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IN THE COMPETITION  
APPEAL TRIBUNAL

Case No. 1035/1/1/04  
1041/2/1/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

17<sup>th</sup> January 2005

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

Appellant

and

OFFICE OF FAIR TRADING

Respondent

AND

THE BRITISH HORSERACING BOARD

Appellant

and

OFFICE OF FAIR TRADING

Respondent

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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

Mr. Christopher Vajda QC (instructed by 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 Addleshaw Goddard) appeared for the Appellant The British Horseracing Board.

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1 THE PRESIDENT: Good morning, ladies and gentlemen. Unless there are any preliminary  
2 applications I suggest we take the agenda for today's case management conference. The first  
3 matter is the question of the identification of the issues for the hearing. Our general view, I think,  
4 is that we have probably got as far as we can in trying to identify what the main issues are. There  
5 is not complete agreement, and BHB I think in particular regard some of the issues in this case as  
6 going a bit wider than the issues listed here, which is something which we understand. It seems to  
7 us that it is not going to be useful now to try to spend much more time seeking to narrow the  
8 issues further and the practical solution to the problem is simply to leave it to the parties to bear in  
9 mind what the Tribunal considers the issues to be and then to develop whatever they wish within  
10 the time allotted.

11 As to that point, which I think is relevant to the question of what the issues are and how  
12 much time we should spend on them, we are still of the view that we should try and control rather  
13 closely the time spent on the oral procedure in this case because we have had things very fully  
14 argued in writing, and they are even more fully argued now that we have had the Defence and the  
15 Reply. Our present view is that, as far as the hearing is concerned, we should allocated a day for  
16 the Racecourse Association, we should allocate half a day for BHB and we should allocate a day  
17 for the OFT, which would enable us to complete the oral hearing of this case within three days,  
18 still leaving a little bit of time for final replies. Within those allocations I think we just have to  
19 leave it to the parties to concentrate on what they think their main points are, but it is a case,  
20 I think, where we ought to try to stick very closely to the time limit.

21 That is our general view on the issues in the case. May I make one particular observation  
22 on a point made by the Racecourse Association, which I think is made on pp.1 and 2 of their  
23 observations, when they seek some further clarification by the OFT of exactly what is meant by  
24 "a significant portfolio", which is a point that goes, certainly from argument, to critical mass. The  
25 provisional view at the moment is that it is not going to be useful at this stage to clarify things  
26 much further. I think we have got the evidence that we have got and we should proceed on the  
27 basis of the evidence that is in the file already and what is in the Decision.

28 Are there particular points that arise out of what I have said so far, or does that effectively  
29 deal with the first issue on the agenda? Mr. Vajda?

1 MR. VAJDA: Allied to what is going to be dealt with at the oral hearing we very much agree that there  
2 are full written arguments and a lot of issues and indeed I am wondering, in a sense, how to spend  
3 my day in the light of ----

4 THE PRESIDENT: You are fully entitled to reduce it. Sometimes it is more effective to have a short  
5 and pithy opening or presentation rather than to spend the whole day.

6 MR. VAJDA: What I was going to come to in that context is the issue of fact. It appears to me that  
7 there is still quite a lot of dispute as to fact. This is effectively issue 5 on the agenda. Obviously  
8 we would await what the Tribunal have to say in relation to issue 5. This is obviously the only  
9 opportunity one has to go into the facts. If, in fact, there is still factual dispute between us and the  
10 OFT then, subject to the view of the Tribunal which obviously would be of great assistance to us,  
11 we might well be minded to spend a lot of the day on facts, but we need to know what is agreed  
12 and what is not agreed because if we are still in a situation where there is a major dispute as to  
13 what happened in the negotiations I might well wish to spend the day taking the Tribunal through  
14 the documents. Obviously that is the last thing I want to do if the Tribunal says, "We are actually  
15 with you, Mr. Vajda, on that". I plainly do not want to do that. We need to have some idea as to  
16 where we are on the facts so far as the OFT is concerned. Also it would be helpful if the Tribunal  
17 could give some sort of indication as to how they would want these disputed issues of fact to be  
18 resolved.

19 THE PRESIDENT: On that we will hear from Mr. Thompson in a moment after we have seen what  
20 Mr. Vaughan has got to say. On that specific point we are a bit unenthusiastic about the  
21 possibility of attempting to agree facts. Just as a matter of feel, that sounds as if it might be a  
22 process that would take a lot of time.

23 MR. VAJDA: Yes. I think the OFT have indicated that they are not in a position to deal with it.

24 THE PRESIDENT: I think in your Reply in particular you have gone into quite some detail now on the  
25 course of the negotiations, and you have set it all out.

26 MR. VAJDA: We have.

27 THE PRESIDENT: There it is, that is the evidence we have got. It may very well be useful when we  
28 get to the hearing to, from your point of view, make sure the Tribunal has got all that well in mind.  
29 Beyond that, I am slightly unclear as to what more we can do about it.

1 MR. VAJDA: The indication that you, sir, have given that it might be of assistance to go through some  
2 of the documents is helpful. If the OFT's stance remains what I have stated it is, that will give me  
3 a peg as to what I should do at the hearing. Thank you.

