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IN THE COMPETITION  
APPEAL TRIBUNAL

Case No. 1036/1/104

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

27th July, 2004

Before:  
THE HONOURABLE MR. JUSTICE LINDSAY  
(Chairman)  
PROFESSOR ANDREW BAIN  
MR ADAM SCOT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

ASSOCIATION OF BRITISH INSURERS

Appellant

-v.-

OFFICE OF FAIR TRADING

Respondent

Mr. Richard Fowler and Miss Valentina Sloane (instructed by Eversheds) appeared for the Appellant

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

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**CASE MANAGEMENT CONFERENCE**  
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1 THE CHAIRMAN: Who is going to speak first?

2 MR. HOSKINS: Sir, I am not sure I have a great deal to say on behalf of the OFT. We have  
3 obviously set out the position in our letter. I think probably the only thing I should add is  
4 what we understand will now happen is that this situation, if you like, with the GTA, and  
5 the legality of the GTA, will now be brought into the post-modernisation regime, and I am  
6 quite happy to expand upon the difference between the pre-modernisation and the post-  
7 modernisation if the Tribunal wishes. Basically, where it will be left is that it will be a  
8 matter for the parties to the GTA to take their own view as to whether they fall foul of the  
9 Chapter I prohibition and, if so, whether they comply with the requirements for exemption  
10 which are laid down in the Act after amendment and then simply to add that the Office, for  
11 its part, reserves the right to take action in future in that post-modernisation regime if it  
12 feels that that is appropriate. But, subject to that we do not intend to contest this appeal for  
13 the reasons set out in the letter.

14 THE CHAIRMAN: Yes, well plainly the original agenda has been overtaken by events and  
15 something definitely has to be done. We have obviously given some thought to what would  
16 be appropriate. We do not think it would be right simply to allow the appeal because we  
17 think that there are public interest matters that fall for consideration here which they would  
18 not get if we merely allowed the appeal. Given that the OFT is not minded to pursue the  
19 appeal, we had in mind remitting the matter to the OFT with directions as to a number of  
20 subjects which seemed to us of possible relevance.

21 What we have done in the course of the morning is to knock out what seemed to us a  
22 possible Order, but obviously the parties have not seen that and they might wish time to  
23 consider it – they might think it is totally inappropriate – we do not know how they would  
24 react. I think the best course would be for us to hand out copies of what we had in mind so  
25 that you can understand what we are talking about, and that is now being done. [*Document*  
26 *handed to the parties*] It might even help if we rose for ten minutes, or some relatively  
27 short time, for you to see what was a first response. If, for example, it became clear that,  
28 although you would like time to consider this, the matter could be dealt with this week that  
29 would be one thing. If it could not be dealt with this week then we are at the end of the legal  
30 term, people go on holiday and we are looking at probably quite a long adjournment. It  
31 would be mightily convenient for all I would have thought, that if time is needed that the  
32 time could be spent this week. But would it assist if we rose for ten minutes in order for you  
33 to see the sort of things we had in mind? You must appreciate that this all provisional. It  
34 could be that the OFT, seeing this, would wish to oppose it – it could be that other people  
35 would wish to oppose it and obviously were it to be opposed we would hear argument with

1 an open mind, but this seemed a framework for going forward.

2 MR. HOSKINS: Can I ask perhaps for 15 minutes, because that will allow each of the parties to  
3 consider it themselves.

4 THE CHAIRMAN: At least to read it, yes.

5 MR. HOSKINS: And if needs be to actually discuss the position with the other parties.

6 THE CHAIRMAN: Shall we sit again at 25 past 2, and you will have had time to see what you  
7 think.

8 MR. HOSKINS: Thank you.

9 (The hearing adjourned at 2.05 p.m. and resumed at 2.25 p.m.)

10 THE CHAIRMAN: Mr. Hoskins, you have had a moment to look at this. I do not know what  
11 reaction it excites. Is further time needed, and if it is could this week suffice? Or is there  
12 some other reaction?

