 MR. VAUGHAN: This was the point I was really beginning to make ----

23 THE PRESIDENT: Yes, I am sorry.

24 MR. VAUGHAN: -- that the matters you have identified would exclude these things, but the
25 Decision itself includes a lot of these statements relying upon these matters, stated in 2003
26 upon the volte-face as proof of their case.

27 THE PRESIDENT: I was just trying to get a few examples of those statements.

28 MR. VAUGHAN: If we can look at their joint defence A.18, page 14.

29 “In relation to the ATR Summer 2003 statements we noted that some were made in
30 response to specific questions raised by the OFT, others commented on the RCA
31 submissions. In both cases ATR fully appreciated this was under discussion and
32 provided considered comments in relation to those specific issues. In doing so both
33 the ATR and its legal advisers were doubtless aware that s.44 made it an offence to

1 provide misleading information to the OFT punishable by fine or imprisonment. It
2 therefore considers that the contested statements are not in any special category of
3 their own, rather the OFT invites the Tribunal to consider the weight to be placed on
4 the evidence before it, taking account of the circumstances in which the evidence was
5 provided, but also the extent to which it is consistent with the broader circumstances
6 of the case.”

7 So they are bringing all these letters into play in its case. We accept that the issues you have
8 identified do not make this relevant. But the thing that concerns us greatly is that if the OFT
9 continue to rely upon these statements as being part of the history of the matter, and if we do
10 not provide any objection to it it could be taken against us. We think these statements are
11 purely self-serving by somebody who was thinking in terms of using this for ulterior
12 commercial or civil motives in civil actions at that stage. Our case is that the notification was
13 exactly the correct position, where basically they say that the Agreement was not anti-
14 competitive, there was nothing wrong with the price, they were not being made to pay more for
15 anything, they accept that there was no concerted agreement between the RCA courses, and
16 then they suddenly change their tune – and possibly they are relevant to the necessity
17 argument. The OFT might rely upon them as part of the necessity argument, or the non-
18 necessity argument. It was not necessary to do this.

19 We would be quite happy to leave it on the basis of the notification and what was said
20 there and in the business plan, but we are extremely concerned by the fact that the OFT,
21 although it says it is irrelevant, does place reliance upon these and spends a lot of time in the
22 Decision repeatedly making these points at 276 to 414, 432. At 418 they rely on Arena’s letter,
23 401 they rely upon the ATR fax and so on. There is a considerable number of these references
24 to these letters.

25 THE PRESIDENT: Excuse me a moment, Mr. Vaughan. (After a pause) I have it in my head,
26 Mr. Vaughan, and you may tell me that I have completely got hold of the wrong end of the
27 stick, that the documents we are principally talking about are the Response, dated 7th August
28 2003 by Theresa Walsh of Attheraces to the OFT, Arena’s observations on RCA’s response to
29 the Rule 14 Notice of 13th August 2003 and some further comments submitted by Theresa
30 Walsh of Attheraces on 15th August 2003. Those are the main ----

31 MR. VAUGHAN: That is right, they were the letters in 156 of our Notice of Appeal, by that time
32 we had seen these letters because they were in the RCA appeal bundle, but one of our

1 complaints is that we never saw them and they never told us about this when we had our oral
2 hearing.

3 THE PRESIDENT: Yes.

4 MR. VAUGHAN: 156 sets out these documents. It comprises one of our procedural points and also
5 these few letters, which seem to be responses to questions, or responses to the RCA position,
6 bearing in mind that ATR had not put in a defence, and had not had an oral hearing, bearing in
7 mind that the ATR was doomed at that stage – it collapsed, I think, at the beginning of 2004.
8 It was pretty doomed by that stage because the income just was not matching the expenditure.

9 THE PRESIDENT: Your position is that if reliance is to be placed on these documents then what?
10 You can either invite the Tribunal to reject all this because it is completely inconsistent with
11 what they said in the notification.