4 THE PRESIDENT: Yes.

5 MR. VAUGHAN: It is not entirely helpful from our point of view, because if Mr. Vajda spends a lot of  
6 time going through the facts, which he may well have to do, we might also want to do that on the  
7 *volte face* point and that sort of thing. Between him and myself we may not have any chance to  
8 deal with a large number of issues.

9 THE PRESIDENT: Why would you both need to deal with it?

10 MR. VAUGHAN: He deals with the history, as it were, then we have got the notification and the other  
11 parts that follow. The part that I had assumed that Mr. Vajda was mainly concentrating on was the  
12 history ----

13 THE PRESIDENT: The early setting up, yes.

14 MR. VAUGHAN: ---- and the other bits, as it were, from Carlton and Granada and GG and all that sort  
15 of thing that was going on. What really concerns us more are the facts that go on from that,  
16 i.e. the notification and then the evidence on which the OFT relies in support of the allegation that  
17 what was said in the notification cannot be believed. We are extremely unhappy about that whole  
18 issue.

19           At the moment we do not know, and we will not until after we have sat down, what the  
20 OFT's case is on any of these things. We think that is pretty unsatisfactory because we have  
21 closed our case, as it were. Mr. Thompson may well get up and say, "You cannot believe what X,  
22 Y and Z said for the following reasons", and X, Y and Z may be panting to give evidence as to  
23 why they were, in fact, right. We think, as we have said in our skeleton argument, at least the  
24 OFT ought to say what, in fact, they disagree with and what they are going to allege is inconsistent  
25 with what those people have sworn to be true, and have said to be true, so at least we have a  
26 chance to see what it is, particularly given that the order appears to be that the OFT would not  
27 have to reveal its hand, apart from its defence, until we have sat down and concluded our appeal.  
28 So we would think at least, even if we cannot agree things, they identify what things are not  
29 agreed so that we do not have to spend a lot of time in dealing with those.

30           In that respect I think it would help to concentrate on the factual issues. It would help  
31 Mr. Vajda, I think, too so that he does not have to spend ages on agreements when there may be

1 no issue on them. It is not going to help him very much by Mr. Thompson getting up and saying,  
2 “There is no issue about that”, when he could have done that already, particularly when the  
3 timetable is being controlled strictly, which I entirely accept is appropriate.

4 The only other point I would like to make is that if it were possible for the RCA and us to  
5 agree – we are a bit unhappy, which we indicated last time, about the half day for us. We thought  
6 we had agreed on three-quarters of a day, but at least if we can have a day and a half between the  
7 two of us it would be helpful, and there can be an element of allocation between ourselves as to  
8 what it should be. We would have preferred to have three-quarters of a day, as I thought we had  
9 got on the last occasion, but if that is not acceptable perhaps we can share a day and a half, as it  
10 were, which gives an element of flexibility. If Mr. Vajda is brilliant and spends five minutes  
11 saying, “This whole thing is nonsense”, and sits down I can wax lyrical for a day and a half!  
12 I might adopt the same tactic too, I am not suggesting I would not do that, but at least it gives us  
13 an element of flexibility. For example, the history is entirely his, exemption really essentially is  
14 for him, not for us, so there will be issues which I will not want to deal with or which I have dealt  
15 with sufficiently already for our purposes. I think we would like to get some clarity before we  
16 actually open the case as to ----

17 THE PRESIDENT: As to where the factual disputes are.

18 MR. VAUGHAN: ---- where the factual disputes are. Even if it is not a question of agreeing things at  
19 least they can say where they are on factual disputes so that we can deal with them. For example,  
20 we place a lot of reliance on the ATR business plan and I will deal with it extensively, and the  
21 cause of the collapse of the ATR, and effectively it was inevitable it was going to collapse after  
22 things happened and they did not get their platforms in place. We have put in a lot of evidence on  
23 that. We do not want to repeat that. It is something that the OFT did not consider at all in the  
24 decision. We would like to know a bit more about that. It goes on to, as it were, the question  
25 about the assurance that they are seeking from the Tribunal, but I can deal with that letter.

26 MR. VAJDA: Before Mr. Thompson responds, I should say that we agree with what Mr. Vaughan has  
27 said so far as the facts are concerned, it is p.3 of our note for the hearing. So far as timing is  
28 concerned, if we finish within the day obviously we are more than happy for Mr. Vaughan to start,  
29 but we would not want our day to be cut back.

30 THE PRESIDENT: Yes, Mr. Thompson?

31 MR. THOMPSON: I should be very happy to answer any questions the Tribunal may have.

1 THE PRESIDENT: I think there is force in Mr. Vaughan's submissions that it might be useful to at  
2 least try to identify principal points of fact that are in issue before we get to the hearing. It may be  
3 that there are points that are not accepted but are not put in issue, or there are points that are  
4 accepted, or there may be points of fundamental importance about which there is a dispute, but  
5 certainly at the moment the Tribunal is a bit hazy as to what the situation is.

