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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

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

14<sup>th</sup> September, 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 and Mr. Sam Szlezinger (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 QC and Miss Maya Lester (instructed by Messrs Addleshaw Goddard) appeared for the Appellant The British Horseracing Board.

Transcribed from the Shorthand notes of  
Beverley F. Nunnery & Co.  
Official Shorthand Writers and Tape Transcribers  
Quality House, Quality Court, Chancery Lane, London WC2A 1HP  
Tel: 020 7831 5627 Fax: 020 7831 7737

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**CASE MANAGEMENT CONFERENCE**  
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1 THE PRESIDENT: Good morning ladies and gentlemen.

2 MR. VAJDA: Good morning. I hope the Tribunal has received documents from all three parties.

3 THE PRESIDENT: We have, Mr. Vajda. We were going to go through the agenda unless there  
4 was something you want to say to us.

5 MR. VAJDA: No, what I was going to suggest is that we go through the very helpful agenda and  
6 I can indicate where there is agreement, where we have comments, and then perhaps my  
7 friends can come in as appropriate, if that is convenient to the Tribunal.

8 THE PRESIDENT: I think what may be helpful is if we first of all get item 1 on the agenda out  
9 of the way, which is the forum for the proceedings, which appears to be agreed as being  
10 England and Wales,

11 MR. VAJDA: Yes.

12 THE PRESIDENT: We can then decide that. From the Tribunal's point of view, however, a  
13 somewhat major issue arises in relation to item 2 of the agenda, which has horizontal effect  
14 across the range of the Tribunal's workload, which is what we should do effectively with  
15 these two Appeals. This is the third case now in which the Tribunal has had more than one  
16 appeal against a decision in circumstances where at least one of the appellants could have  
17 intervened in the first appeal, but has chosen to bring its own appeal. A situation in which  
18 the Tribunal has two appeals pending instead of one appeal in which there is an intervention  
19 is a very much more complicated situation than an appeal in which a situation in which  
20 there is only one appeal.

21 What we are concerned about from the case management point of view is the  
22 relationship between the RCA Appeal and the BHB Appeal, and whether in particular we  
23 should allow both Appeals to proceed together, or whether we should stay one which would  
24 have to be the BHB Appeal in the way that things have so far developed, and/or whether we  
25 should seek to arrive at a situation in which the BHB Appeal is effectively treated as an  
26 intervention in the Racecourse Association Appeal, rather than a full blown appeal. It may  
27 not be possible to sort that out today, but we really have to manage cases like this very  
28 tightly now because the Tribunal's workload simply does not allow for us to allow things to  
29 be developed unless it is absolutely essential that they have to be done in a full way – we  
30 want to see things done as tightly as we can do them. That is the first issue from the  
31 Tribunal's point of view on which we will be seeking some preliminary observations, and  
32 we may have to have a separate hearing to sort it out.

33 MR. VAJDA: If I could just say so far as my clients are concerned, we would not be in favour of  
34 a stay of the BHB Appeal. I do not know if the Tribunal has had an opportunity yet of  
35 looking into the papers ----

1 THE PRESIDENT: What does the BHB Appeal add from your point of view, Mr. Vajda?

2 MR. VAJDA: What does it add?

3 THE PRESIDENT: What does it add to your Appeal?

4 MR. VAJDA: There are a number of additional points which are what I would call procedural  
5 points, which we have not very much interest in, and which Mr. Vaughan will elaborate on.  
6 But at the heart of both Appeals are issues of fact in that as the Tribunal may be aware the  
7 allegation in the Decision is that this was an anti-competitive arrangement, and that this was  
8 to the disadvantage of the buyers. An important part of the Appellant's case is that that is  
9 inconsistent with the evidence at the time, so there is going to be a large element of fact, I  
10 suspect, although we have not seen the OFT's defence.

11 THE PRESIDENT: But your position is you have put in your Appeal and you do not apparently  
12 wish to cross-examine, so from your point of view how does it help you to have the BHB  
13 Appeal going on as well? What additional point is there in the BHB Appeal that is not in  
14 your Appeal?

15 MR. VAJDA: Well the BHB take a few points on the market, which go beyond what we, the  
16 RCA are saying, so that is if you like a point of substance, and also they have procedural  
17 points. So far as the procedural points are concerned, as we have indicated in our outline,  
18 one of them is the issue of disclosure of documents and we would suggest that that be dealt  
19 with separately first, and does not need to concern us. But so far as the substantive case is  
20 concerned, we see no reason why the BHB should not be present. That is exactly what  
21 happened in the Court of Justice, at the CFI and they plainly have an interest in these  
22 proceedings and ----

23 THE PRESIDENT: The issue is not whether they should be present, or whether they should be  
24 heard, but under what guise should that happen?

25 MR. VAJDA: In my submission it would not be sensible to have two separate hearings in the  
26 sense of having an RCA hearing and then a BHB hearing. I can see that there may be policy  
27 questions as to whether or not it is a good idea to consolidate the two Appeals and it may  
28 well be that it is premature to reach any decision on that today. What I am submitting is  
29 that so far as a stay of the BHB Appeal is concerned, we would not be in favour of that,  
30 obviously Mr. Vaughan can address you on that point but that is our position as a party to  
31 this agreement. We think there is value in the BHB points being ventilated, subject  
32 obviously to case management – how much time this case is going to take.

33 THE PRESIDENT: I will come to Mr. Vaughan in a moment, he is no doubt anxious to help.

34 MR. VAJDA: As ever, as ever, yes.

1 THE PRESIDENT: This is third occasion that this situation has arisen. In the first case the  
2 second appellants very sensibly agreed that their Appeal could wait until the first Appeal  
3 was disposed of. In the second case what is under consideration at the moment is that the  
4 second Appeal is simply converted into an intervention and is heard as an intervention in  
5 the first Appeal, and it is a solution along those lines that we are wondering about in this  
6 particular case.