12 MR. VAUGHAN: Yes.

13 THE PRESIDENT: Or you can seek to go further and put this in issue in some form of cross-
14 examination?

15 MR. VAUGHAN: That is right, yes. Obviously we would much rather the first point, because we do
16 not want to cross-examine, and we do not necessarily want to see documents. Equally we do
17 not want to marginally win simply on burden of proof or something like that, we want to get
18 this issue out of the way, and if it is going out of the way and therefore is not to be relied upon
19 by anyone, then we are very happy going ahead without either of the documents or the
20 subsequent matters, because we have then notification which obviously speaks for itself,
21 signed as being correct by the chief executors of these companies, and basically they would
22 have to say that was not the truth.

23 THE PRESIDENT: And that is as much subject to all the provisions regarding criminality, as is the
24 subsequent stuff – if not more?

25 MR. VAUGHAN: Yes.

26 THE PRESIDENT: If not more, you would say, because it is a much more formal and considered
27 document.

28 MR. VAUGHAN: Yes.

29 THE PRESIDENT: Off the top of my head – we will put our heads together in a moment – I would
30 have thought for myself that one way of approaching this is to let the case unfold for the
31 moment on the way we have indicated. If it appears that what is in these documents turn out to
32 be significantly material to the final outcome, then I think we need to reconsider the procedural
33 situation and give you an opportunity to renew this application at that time.

1 MR. VAUGHAN: I would be perfectly happy. Maybe the first tranche of documents from the OFT
2 will answer a lot of the questions.

3 THE PRESIDENT: Going back to the disclosure issue, yes.

4 MR. VAUGHAN: Yes, going back to the OFT disclosure rather than the ATR disclosure.

5 THE PRESIDENT: Absolutely, yes.

6 MR. VAUGHAN: So it may well answer a lot of the questions.

7 THE PRESIDENT: From our point of view it is somewhat difficult, procedurally, to make orders
8 against parties that are not in front of the Tribunal without at least giving them an opportunity
9 to say why no order should be made.

10 MR. VAUGHAN: Yes it would be a sort of “order nisi” or something.

11 THE PRESIDENT: If we need to do it we need to do it and we would do it if we needed to, but I am
12 not completely sure at the moment that we have reached the stage when we can tell whether we
13 need to do it or not.

14 MR. VAUGHAN: I am perfectly happy with that?

15 THE PRESIDENT: Does that sound a reasonable approach?

16 MR. VAUGHAN: No, that sounds sensible, it satisfies me.

17 THE PRESIDENT: Well I will see if it satisfies Mrs. Hewitt and Professor Bain.

18 (The Tribunal confer)

19 THE PRESIDENT: If that, as it were, parks the Attheraces’ side of it for the time being, that leaves
20 these OFT documents. I do not know whether you have a position on this application,
21 Mr. Vajda before I go to Mr. Thompson? You have the documents.

22 MR. VAJDA: I have the documents.

23 THE PRESIDENT: Is there any reason why you should not give them to Mr. Vaughan?

24 MR. VAJDA: I think we might be in breach of section ----

25 THE PRESIDENT: You would be in breach of something or other?

26 MR. VAJDA: I could say this, we think Mr. Vaughan and his clients should have these document.
27 There are two reasons for that. The first reason is supposing the RCA was not here at all, or
28 supposing we withdrew tomorrow and if there is a document on the OFT’s file, as the
29 President indicated, which is exculpatory it would seem astonishing that the OFT would not
30 disclose that to my friend. That is the first point. I cannot see how there can be a fair trial on
31 that basis.

32 The second point is this, the OFT has not withdrawn and at the moment it is not
33 seeking to withdraw, but it would be an extremely odd situation in my respectful submission

1 for this case to proceed on the basis that we have some documents and Mr. Vaughan does not,
2 and so I would support Mr. Vaughan in that.