6 MR. THOMPSON: I must confess, I find it quite difficult when the whole thing is conducted in such  
7 abstract terms. My and Mr. Gregory and indeed the OFT's sincere intention in reducing what was,  
8 by any standards, a fairly substantial Defence was making clear what the OFT's position was in  
9 writing so that there would be no doubt what the OFT did or did not accept. My understanding  
10 really, standing here today, is that this is, in fact, the position, and I am somewhat puzzled that the  
11 Appellants claim not to know what the OFT's position is on a variety points. They have made one  
12 very specific point about the level of critical mass, but for example, on the question of whether or  
13 not individual selling is feasible where a number of people say that it was not, it is quite clear that  
14 the OFT takes a view that it was indeed the position in relation to the question of whether or not  
15 the bidders were all mad keen to have collective selling, that is a matter which is deposed to in the  
16 evidence where it is fairly clear both from the Decision and from the Defence that that is not  
17 something that the OFT is necessarily persuaded on. I am not quite sure at what level of detail the  
18 Appellants are really uncertain about what the OFT's position is. I do not at all wish to be  
19 unhelpful. I can see that if we are going to have a fairly tight timetable there may be room for  
20 working in advance, but at the moment I am uncertain as to why it is that the Appellants claim not  
21 to know what the OFT's position on these fairly fundamental questions is.

22 In terms of the timing the tight timetable that is being put forward does rather reinforce  
23 the OFT's concern that it should have a clear day in which to make its case. One possibility  
24 would simply be to make it clear that the OFT will start after lunch on the second day and the  
25 Appellants will have to sort themselves so that they are concluded by then one way or the other.  
26 Obviously, if everybody goes short then we may have to debate the matter at the end of the first  
27 day but we should at least know that we will be starting at two o'clock on the second day.

28 THE PRESIDENT: We sometimes set guideline timetables where it is not very clear whether a  
29 particular party is going to finish at 2.30 or 2.45 or whenever. Our view is at the moment that this  
30 is a case in which we should have a strict timetable and you should be able to know that you will  
31 start at two o'clock on the second day.

1 MR. THOMPSON: I am grateful. Then we will undertake to finish by lunchtime on the next day,  
2 whereas if we do not get put into bat until fading light on the second day the whole timetable  
3 could get compressed.

4 THE PRESIDENT: There are always unforeseen things that can crop up, but in principle we are going  
5 to try to do it in the way you suggest.

6 MR. THOMPSON: I am grateful.

7 THE PRESIDENT: Your reply to the facts, what is disputed and what is not disputed is, “Well, it  
8 should be pretty clear already what is disputed or where the OFT stands on these points”.

9 MR. THOMPSON: Yes, the OFT’s stance is very fully apparent, we would say, in the Decision and  
10 even more fully apparent in the Defence. I think the other thing I would say is that the principal  
11 areas of dispute, the two areas I have suggested, are not issues of primary fact about what  
12 happened at particular meetings, whether particular things were said, but about what was or was  
13 not feasible in this market at that time, which are very largely questions ultimately of opinion to be  
14 inferred from the whole of the evidence, and where, in my submission, it is quite different for the  
15 OFT not to accept what a particular individual may express as his opinion and what would have  
16 happened as against saying that that person is lying. I do not think there is anything where we are  
17 suggesting that somebody has said something which is untrue as a matter of primary fact in that  
18 sense, although if there is such a thing then I can see that that is something which we might need  
19 to make absolutely clear. At the moment, standing here, I am not aware that we are talking about  
20 issues of primary fact, what did happen on particular days, as against understanding the market –  
21 for example, what other bidders would have done in particular circumstances.

22 THE PRESIDENT: Yes. On that latter point, you say it is not so much primary fact but a question of  
23 assumption and inference and conclusion as to what would be reasonably likely in these sorts of  
24 circumstances?

25 MR. THOMPSON: Yes, if I could use the example which is repeated quite frequently in the RCA  
26 Reply where it is said that Channel Four wanted all the rights. That is not a matter, I think, within  
27 the knowledge of any of the witnesses and there are various documents, in particular various press  
28 articles, that we rely on to show that they did not want all the rights and Channel Four say much  
29 the same sort of thing. I am not sure that that will actually go to that level. It might be a matter  
30 which is very material and where the OFT and the Appellants might take a quite different view on

1 the basis of the documents, but we are not sure that there is anything very useful that can be done  
2 by way of schedules, and so on. It is fairly clear that that is an issue on the pleadings.

3 THE PRESIDENT: Yes. Let us see what Mr. Vajda and Mr. Vaughan have got to say about that. If we  
4 are going to try and take the facts any further, I suppose it might involve the appellants asking  
5 themselves, “What facts are crucial for us for our case and to what extent is it clear whether or not  
6 the OFT accepts those facts?” If you have got issues where you say you are genuinely unclear as  
7 to what their position is – Mr. Thompson says their position is clear – it always open to you to try  
8 to clarify it further in correspondence before the hearing or to narrow it down to very crucial  
9 points. There are maybe three or four points and it may be that the OFT will say, “I rely on  
10 paragraph so and so of the Defence”, and you will say, “Well, that does not deal with this point in  
11 X’s witness statement, so what is your position on this point in X’s witness statement?” I just do  
12 not know. It is a bit difficult for us at the moment, not being deeply into the facts, to know quite  
13 how to handle it.