13 MR. HOSKINS: Mr. Fowler has a "Plan B", and I think it is probably best for him to present that  
14 first, and then I can state the Office's position in relation to that.

15 THE CHAIRMAN: Yes, Mr. Fowler?

16 MR. FOWLER: As we understand it, you put forward this proposal because you would not be  
17 willing, understandably, to grant the relief we sought in our application without an  
18 investigation. In our application, of course, we were seeking not merely to have the  
19 decision set aside, but also to have either a decision that the GTA fell outside Chapter I, or  
20 that it was eligible for exemption without amendment. In the light of what my friend has  
21 said on the OFT's position, my clients are content to see an order made that merely set aside  
22 the OFT's decision but with costs we would say. Then we would be left in the same  
23 position as any other agreement post-modernisation with no decision against, and merely to  
24 be dealt with if and when occasion arose in the normal way to the courts. It would seem to  
25 us that that would be the most appropriate way of proceeding.

26 THE CHAIRMAN: The difficulty about that is that we would be undoing the decision that at the  
27 moment there is an infringement of Chapter I without being satisfied that it would be right  
28 to undo that decision. Obviously, we have not heard the parties on the issue and, as you  
29 will have seen from our little list, (i) to (x), there are a number of things we think merit  
30 investigation and which might not have been adequately investigated so far. If we just  
31 undid the whole decision then it would be left to some parties at some time to come back  
32 and start another old process, but not necessarily in the focused way which this draft would  
33 provide.

34 MR. FOWLER: It appears to us, Sir, that the points that have been raised have, in fact, been

1 explored in the course of the investigation that has taken place over the last two years and,  
2 indeed, the decision reflects in many respects a degree of agreement between the ABI and  
3 the OFT as to some of the main areas of concern that you raise. I think that the area of  
4 particular importance, so far as we are concerned, is the fact that in relation to what you call  
5 in this draft order the “effective price”, that is to say the terms of settlement as between the  
6 CHO and insurer in any particular case we say, for the reasons we have set out in our  
7 application there is absolutely no scope for competition being distorted in any  
8 circumstances. The real issue that we think needs to be explored, if anything, in which we  
9 think the Decision of the OFT failed and the reason why we appealed against it, is that it has  
10 failed to look and see where and how the effect on competition alleged arose. We believe  
11 that that is a defect in the Decision and one on account of which it is right and proper that  
12 the Decision should be set aside. Thereafter the matter could perfectly well proceed without  
13 the need for any further investigation on the part of the OFT, merely relying on the normal  
14 procedures that would apply to any other agreement in these circumstances.

15 THE CHAIRMAN: It is certainly open to you, obviously, to press forward your appeal whether  
16 the OFT opposes it or not. What the result would be is a different matter because it could  
17 be that the result would end up with something rather like this draft in any case, but it is  
18 open to you to press that, if you wish.

19 MR. FOWLER: If the Tribunal feels that it is necessary that the matter be remitted for further  
20 investigation by the OFT, then what Mr. Hoskins referred to as “Plan B” is called into play.

21 THE CHAIRMAN: Let us hear about Plan B then.

22 MR. HOSKINS: Sir, before we move to that, can I make submissions which will actually support  
23 Mr. Fowler’s original suggestion which is that the Decision be set aside. The reason why  
24 we take that position is as follows. First, in terms of whether the Tribunal would be undoing  
25 a decision which finds a Chapter I infringement, I think it is important to understand that, in  
26 setting aside the Decision, the Tribunal would not be making a statement one way or the  
27 other as to the compatibility of the GTA with a Chapter I prohibition. The question of  
28 legality of GTA would stand open. So setting aside the Decision would not connote one  
29 thing or another in terms of legality, it would leave the position open.