3 THE PRESIDENT: Thank you. Yes, Mr. Thompson?

4 MR. THOMPSON: Do I take it that we are limited to the rather narrow question of the documents
5 which have been disclosed, or are in the process of being disclosed to Mr. Vajda ----

6 THE PRESIDENT: As I understand it.

7 MR. THOMPSON: -- and the ones that have not been disclosed to Mr. Vaughan?

8 THE PRESIDENT: That is it.

9 MR. THOMPSON: In particular I think the Tribunal has indicated interest in the *Solvay* point.

10 THE PRESIDENT: I do not know that we have indicated our interest in it, Mr. Vaughan has raised
11 it and it is an obvious point that needs to be addressed. I think we, for our part, are to some
12 extent interested in the idea that there are some documents that come into existence that do not
13 go into the file.

14 MR. THOMPSON: If I can deal with the first point first. You may recall that the final submission
15 I made at the last hearing was that Mr. Vaughan's position was not the same as Mr. Vajda's
16 and that if he was going to pursue the issue of disclosure he should address the question of
17 whether an Intervener had the same what you might call *Solvay* right as a principal Appellant.
18 Although quite a number of submissions have now been put in and detailed issues about what
19 was or was not referred to in the Decision, which of course, indicates the type of documents
20 that Mr. Vaughan's clients had in fact received since then, because it has received all the
21 documents referred to in the Decision, one thing he has not addressed is why he, as an
22 Intervener, should be entitled to the same level of disclosure as an Appellant. In summary, the
23 OFT ---

24 THE PRESIDENT: Wait a minute. What are we talking about? Are we talking about the stage
25 before the OFT, or are we talking about the stage before the Tribunal?

26 MR. THOMPSON: Well we are obviously talking about the stage before the Tribunal.

27 THE PRESIDENT: Clearly he is an Appellant before the Tribunal.

28 MR. THOMPSON: Indeed he is, I am sorry, I used the wrong word there.

29 THE PRESIDENT: He is not an Intervener, despite our suggestion that he might become an
30 Intervener [Laughter] He actually managed to maintain his status as an Appellant.

31 MR. THOMPSON: Indeed, he is an Appellant, I accept that.

32 THE PRESIDENT: So he is an Appellant – an Appellant with a sufficient interest in the Decision
33 Appeal.

1 MR. THOMPSON: Yes, but he was never a party to the original arrangement and even if the case
2 had been a more grave infringement from the OFT's point of view, and there had been an
3 exposure to fines, his clients would never have been exposed to fines, to take an extreme
4 example. Therefore, he would not, at least as a matter of principle, have fallen from the scope
5 of the *Solvay* jurisdiction. That is the simple point which has been raised and which has not
6 been addressed by Mr. Vaughan or his clients.

7 THE PRESIDENT: I think we are on to a slightly different procedural situation now. There are two
8 stages, are there not? What is the extent of what we are calling in shorthand – no doubt to the
9 bafflement of at least some people in the room – the *Solvay* principle, in terms of the
10 administrative procedure and, indeed, in this case I do not think anybody was exposed to a fine
11 were they because there is no practical possibility of anybody being fined I think.

12 MR. THOMPSON: Indeed.

13 THE PRESIDENT: So that is what happened in the administrative procedure, and *Solvay* is about
14 a fines' case at the administrative stage. That is the first point. The second, possibly different,
15 point is that we now have an Appeal at the Tribunal by BHB and the Racecourse Association,
16 and we have the perhaps somewhat curious situation that one Appellant has some documents
17 and the other Appellant has not. Is that really very satisfactory?