14 MR. VAJDA: Yes. The last thing we want to do is to turn this morning into a hearing that goes deeply  
15 into the facts. Part of the difficulty arises from the fact that we have had three, but not four,  
16 rounds of written pleadings – Mr. Thompson, of course, is saying there is a Decision, but things  
17 have moved on since then – and, as the Tribunal observed, we have put in a very full Reply  
18 dealing with a number of what we would say are inaccuracies. I have no idea – this is about 20  
19 pages in in our Reply – to what extent the material in there is now accepted and disputed by the  
20 OFT, and this comes back to a point I made earlier. Plainly, if the OFT say, “Most of this we now  
21 accept, we accept everything apart from these three paragraphs”, that would obviously shorten  
22 what I would otherwise have to do. This, of course, is linked to the question of the order of  
23 skeleton arguments.

24 THE PRESIDENT: Absolutely.

25 MR. VAJDA: That is really the point I am making.

26 THE PRESIDENT: That is the point that you are making, yes. Mr. Thompson, I think what Mr. Vajda  
27 is a point that had also occurred to us, particularly in the context of the order of skeleton  
28 arguments. Obviously what we do not want to happen is to find out at lunchtime on the second  
29 day what the OFT’s position is on certain points, particularly in the Reply, if at that stage disputes  
30 emerge that could have been identified at an earlier point. There are two ways of doing that – at  
31 least two ways, maybe more than two. One is for the parties to have some kind of exchange

1 between themselves to establish to what extent matters in the Replies are disputed as far as facts  
2 are concerned, and/or for the OFT to go first in its skeleton argument, which would stand not only  
3 as a skeleton argument but as a sort of rejoinder to the Reply, which would be an economical way  
4 of dealing with the pleadings. On either view, it would avoid the possibility of something popping  
5 up at the stage of the OFT's submissions that the Appellants ought to have had a chance to deal  
6 with in their opening. It is just a question of avoiding that sort of misunderstanding.

7 MR. THOMPSON: Absolutely, I understand that, and it may be that what we are really discussing is  
8 what the best mechanism because it is obviously not in the OFT's interests to have the thing go off  
9 half cock, as they say, because ----

10 THE PRESIDENT: No, quite, I think we are just discussing mechanism at the moment.

11 MR. THOMPSON: I think that may also raise the question – I think Mr. Vaughan raises the possibility  
12 of, as it were, tendering his witnesses for cross-examination because he is so enraged at the OFT  
13 not accepting some point in that statement. I think it is implicit from what the Tribunal said in  
14 opening that, in principle, the Tribunal is not looking for witnesses to be tendered to inform itself  
15 of this particular ----

16 THE PRESIDENT: Not at this stage, no.

17 MR. THOMPSON: The matter can be debated by reference to witness statements and some form of  
18 schedules setting out what is or is not agreed.

19 THE PRESIDENT: That is our present view. It is always, of course, possible that as one gets deeper  
20 into matters in the course of a hearing one realises that there is some factual issue that one  
21 absolutely needs evidence on, in which case one would have to re-schedule a later occasion to  
22 have some evidence. I think at the moment we do not feel we need to physically have oral  
23 evidence from witnesses.

24 MR. THOMPSON: I wonder if I could have a moment to see what the OFT have in mind as to possible  
25 ways of helping the Tribunal. I do not say that we need to have a break, but if I could just turn  
26 round. (After a pause) I think the OFT's suggestion would be, which is something of a hybrid of  
27 what is being suggested, that we would certainly do our best in our skeleton argument to set out  
28 any specific points of fact that were disputed, for example in particular witness statements, and  
29 also we would do our best to respond to any questions along the line that the Tribunal was  
30 suggesting about points that the Appellants were unclear about in terms of what was and was not  
31 in issue. We think that, given the timetable is relatively short, is probably the best way forward.

1 I am obviously open to suggestion from the Tribunal or from the Appellants as to whether that is  
2 the best way forward.

3 THE PRESIDENT: That might imply that you would actually go first with your skeleton argument?

4 MR. THOMPSON: I think it probably would imply that, yes.

5 THE PRESIDENT: Which might have some advantages, not just for you but for the case as a whole.

6 MR. THOMPSON: You will appreciate the whole question of who goes first is quite a sensitive one,  
7 because these are Appellants.

8 THE PRESIDENT: Quite, they are the Appellants. You are the Respondent. There are interesting  
9 issues within this case as to on which points who bears what burden of proof and what difference  
10 it makes, if any.

11 MR. THOMPSON: Yes, indeed, and the issue of quite what a reply is in these proceedings is a further  
12 interesting question, because I think at some points a reply is thought of as a fairly formal  
13 document, whereas these Appellants – and it is no criticism of them – have obviously set out their  
14 Reply almost like a further Notice of Appeal.