30 The second point is that if the matter to be remitted, and I must admit I realise the  
31 problems as I stand up, one gets into the problem of the transitional provisions as between  
32 the pre-modernisation regime and the post-modernisation.

33 THE CHAIRMAN: You will see at the head it says: “By way of determination of the appeal”, it  
34 was intended thereby to bring the current appeal finally, quite plainly, expressly, to an end,

1 so that if the matter was investigated in the way that the draft suggests, and if there were to  
2 be litigation thereafter it would be entirely fresh and therefore under the new regime.

3 MR. HOSKINS: Sir, that takes away the point I was going to make, namely, is it better to bring  
4 this kicking and screaming into post-modernisation rather than trying for some halfway  
5 house.

6 THE CHAIRMAN: Yes.

7 MR. HOSKINS: So what is left of the first point I made, the question of legality stands open. As  
8 I made clear in my opening remarks, the OFT does reserve the right to take action in the  
9 future if it considers it appropriate. Our primary submission is that it is actually more  
10 appropriate to leave it to the Office as a question of priorities and public concerns, to  
11 decide whether it should take action or not against the GTA, this Decision having been set  
12 aside.

13 THE CHAIRMAN: Would you be in a position to offer an undertaking that fleshed out  
14 something that rather obviously covered grounds such as (i) to (x) here.

15 MR. HOSKINS: That is certainly not the intention. Our primary submission is simply that the  
16 OFT, having heard what the Tribunal has said, and obviously having seen the draft order,  
17 will then obviously go away and consider very carefully whether, as a result of the concerns  
18 expressed it should take action, post-modernisation action, at this stage, but the submission  
19 is that ultimately it is best to leave that decision to the Office rather than requiring the  
20 Office to take action by way of remittal, that is the way we would put it.

21 THE CHAIRMAN: If we merely leave it to the Office, the Office might not look into the very  
22 things which we think in the public interest ought to be looked into. If you have either an  
23 order such as this under your belt, or an undertaking that does much the same, then we  
24 could be relatively comfortable with the fact that the public interest was being sufficiently  
25 looked into.

26 MR. HOSKINS: Sir, I think the position is in terms of the protection of the public interest, with  
27 respect, it is a question of who is the first arbiter of whether action should be taken. Now,  
28 what the OFT is not saying is “set aside the Decision and we are never going to look at it  
29 again.” It is saying set aside the Decision and, as a public Body with the functions that it  
30 has, we will obviously consider very seriously what the appropriate way forward is post-  
31 modernisation. In our respectful submission actually that is the way it should be done,  
32 because if one accepts that setting aside the decision is neutral in terms of legality, the  
33 question is then simply who should decide whether further investigation should, or should  
34 not take place – the Tribunal or the OFT? Our submission would be that once the Decision

1 has been set aside it is actually appropriate for the OFT to take that Decision, because the  
2 first port of call under the Act in terms of deciding whether to take action is the Office  
3 rather than the Tribunal.

4 THE CHAIRMAN: That would be a perfectly tenable view had it appeared that features such as  
5 these (i) to (x) had been considered the first time around. If they had not been considered  
6 the first time around, could we be sure that they would be considered the second time  
7 around? That would be a concern if we simply left it to the OFT to do or not do as it chose,  
8 which is why we tried to flesh out areas which we really think in the public interest should  
9 be looked into.

10 MR. HOSKINS: That is probably what lies between us, Sir, because if we were to embark upon a  
11 remittal route again my submission, which I suppose takes us to Plan B, would be that even  
12 if the matter were to be remitted it should not be remitted in terms of “you must investigate  
13 (i) to (x). The basis of that submission is the same as I have just stated in relation to our  
14 preference for Plan A which, in terms of scope of investigation, that is a matter that  
15 primarily should fall to the Office rather than to the Tribunal to decide. So if we do get to  
16 Plan B and its remittal my submission would be in fact that the Tribunal should not be  
17 saying “you must do (i) to (x)” – I say that because first of all it is not for the Tribunal to  
18 assess priorities in terms of public interest, and I say that with all due respect.