18 MR. THOMPSON: I can see that there are some procedural issues there, but with respect I would
19 not accept Mr. Vajda's points as necessarily decisive because one could equally well think of
20 cases where the rights of the primary parties and of an Intervener came apart quite strongly and
21 where there were a large class of documents which what you might call the "party" Appellant,
22 as against the "Intervener" Appellant, where the party Appellant would be entitled to see all the
23 documents, and the Intervener Appellant, whose interests might be quite marginal, would not
24 be entitled to do so. So the OFT does see this ----

25 THE PRESIDENT: But their interests cannot really be described as "quite marginal" can they?

26 MR. THOMPSON: Indeed. The reason here is that the OFT sees this as an important point of
27 principle which has, indeed, been addressed by the Tribunal recently in the *Claymore* case in
28 a slightly different situation of a ----

29 THE PRESIDENT: A completely different situation, Mr. Thompson.

30 MR. THOMPSON: A different kind of third party interest, and where principles have been laid
31 down which, in my submission, are of general application, namely, that disclosure is made

1 – I am sure the Tribunal has it in mind – in accordance with principles common to this
2 jurisdiction and to the High Court where it is demonstrated to be necessary and proportionate
3 to do so.

4 THE PRESIDENT: Claymore is an Appeal by a complainant against a non-Decision. This is an
5 Appeal against a finding of infringement by a party who has direct interest in the finding even
6 if they are not, technically speaking, a party to the Agreement which is found to infringe. That
7 is a different situation, I think, is it not, from Claymore.

8 MR. THOMPSON: It is a different situation but, in my submission, it is governed by the same
9 general principles, which are set out ----

10 THE PRESIDENT: Right, do you want to take us to the general principles?

11 MR. THOMPSON: The relevant part is where the statement of principle is, and that is at para.113 of
12 the *Claymore* Judgment. I do not know whether the Tribunal wishes to have a copy of it, or
13 whether you are happy for me to read out the relevant statement.

14 THE PRESIDENT: Is it somewhere in our papers – I am not conscious that it is.

15 MR. THOMPSON: I do not think it is, but the statement is clear and transparent, as you would
16 expect.

17 THE PRESIDENT: You had better read it then.

18 MR. THOMPSON: It says:

19 “113. The general approach to discovery before the Tribunal is that it is not
20 automatic. It needs to be ordered by the Tribunal, usually upon a request by a party
21 to the proceedings. The Tribunal must be satisfied that the disclosure sought is
22 necessary, relevant and proportionate to determine the issues before it.

23 “114. The need for the party seeking discovery to show necessity, relevancy and
24 proportionality is all the more acute in cases such as the present.”

25 And that is the point which the Tribunal has put to me.

26 THE PRESIDENT: Necessary, relevant and proportionate, right.

27 MR. THOMPSON: Yes, indeed. We say here that although it is quite clear that BHB has a strong
28 sense of grievance that Attheraces has sought to get out of a commercial agreement which had
29 some substantial commercial benefits to the BHB’s constituents, as it were – the courses – and
30 that the ATR has changed its position during the course of the OFT investigation, and those
31 points are quite clearly in the appeal and have been addressed in Part A of our Defence, as to
32 whether there is an issue of credibility in relation to the altered position and that, as the

1 Tribunal has put to Mr. Vaughan, is obviously a matter which is live, and potentially relevant
2 to some of the issues in relation, for example, to critical mass and veto rights.

3 THE PRESIDENT: So ATR's position, live and potentially relevant?

4 MR. THOMPSON: Yes. In my submission, to go beyond the issue of credibility, which is certainly
5 live, is a quite serious allegation that, for example, Freshfields have been party to putting in
6 representations which do not actually represent the accurate position. In my submission, it is
7 not really necessary for the disposal of this Appeal, to probe those questions, and there is no
8 serious basis for such an allegation.

9 THE PRESIDENT: Is it possible just to give some indication of what it is we are talking about?

10 The documents in question have been made available apparently to the RCA. Is it possible to
11 identify how many documents we are talking about and what they are? These are notes of
12 meetings of a given date, three documents, or 400 documents or what are we talking about?