15 THE PRESIDENT: You think there are things in the Replies that should have been in the Notice of  
16 Appeals?

17 MR. THOMPSON: I do not know, it is more the form of it. They have gone back to square one and  
18 argued the whole case again in the Reply. I think they are now asking, “Why has the OFT not  
19 responded to points?” It is perhaps a slightly unusual procedure from that point of view as well, in  
20 that we have now got two sets of accounts of the facts from the RCA and they now seem to be  
21 relying on the Reply rather than on the Notice of Appeal even though they argued the facts quite  
22 fully in the Notice of Appeal. It is a slightly unusual situation, but that would be our suggestion.

23 THE PRESIDENT: Yes.

24 MR. VAJDA: Without getting into a debate as to the quality of our reply, could I say that we, for our  
25 part, would be content with what Mr. Thompson suggests, which, as I understand it, would be for  
26 the skeleton argument to serve as a sort of hybrid – that is to say to deal with outstanding points,  
27 or to tell us and Mr. Vaughan what facts are in dispute both as regards the witness statements and  
28 the Replies. My only observation on that would be so far as timetable is concerned. Given that it  
29 is this hybrid document which involves questions of fact, we would suggest that that should be  
30 filed in, say, the middle of February to give us sufficient time to respond. What I had in mind,  
31 looking at my diary, was the 14<sup>th</sup> February, which is a month before the hearing.

1 THE PRESIDENT: You had suggested the 28<sup>th</sup>, I think.

2 MR. VAJDA: This was on the assumption that the factual dispute could be resolved in some other way.

3 I am content with the way that Mr. Thompson wishes to deal with it, but I think, if it is going to be  
4 dealt with by way of a skeleton argument, it is slightly different from the normal sort of skeleton  
5 argument, and therefore, in my respectful submission, it should be filed a little earlier than a  
6 normal skeleton argument would be.

7 THE PRESIDENT: Yes.

8 MR. VAJDA: Mr. Vaughan has suggested 21<sup>st</sup> February or the 18<sup>th</sup>. The point is we are going to need a  
9 little more than a week, effectively, to deal with a document which is going to be dealing with  
10 disputed issues of fact.

11 THE PRESIDENT: I would have thought 21<sup>st</sup> February would not be a unreasonable date. Does this  
12 sound as if we are resolving things, Mr. Vaughan?

13 MR. VAUGHAN: Yes, I think so. The fundamental point is that if what was said in the notification is  
14 right the OFT is wrong. So the OFT has got to prove that what was said in the notification was  
15 not only wrong, but obviously wrong and deliberately wrong. We set out the bits of the  
16 notification, not signed only by RCA but also by all the companies, in our Notice of Appeal 79  
17 quite extensively, and we are going to assume that what was said there is right for the purpose of  
18 the hearing. My friend has got to show that that is wrong basically. They point out the  
19 connection, that they needed to negotiate ----

20 THE PRESIDENT: We do not need all that elaborated now.

21 MR. VAUGHAN: Basically they have got to show that is wrong, and our position is going to remain,  
22 from the point of view of the hearing so that my friend understands, that they have not gone  
23 anywhere near saying that those sort of things were just wrong and deliberately wrong and  
24 reprehensibly wrong. My friend said he does not have to say they are lying, but there are a large  
25 number of those things which nobody could have sworn to if they were not lying. So my friend  
26 has got to cope with that.

27 Also, some of the things we want clarification on are things which he did not deal with  
28 either in the Decision or the Defence, things like the business plan, the s.26 notices, the  
29 subsequent meetings, because we never got the subsequent meetings until after the last CMC. The  
30 s.26 notices we had to find from another file, where he relies on two. He relies on one Arena one,  
31 I do not think there is a point on that. He has never dealt with that at all. The reason for the

1 collapse of the venture, he has not dealt at all with that. So we will assume that he is not going  
2 beyond what he says in his Joint Defence.

3 THE PRESIDENT: You have put the OFT on notice now.

4 MR. VAUGHAN: Yes, so that there is no disagreement about that. Also we want to make it absolutely  
5 clear that if my friends want to say that the notification is wrong he has to call evidence, he cannot  
6 really do it by inference. The evidence he has adduced so far, a few letters from 2003, is not  
7 adequate. If he wants to prove they are wrong he has got to call evidence, or alternatively to  
8 adduce documentary evidence that is so convincing that it entitles the Tribunal to say that this was  
9 obviously deliberately wrong. You have got sworn statements, signed statements, and a certified  
10 declared as correct notification as against a few letters. I do not want my friend to think that it is  
11 going to be other than very difficult for him to prove what he is seeking to establish in this matter.

12 THE PRESIDENT: You rely very strongly on the initial matters?

13 MR. VAUGHAN: Yes. On that basis I would agree with Mr. Vajda that the 21<sup>st</sup>, a Monday, would be  
14 an adequate, and it would give us two full working weeks to provide ----

15 THE PRESIDENT: So 21<sup>st</sup> February for the OFT and 7<sup>th</sup> March ----

16 MR. VAUGHAN: And then two weeks for us. We do ours on 7<sup>th</sup> March and that gives everyone a  
17 week to think about it. I think what we may well do is to cover in our skeleton argument some  
18 things which we are not covering in our speech, so we can economise there, though not on the  
19 skeleton argument.