19 THE CHAIRMAN: Well not alone. Although you are guardians of the public interest, as I would  
20 readily accept, you are not the only guardians, and we are the guardians of the guardians,  
21 which is why we were concerned that the (i) to (x) did not, on the face of things, get  
22 sufficient consideration first time round, or at any rate the position is such that we would  
23 wish them to be looked into a second time around. As I say, if you can satisfy us with an  
24 undertaking then that would plainly suffice, and we could then drop the direction. But I can  
25 quite see for amour propre reasons, if no other, a direction looks a little hard, but that could  
26 be avoided, as I say, with a timely undertaking. Whether it would help you to have time to  
27 frame an undertaking is for you to consider.

28 MR. HOSKINS: Sir, our preference is not to be either directed to do specific things, or to have to  
29 undertake to do specific things. To summarise the position, what the Office says today is  
30 that we have obviously seen the Tribunal’s concerns, and those will be considered very  
31 seriously within the Office, but that the Office should be left to take account of those  
32 considerations and to come to a decision itself as to what is the best way forward it sees fit,  
33 rather than being directed, or an undertaking being told we must investigate (i) to (x). I am  
34 sorry if that is blunt, but I think that is what the position comes down to.

1 THE CHAIRMAN: Well, to be equally blunt, you might find difficulty in persuading us that  
2 simply to leave it totally unregulated was sufficient given the “inadequacy” would be too  
3 strong a word, but given the outcome of the first time round.

4 MR. HOSKINS: Sir, I understand that position. I do not think I can take our position much  
5 further.

6 THE CHAIRMAN: Perhaps it is for Mr. Fowler to consider whether the appeal runs on in your  
7 absence, or in your presence, as it really would have done.

8 MR. HOSKINS: Well, Sir, if the position is that Mr. Fowler’s Plan A, which is to allow the  
9 appeal to set aside the Decision, is not to be accepted then one does move into  
10 consideration of scope of remittal, and if that is the case then you have had my submissions  
11 on the Office’s preference, namely, if there is to be a remittal it is to be without (i) to (ix)  
12 being specified, but the Office obviously has seen what the Tribunal has said. If that  
13 submission is not accepted and there is to be a (i) to (x), whether it be by way of direction or  
14 undertaking, then we would ask for some days to actually consider (i) to (x) because I think  
15 we do need to go back to the ----

16 THE CHAIRMAN: Can you do it this week? It behoves everyone, I think, to get rid of it if we  
17 can this week. The reasons are obvious, the beginning of August all sorts of holidays start.

18 MR. HOSKINS: We will do it this week, Sir.

19 THE CHAIRMAN: Any particular day this week? Can you come back Thursday, Friday?

20 MR. HOSKINS: Can I just take instructions?

21 THE CHAIRMAN: Yes. Friday, I think, Mr. Hoskins, is probably the only one we can do. That  
22 shortens debate!

23 MR. HOSKINS: Friday it is then.

24 THE CHAIRMAN: Everything else rather does depend on this first question, does it not?  
25 Whether there are other things on the agenda that we can get rid of now that might save  
26 time later.

27 MR. HOSKINS: I suggest if there is to be a further hearing on Friday, is close of business for  
28 written submissions cutting it too fine for the Tribunal? Are you envisaging sitting at 2 or at  
29 10.30? When would you envisage having something in writing – if that is indeed what you  
30 are envisaging?

31 THE CHAIRMAN: If we sat at 2 and you had submissions in by 10.30 – preferably before, but  
32 not later than 10.30 on Friday. Your side might well wish to put in observations, or  
33 argument or whatever.

34 MR FOWLER: I think we certainly would, Sir, and probably I think we would wish to put in our

1 observations at least on the extent to which the areas of concern that you have identified  
2 had, in fact, already been addressed and investigated by the Office in the light of the  
3 submissions that we made to them.