13 MR. THOMPSON: It would be in double figures, but not in triple figures – I will be corrected if
14 I am wrong.

15 THE PRESIDENT: This is a series of meetings.

16 MR. VAJDA: If I may assist the Tribunal, **these** are the documents that one is talking about – they
17 are hardly substantial. I should also say – I did not raise it earlier – there are also some notes of
18 telephone conversations with third parties that are also not in the Notice, we have not received,
19 although I have dealt with, as it were, behind the scenes. Mr. Thompson promises that we will
20 get those within seven days. But **these** are the ones that we have, Mr. Vaughan has not.

21 THE PRESIDENT: I am sorry, it is easier to ask Mr. Vajda – I could equally ask Mr. Thompson –
22 how many meetings are we talking about, Mr. Vajda?

23 MR. VAJDA: There are probably about ten meetings.

24 THE PRESIDENT: Ten meetings?

25 MR. VAJDA: Ten meetings.

26 THE PRESIDENT: Taking place between what dates?

27 MR. VAJDA: Most of them are in 2002. They are transcripts of notes taken by somebody at the
28 OFT.

29 THE PRESIDENT: They have been typed up.

30 MR. VAJDA: Typed up, yes.

31 THE PRESIDENT: And when is the first meeting, and when is the last meeting?

32 MR. VAJDA: The first meeting appears to have been on 29th April 2002. There is one which is
33 undated; the last appears to be 6th January 2004. That was a meeting with us as it happens.

1 THE PRESIDENT: Yes. Mr. Thompson, I can see your sensitivity, and I can understand, I think,
2 what you are concerned about, or what the OFT might be concerned about, is the question of
3 getting into all kinds of disclosure obligations in the course of the administrative procedure, vis
4 à vis parties that are not directly involved in that procedure but claim to have some sort of
5 interest.

6 MR. THOMPSON: Yes.

7 THE PRESIDENT: I can see that that is a concern, and it may well be a legitimate concern. I do not
8 think anyone is suggesting that at the administrative stage all third parties necessarily have the
9 same rights as the person who is the direct recipient of the Rule 14 Notice. Quite how far
10 those rights go in relation to persons who are not the direct recipient of the Rule 14 Notice, but
11 are perhaps affected by it is another question. But in some respects the procedural situation in
12 this case has now moved on from then and it is, as it were, now and we actually have two
13 Appeals in front of the Tribunal in which one Appellant is apparently able to tell us about and
14 rely on, presumably in open court, all these various documents, but the other Appellant does
15 not have them. That seems to me to be a somewhat – if I use the word colloquially – “one off”
16 situation which is not, at first sight, completely satisfactory.

17 MR. THOMPSON: I can see that.

18 THE PRESIDENT: Just one other question. As I followed the discussion so far, there is nothing for
19 which confidentiality is claimed in these documents, is there?

20 MR. THOMPSON: There are some issues about that, but obviously they could be addressed
21 piecemeal, as they have been addressed in relation to the documents disclosed as attached to
22 the Decision, where there are some issues of confidentiality which are not identical between
23 the RCA and the BHB as I understand it. So we are not saying the whole class is protected by
24 confidentiality.

25 THE PRESIDENT: What would stop Mr. Vajda simply reading these documents into the transcript
26 now if he wanted to – apart from the confidentiality point which would no doubt be sorted out?

27 MR. THOMPSON: It would be an issue which would then have to be raised as to the extent to
28 which these Appeals can satisfactorily be consolidated or treated as a single hearing. I accept
29 that there would be some procedural problems in that situation. You have put two points to me
30 – we are worried about the administrative stage, yes indeed we are.

31 THE PRESIDENT: That we can understand.

32 MR. THOMPSON: Equally that administrative stage reads across because any one of those parties
33 could, in principle, claim to be sufficiently interested that they could come before this

1 Tribunal, and our concern is that if they do that then suddenly the floodgates will open. The
2 Tribunal says that at the administrative stage we may have very limited obligations but, as
3 I understand it, it may be being put to me that should the same person put in an appeal to this
4 Tribunal their procedural rights might suddenly be transformed, and we see some difficulties in
5 where that is tending, because if that is true in the Tribunal then it reads back to the
6 administrative stage, so we do not think that it can simply be assumed that there is no real issue
7 here, because it seems to us rather unsatisfactory that the position should be radically different
8 before the Tribunal than it would be at the administrative stage.