20 THE PRESIDENT: You can always cross-refer us to the pleadings so that we do not have to read things  
21 twice. So I think what we will simply say on the question of the facts in dispute is that in its  
22 skeleton argument to be served on the 21<sup>st</sup> ---- I am sorry, Mr. Thompson.

23 MR. THOMPSON: The debate between the Tribunal and the Appellants led to a small re-think by the  
24 OFT simply because of availability as to whether it would be acceptable for us to produce a  
25 schedule by the 21<sup>st</sup> and our skeleton argument by the 28<sup>th</sup>, because otherwise I think the timetable  
26 is getting tight from our point of view. If what is really causing this acceleration is the need to  
27 define issues of fact then we would undertake to produce a schedule identifying the issues of fact  
28 by the 21<sup>st</sup> and then our skeleton argument on the points of law on the 28<sup>th</sup> in accordance with the  
29 timetable originally proposed by the Appellants. That would be acceptable to us, but we think it  
30 would be very tight to produce everything by the 21<sup>st</sup>.

31 THE PRESIDENT: What is the availability problem?

1 MR. THOMPSON: Well, it is partly mine, partly Mr. Gregory's and partly the OFT's, it is a  
2 combination.

3 THE PRESIDENT: How does that strike you, Mr. Vajda?

4 MR. VAJDA: It does not strike me very happily. We are five weeks away. They have had our Reply  
5 since 3<sup>rd</sup> December, and we would submit that, given the OFT are willing to do it by way of  
6 skeleton argument, the date proposed by the Tribunal should be followed. It would be much  
7 easier to have everything in one document. We cannot really work on the facts until we know  
8 what they say on the law.

9 THE PRESIDENT: (After a pause) I think, Mr. Thompson, we have to stay with the 21<sup>st</sup>. Do your best  
10 endeavours for the 21<sup>st</sup>.

11 MR. THOMPSON: We will do our best. It may be longer than it would otherwise be, but we will try  
12 not to have the same thing twice.

13 I should perhaps also say – it perhaps does not require saying – we did not entirely accept  
14 the way that Mr. Vaughan put it.

15 THE PRESIDENT: Not entirely, I am sure. I have the impression that directly or indirectly we have  
16 probably covered quite a lot of the points that are raised in items 2 to 6 of the agenda.

17 MR. VAUGHAN: Sir, I think the item that remains unresolved, or undealt with, is the OFT's request  
18 that you indicate that they can prove their case merely by inference as opposed to anything else.  
19 Obviously we object to that strong, but that is going to become more apparent ----

20 THE PRESIDENT: That is p.4 of the OFT's observations?

21 MR. VAUGHAN: Yes, the end of point 3. Obviously we would be, as we made clear, totally opposed  
22 to that and that is obviously a crucial issue. One does not need to resolve it now because our  
23 position is clear and it is going to depend on how much factual dispute there is, whether they are  
24 primary facts or secondary facts – whether conclusions can be drawn from documents or whether  
25 they are primary facts. I think we would certainly be totally opposed to them even thinking they  
26 could proceed on that basis. It is a fundamental procedural question, but I do not think we need to  
27 embark upon that until we actually see what we are talking about. It may be that we are talking  
28 about nothing very much, a date or two or something like that. It does not seem appropriate to  
29 give that assurance at any stage, let alone when we do not know what we are talking about.

30 MR. VAJDA: I agree entirely – we have said it in our skeleton argument – with what Mr. Vaughan has  
31 said. This is an important point because if one takes them to a judicial review where cross-

1 examination is not the norm, but it is well established that if one is going to be challenging witness  
2 evidence one has to cross-examine the deponent and obviously it is important, if there are factual  
3 issues that have to resolved, they are resolved in a way that is consistent with the way it is done in  
4 English court proceedings. If this case were to go to another place one could not say, "This has  
5 gone by default", so we very much put down a marker together with Mr. Vaughan on this point.

6 THE PRESIDENT: Mr. Thompson, I do not think you have much prospect of getting from the Tribunal  
7 the confirmation that you are seeking here. It is a matter really for the OFT to decide for itself  
8 what crucial facts that are in issue that are relied on by the appellants it wishes to challenge. If it  
9 decides to challenge them by means of a countervailing witness statement or countervailing  
10 evidence and leave it to the Tribunal to decide it on the evidence, it is rather difficult for the  
11 Tribunal to say in advance what would or would not be an acceptable procedure. It is always  
12 possible, I suppose, when, as Mr. Vaughan said, we are further into what we are really taking, that  
13 either the Tribunal or the parties, or one of them, will say, "This is a point on which we really do  
14 need to get to the bottom of and do need to arrange a specific occasion when we have to hear some  
15 evidence physically", but at this stage I do not think there is nothing we can say as a Tribunal.