4 THE CHAIRMAN: If the OFT's observations do not hit paper until 10.30 on Friday you are not  
5 going to have very long, are you, to think about them – or do you think your observations  
6 will be independent of what the OFT say?

7 MR. FOWLER: I think to some extent they may be independent of what the OFT is saying, and  
8 we will then need to take account of what the OFT is saying.

9 THE CHAIRMAN: The OFT ought to supply you as soon as it puts pen to paper and, if you can  
10 respond in a responsive way rather than independently so much the better. But if you can  
11 get in whatever you want by 11 o'clock on the Friday that would be very helpful.

12 We have the AMA here, have we? Miss Black, would you like to be here on Friday?

13 MISS BLACK: Yes, I think we would, yes.

14 THE CHAIRMAN: Again, if the OFT could supply you with whatever they want to say as soon  
15 as possible, and if you could respond in writing – we are not giving a direction, but  
16 obviously we have a rather short space of time – but we welcome you back on Friday.

17 MISS BLACK: Thank you very much.

18 THE CHAIRMAN: It is probably better, is it not, to leave over the question of intervention until  
19 Friday?

20 MISS BLACK: Yes, I think so, in the circumstances.

21 THE CHAIRMAN: You do not know what you are intervening in until Friday.

22 MISS BLACK: It is changing rather rapidly, yes, Sir.

23 THE CHAIRMAN: Have you got the papers already or not?

24 MISS BLACK: We have not had the Notice of Appeal, no.

25 THE CHAIRMAN: Mr. Hoskins, ought they to be supplied with the papers even ahead of  
26 intervention?

27 MR. HOSKINS: I am sure that is so, unless there are confidentiality issues.

28 MR. FOWLER: There are confidentiality issues.

29 THE CHAIRMAN: Yes, there are. Well perhaps we ought to leave your having the papers over –  
30 well, they can certainly have the Decision and the Notice of Appeal, could they not? There  
31 is nothing in that is there that is confidential?

32 MR. FOWLER: We have a redacted version, that is redacted in the form that we have applied the  
33 confidentiality. I am sure we can agree that that be made available in advance of any final  
34 decision on the question of confidentiality.



1 THE CHAIRMAN: It is only you that has the redacted version, presumably, so far.

2 MR. FOWLER: It is.

3 THE CHAIRMAN: So if you could supply the AMA, Herbert Smith I think it is, with the  
4 redacted version so that they know roughly what is going on.

5 MISS BLACK: That would be helpful.

6 THE CHAIRMAN: That would be helpful, yes. We have to consider the forum and the answer is  
7 England and Wales and here, is it not?

8 MR. HOSKINS: That is certainly what we suggest, Sir, yes.

9 THE CHAIRMAN: And then intervention is put on one side. Looking through the agenda as it  
10 was framed on 21<sup>st</sup> July, 3 has gone for the moment. Confidentiality can be dealt with either  
11 on Friday or later. Disclosure is not yet appropriate, there is no defence yet. We cannot set  
12 a further timetable yet until we know what is going to happen on Friday.

13 So, short of adjourning to Friday and giving the informal directions that you have  
14 already mentioned, is there anything else we can do today.

15 MR. HOSKINS: There is just the technical point that the defence is due on 4<sup>th</sup> August.

16 THE CHAIRMAN: We need to extend time.

17 MR. HOSKINS: Yes, thank you, Sir.

18 THE CHAIRMAN: Again, we can deal with that on Friday because if, for example, we are  
19 dismissing it, or whatever happens, there will not be a defence. There is no point in  
20 spending money on a defence that transpires to be unnecessary, so that can be dealt with on  
21 Friday.

22 Is there any other point that anyone wishes to raise before Friday? *[No comments]*

23 Well, we will adjourn until 2 o'clock on Friday.

24 (Adjourned until 2 p.m. on Friday, 30<sup>th</sup> July 2004)