9 THE PRESIDENT: If you want us to decide what the position is at the administrative stage, we may
10 have to decide it. But if you want to distinguish this case on the basis that we have a rather
11 special situation of two Appellants, one with documents and one with out the documents,
12 which is the way of deciding it without having to decide the administrative stage. If you want
13 us to decide what the administrative stage is it might become quite a big point.

14 MR. THOMPSON: Well indeed. It is in principle quite a big point for the OFT, but I quite recognise
15 that it may be quite a small point in relation to this case. I have a note here saying “Speak to
16 me” from my Junior – would it be all right if I speak to him? [Laughter]

17 THE PRESIDENT: Those are generally important notes! Do you want a few minutes to think about
18 it?

19 MR. THOMPSON: Well can I see what is being said to me?

20 THE PRESIDENT: Yes, you take your time.

21 MR. THOMPSON: (After a pause) I think we would like a brief moment to consider the matter.

22 Could I just add one point which I think is the factual consideration that is being put to me?

23 The reason why these documents did not appear on the file is not related to *Solvay*, it relates to
24 the developing practices of the OFT whereby some I think generally manuscript notes have not
25 always been transcribed and kept on the file. As I understand it the developing practice now is
26 that a more formal approach has been adopted, and that more formal meeting notes are, in
27 general I hope universally prepared, and would now form part of the file, but perhaps I could
28 confirm that as well in case I have said something slightly inaccurate over a short adjournment,
29 if we could have five or ten minutes, but that is the general position.

30 THE PRESIDENT: Yes. Thank you very much. We will rise for ten minutes.

31 (Short break)

32 THE PRESIDENT: Yes, Mr. Thompson?

1 MR. THOMPSON: Thank you. We have discussed this and I should say that there is still a point of
2 principle which the OFT relies on. We are not seeking a Ruling on that in the context of these
3 proceedings, certainly not at this stage. We are willing to give BHB the documents that it has
4 sought annexed to its Order, and also the additional documents in relation to the meeting notes
5 which Mr. Vajda has sought, and I should perhaps clarify that in so far as there is a class which
6 has not yet been provided to Mr. Vajda I am happy to confirm that unless there is some
7 administrative glitch, which I do not anticipate ----

8 THE PRESIDENT: The same applies?

9 MR. THOMPSON: We will provide that to him within seven days, so I hope that that will resolve
10 the position between the OFT and the BHB at least at this stage, though of course the issue of
11 principle sits in the background.

12 THE PRESIDENT: The issue of principle remains.

13 MR. THOMPSON: If, in due course, some issue arises between the RCA and the BHB where we
14 consider it is important enough to raise, I think that is the position.

15 THE PRESIDENT: So effectively, for our purposes, it is by consent agreed without prejudice to the
16 legal position ----

17 MR. THOMPSON: Yes.

18 THE PRESIDENT: -- which you have made very clear, that the documents which Mr. Vaughan
19 seeks he can have. So we do not need to make an order on that.

20 MR. THOMPSON: And additionally the meeting documents to which he has referred, and to which
21 Mr. Vajda has also referred.

22 MR. VAUGHAN: The schedule we annexed to our Order plus the meeting notes and, if Mr. Vajda
23 gets the communications, the notes of telephone conversations then we get those too.

24 THE PRESIDENT: The same applies to you.

25 MR. VAUGHAN: Sorry, Mr. Vajda said "if", it is "when", we get those.

26 THE PRESIDENT: So that is effectively agreed?

27 MR. THOMPSON: I think that is right and as far as I am concerned, in relation to Attheraces the
28 position is parked for the time being.