16 MR. THOMPSON: There may be some misunderstanding because the timetable that the Tribunal has  
17 established is entirely consistent with the OFT's understanding of the position and inconsistent  
18 with some of the more robust submissions that Mr. Vaughan has just made, which is that  
19 essentially anything put forward on a piece of paper that is signed as true will necessarily be  
20 accepted in terms of the overall analysis of the cases. I think the OFT's point is that it is quite  
21 clear that many of the witnesses hold strong feelings about the way this case has turned out and  
22 clearly resent the OFT's decision and say certain things in their statement to that effect. Merely  
23 because they have given a witness statement that clearly disagrees with the OFT, it is not  
24 necessary to cross-examine them to debate the underlying issues in the statements. I think it is  
25 more in that area that the OFT's decision not to enter into polemical debate with witnesses does  
26 not mean that we accept their analysis of what would have happened in certain circumstances or  
27 their analysis of the market. As I understand it, that is normal practice, both in the court of first  
28 instance where matters are often dealt with on documents and this Tribunal where broader issues  
29 of competition policy and evidence need to be decided by reference primarily to the documents  
30 and the economic underlying reality rather than by entering into cross-examination of witnesses.

1                   We have heard the debate that has gone on today and we will do our best to focus any  
2 issues of fact in the way that we have discussed, but we are not really seeking any more than to  
3 understand that the normal rules will apply and that this will not be a matter where it will be  
4 treated like a murder trial where every point has got to be debated and developed with the  
5 witnesses before it can be accepted. It is that type of point that we are seeking to discourage.

6 THE PRESIDENT: I think we should just leave it there. Are there any other applications or  
7 observations from anybody?

8 MR. THOMPSON: There is one other point: the papers behind you, sir, you may think there is a  
9 degree of duplication in the bundles and I do not know whether you would like to give some  
10 guidance or invite the parties to try and reach agreement as to the best way forward. I see that the  
11 bundles have already started to be numbered behind you and it may be that you wish to stick to  
12 that numbering. I thought I should just raise the issue of bundles.

13 THE PRESIDENT: I suggest your instructing solicitors get in touch with the Registry staff and see  
14 whether there is any particular step that needs to be taken.

15 MR. VAUGHAN: The only other point, Mr. Thompson, I am reminded, said he would use his best  
16 endeavours to get in on the 21<sup>st</sup>. We are assuming he is going to do that and the endeavours are  
17 that he is going to use his best endeavours.

18 THE PRESIDENT: That is date that will appear in the Tribunal's ----

19 MR. VAUGHAN: That is fine, thank you very much.

20 THE PRESIDENT: Thank you very much. There is a further point that Professor Bain would like to  
21 raise.

22 PROFESSOR BAIN: Thank you, President. There is one issue on which we would like some guidance.  
23 We think that in the first instance it is an issue for the OFT. We are unclear as yet about one  
24 aspect of the Decision which has occurred to us which may possibly have some bearing on the  
25 OFT's economic argument, so it would be helpful, Mr. Thompson, if you could address this issue  
26 in your skeleton argument before the hearing so that we know about it in advance.

27                   The market for non-LBO bookmaking is said to comprise a distinct economic market  
28 separate from the markets for other rights – for example, LBO bookmaking rights. It is accepted  
29 that punters may switch between alternative means of placing bets if the odds available differ.  
30 This downstream substitutability does not feed through into the upstream markets for rights  
31 because it is said if the payments for rights take the form of fixed lump sum payments, economic

1 theories suggest that in most circumstances a change in the level of payments will not affect the  
2 odds offered to punters.

3 If, in contrast, the payments had been linked to the betting turnover generated, economic  
4 theory would suggest that in most circumstances an increase in the payments for non-LBO  
5 bookmaking rights would translate into poorer odds for punters or a compensatory reduction in  
6 other costs, such as marketing costs, leading to fewer punters placing internet or IDTV bets. So  
7 the fact that the rights payments under the agreement were broadly fixed is crucial to the  
8 identification of the market for non-LBO bookmaking rights as a distinct market. Economic  
9 markets are usually or normally defined, to my understanding, by references to their  
10 characteristics in a competitive situation, in order, for example, to avoid the cellophane fallacy.

11 At first sight the OFT's counter-factual of a competitive situation seems to involve fixed  
12 payments, the OFT would say lower fixed payments than they would have been under the  
13 agreement. If the competitive counter-factual involved payments linked to betting turnover then  
14 an increase in these payments would affect the odds of the products offered to punters, and the  
15 market for non-LBO bookmaking rights would not be a distinct economic market.

16 Turn now to the OFT's case on the distortion of non-price competition. Here the  
17 argument seems to be that the fixed nature of the payments under the agreement eliminated  
18 incentives which would have existed in a competitive situation – in other words, the counter-  
19 factual competitive situation involved a payment structure that would have contained links  
20 between the rights payments to individual racecourses and the betting turnover generated by their  
21 races. It seems, therefore, that there may possibly be an inconsistency in the OFT's competitive  
22 counter-factual. For the purpose of market definition the rights payments are fixed; for the  
23 purpose of non-price distortion the same payments appear to be variable.

24 Mr. Thompson, it would be helpful to us if the OFT could sort out our confusion or  
25 clarify the position before the hearing.

26 MR. THOMPSON: Yes, I am very grateful for that. I should perhaps have mentioned that we were also  
27 grateful for two questions on the last occasion we were before the Tribunal, and we will seek to  
28 address those issues. I am afraid I am not going to attempt to answer that quite complex question  
29 standing up now.

1                   Since I am standing up there is one other issue which we should perhaps air before the  
2 Tribunal, which is the BAGS issue which is related to the non-price issue where Mr. Vajda has  
3 indicated his dissatisfaction.

4 THE PRESIDENT: He objects to that.

5 MR. THOMPSON: That said, he has dealt with it in one of his witness statements, Mr. Gundill, and  
6 says that he will deal with it further in his skeleton argument. It occurred to us that that was not  
7 necessarily a very satisfactory way forward and if the matter is going to be debated then it should  
8 be debated on the basis of evidence. It is clear from Mr. Gundill's statement that there is at least  
9 one such contract in the possession of the Appellants and the OFT has also seen two non-  
10 Appellant racecourses' contracts. So it seemed to us that it may be suitable for this to be the  
11 subject of further evidence. I raise it for the Tribunal on that basis. I do not know whether  
12 Mr. Vajda wishes to take this matter further. We did not think it was very satisfactory that an  
13 issue that might have been one of primary fact was only going to be dealt with in the RCA  
14 skeleton argument, particularly if the RCA skeleton argument was going to come after the OFT  
15 one.

16 THE PRESIDENT: I think our initial view was that we did not particularly want to go into all this  
17 because it is not really something that figures at all in the decision. Do you want to react to what  
18 Mr. Thompson has just said, Mr. Vajda?

19 MR. VAJDA: It is para.4.100, p.53 of our Reply. We take a number of points. Our main point is that it  
20 is totally new stuff. We did not think it would be sensible to make an application to strike it out,  
21 because I do not think that is the way the Tribunal works. We say this has not been properly  
22 formulated. The OFT have now come back in their skeleton argument for this hearing trying to  
23 defend their position. If the Tribunal takes the view that this is irrelevant that would be very  
24 helpful to us because that would then eliminate an issue that we need to deal with. I am very  
25 happy to proceed on that basis. It is really, in our view, for the OFT to put its case on BAGS,  
26 which it never has done, but having made a few comments in their note for this hearing plainly  
27 I cannot allow those comments to, as it were, remain unsaid, unless the Tribunal says, "Do not  
28 bother to pursue that avenue, it is irrelevant", in which case obviously we will not.

29 THE PRESIDENT: (After a pause) I think our present feeling on this BAGS point is that it is  
30 something of a distraction, Mr. Thompson, it is not in the Rule 14 Notice and the Decision.  
31 Although these Appeals do tend to get a life of their own it is quite difficult to bring in new stuff

1 that the Appellants did not have a chance to comment on in their Notice of Appeal. I am not sure  
2 that it is going to be particularly fruitful to try and develop this aspect.

3 MR. THOMPSON: As we put in our skeleton argument, there is obviously an issue of the counter-  
4 factual which is being joined both by the OFT and by the Appellants and indeed is raised by  
5 Professor Bain's question. On that basis it is potentially relevant to what the counter-factual  
6 would have been and it is now an issue which is apparently in the case. So if there is primary  
7 evidence ----

8 THE PRESIDENT: Yes. (After a pause) Professor Bain is just pointing out that there is possibly a  
9 timing issue as well as to what is the relevant time this particular evidence is talking about, rather  
10 than the time the agreement that we are discussing in the Appeal was set up.

11 MR. THOMPSON: I fully appreciate that.

12 THE PRESIDENT: Leaving that aside there are possibly procedural difficulties in going too far down  
13 this particular road. At the moment and provisionally, I am not sure that the Tribunal is clear that  
14 this is potentially relevant. I am not sure that we can take it much further than that at this stage.

15 MR. THOMPSON: It may be that between the parties ----

16 THE PRESIDENT: Just pursue it between the parties as you wish, but I am just giving a very  
17 provisional indication of how we see it at the moment. I suspect there are more important points  
18 in the case than this one.

19 MR. THOMPSON: I suspect that that is so.

20 MR. VAJDA: Could we leave it on this basis, that we will not pursue the BAGS point unless invited to  
21 do so by the Tribunal?

22 THE PRESIDENT: Let us see how far the OFT pursues it. It is a point raised by the OFT, is it not?

23 MR. VAJDA: Yes, and, as I understand it, the Tribunal's view for the present is that it is not a relevant  
24 point, in which case, in order to reduce contentious issues, we will not deal with it.

25 THE PRESIDENT: You do not need to deal with it unless it figures in their skeleton argument. If it  
26 figures in their skeleton argument you will have to spell out what your position is.

27 MR. VAJDA: Yes.

28 THE PRESIDENT: Thank you all very much indeed.  
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