29 THE PRESIDENT: That is parked?

30 MR. THOMPSON: I do not anticipate submissions.

31 THE PRESIDENT: So we do not need to have further submissions.

32 MR. VAUGHAN: I do not need to deal with the point, because we feel quite strongly on the
33 categorisation of us as Intervener below, because in fact they spent their whole time saying

1 there is no such thing as an Intervener when we had to go to the High Court to get permission
2 in order to make submissions. Their case was there is not such thing as an Intervener. We now
3 find that basically we are now categorised as Intervener. If we are an Intervener we are a very
4 special one, however, I do not need to go into that.

5 THE PRESIDENT: I do not think we need to go into that. I think from the Tribunal's point of view
6 we can only express the view that that is a very sensible way of solving the problem in this
7 particular case. In relation to the Tribunal's *Claymore* Decision and the kind of situation that
8 has arisen here, it is of course worth bearing in mind that circumstances do alter cases, and that
9 there are different situations and it is not necessarily the case that a given Judgment of the
10 Tribunal can be read as relevant authority for different circumstances, or necessarily perhaps
11 that all "Interveners" are in exactly the same position either at the administrative stage or
12 before the Tribunal. So I think all these matters will need to be sorted out sensibly as we all
13 collectively develop this regime.

14 MR. VAUGHAN: And obviously it is a great help when the OFT say their practice has now
15 changed and that they do put these meeting notes on the file – these type of meeting notes go
16 on the file.

17 THE PRESIDENT: Yes.

18 MR. VAUGHAN: And that is obviously a great improvement, because it means that there is not a
19 subclass of documents.

20 THE PRESIDENT: I think Mr. Thompson was just going to come back to confirm that what he said
21 earlier is the situation.

22 MR. VAUGHAN: Yes, well that is a great comfort to practitioners.

23 MR. THOMPSON: Yes, I think that is confirmed. I think Mr. Vaughan and I were in another case
24 where there were more formal meeting notes taken and put in evidence and, as I understand it,
25 that is the normal practice of the Office.

26 THE PRESIDENT: So the general practice now, which as a Tribunal I think we would also very
27 much welcome, is that notes are kept of meetings and they are transcribed – there is a formal
28 note of the meeting – and that that goes into the file.

29 MR. THOMPSON: The only reservation I have is whether or not there may not still be telephone
30 calls which arrange meetings, etc., which given human fallibility do not necessarily get
31 recorded, but that is the problem.

32 THE PRESIDENT: But the aim is that everything relevant should be recorded?

33 MR. THOMPSON: I understand that what I said is correct.

1 THE PRESIDENT: Well it is a very good practice generally to be able to have the administrative
2 trace of whatever it is that has happened just in case there is an issue later on, so thank you
3 very much for that, Mr. Thompson, it is appreciated. Very well, have we more or less dealt
4 with the outstanding issues?

5 MR. VAUGHAN: I think the only thing is the date of the Reply.

6 THE PRESIDENT: What would you want, Mr. Vaughan?

7 MR. VAUGHAN: We have said the end of November, Mr. Vajda suggested the beginning of
8 December, it is not really critical. The OFT suggest the end of November, but if Mr. Vajda
9 wants three more days I am certainly not going to ----

10 THE PRESIDENT: What is it that you want, Mr. Vajda?

11 MR. VAUGHAN: I suggested 3rd December. We would anticipate doing two things, first, putting in
12 a reply; and secondly, putting in probably some more witness evidence at the same time to deal
13 with what I call “reply evidence”, that is dealing with points that have arisen in the OFT’s
14 defence. We would suggest that we do both at the same time on 3rd December, which
15 according to me is a Friday, and on this timetable that would give everybody sufficient
16 opportunity to digest that before the CMC on 17th.

17 THE PRESIDENT: Let us say 3rd December for reply. Very well, unless there is anything else?

18 MR. VAUGHAN: Thank you very much indeed, and your colleagues.

19 THE PRESIDENT: Thank you very much.

20 _____