7 MR. VAJDA: Yes, then perhaps as between intervention and second Appeal, if I can put it like  
8 that, it may be appropriate for you to hear directly from Mr. Vaughan. The point that I am  
9 making is that whether one has intervention or second appeal, we certainly should have one  
10 hearing.

11 THE PRESIDENT: But I have not completely grasped so far, and it is probably that I am being  
12 very slow, you have said that there are some procedural points that you are not particularly  
13 interested in. You have said that there are a few points on the market, and you have said  
14 there are some issues of fact which you are not pursuing, so I am not completely clear why  
15 you are saying that you need their appeal, and if you need their appeal why have you not  
16 made the points in your Appeal?

17 MR. VAJDA: We have made the points in our Appeal. A number of the points that we have  
18 made are also made in the BHB case. Mr. Vaughan will tell you that the BHB have made  
19 additional points. Plainly both parties have an interest in having this Decision quashed, and  
20 it seems to us that it is sensible that this be done at one go. In terms of case management if  
21 one is concerned it is well within the capability of the Tribunal to set time limits, so one is  
22 not effectively going to have twice the length of one appeal – that is certainly not what we  
23 are suggesting. What we think would be wrong would be to shut out the BHB either by  
24 saying “it is an intervention and it is going to be stayed”, or treat it as a second appeal and  
25 staying it. They have set out what their interests are in these proceedings. As I say, there is  
26 a large degree of overlap but not total overlap in the case, and plainly it is in the interests of  
27 the RCA that the BHB should be able to ventilate its points where it says that the Decision  
28 is defective.

29 THE PRESIDENT: Thank you. I think we had better hear Mr. Vaughan now. Mr. Vaughan,  
30 what we are driving at, and let me try and put it in non-technical terms, if I may.

31 MR. VAUGHAN: Yes, that is helpful to me.

32 THE PRESIDENT: What we are driving at is this, there is always a risk in cases like this that two  
33 appellants wishing to develop full blown appeals as it were double the time and effort and  
34 work and all the rest of it. In another scenario, two parties like yourselves and the  
35 Racecourse Association can be effectively heard in a way that does not actually double the

1 work but is done in a sort of a hidden way. One of the ways that that is very often achieved  
2 is through the intervention procedure, where the intervener has a role to play – and a very  
3 important role to play, if I may say so – but it is a crisper and more concentrated role than  
4 necessarily the role of a full appellant, and that saves everybody a lot of time, work and  
5 effort and helps one get to the main points quicker. Although it may be a rather technical  
6 point we are on at the moment what we are wondering is whether your Appeal is, in its  
7 essence, a sort of supporting appeal in a sort of intervener type role even if it is done in the  
8 guise of an appellant, and whether there are consequential case management type directions  
9 that we could or should make to reflect that. No one is suggesting that you should not be  
10 heard, or you should not have a chance to make your points, but the question is in what sort  
11 of way? It is not a question that just affects this case, but for the reasons I have given it is a  
12 horizontal problem across the Tribunal.

13 MR. VAUGHAN: We thought very considerably at the beginning about whether we should  
14 intervene or whether we should bring our own appeal. Our interest nobody is disputing at  
15 the moment to bring an appeal, and that is set out for reference at paras. 39 onwards of our  
16 appeal document.

17 THE PRESIDENT: What would help me, I think is to understand what were the considerations  
18 that led you to do the one rather than the other?

19 MR. VAUGHAN: That is right. If one looks at our application for leave to appeal, at paras. 91  
20 onwards, we set out as it were why we intervened in the oral hearing in the RCA case.

21 THE PRESIDENT: Your Notice of Appeal?

22 MR. VAUGHAN: Paragraph 91 onwards. Basically what happened, we were shown drafts (93)  
23 of the RCA response to the Notice, and it was clear that they were not raising a large  
24 number of issues which we had asked them to raise, as it were the whole gamut of British  
25 racing – RCA tend to see racing through racecourses' eyes, we see it through they eyes of  
26 the trainers, the breeders, the bookmakers, etc. and as part of the co-operative of BHB of  
27 which RCA is a member having directors on BHB. They refused to put in points we wanted  
28 them to raise, so we then applied to intervene at that stage. The OFT did not accept that we  
29 were entitled to do that. It said there was no provision for intervention and amusingly  
30 enough one of the reasons they gave in 1999 is that we could not intervene but we could  
31 always appeal any subsequent Decision. But we were not satisfied with that and we went to  
32 the High Court. They backed down, and effectively allowed us to intervene and have an  
33 oral hearing and they were ordered to pay the costs and at para.103 Mr. Justice Jackson,  
34 who ordered them to pay the costs said that this matter was of major importance not only to

1 the OFT, to BHB, to the general public, but also to the interests of horse racing. So he  
2 accepted that it was a much wider thing than merely a spat about horse race courses.

3 At our oral hearing we then dealt with a large number of these particular matters  
4 which the RCA did not raise, and it is appropriate at this stage also to say the RCA did not  
5 request an oral hearing, indeed nor did the ATR companies, we were the only parties who  
6 had an oral hearing, and we advanced our case at that stage in law and in fact. We gave  
7 evidence, the Chief Executive gave evidence, our economist, Mr. Elliott, gave evidence, and  
8 I think others gave evidence. I should bear in mind also at this stage that there was a  
9 parallel, a much bigger case going on, where the OFT now have accepted, with denials of  
10 liability, commitments in the future. We put in denials of liability. That is not yet resolved.  
11 There are still outstanding issues as to whether they accept the commitments at this stage.  
12 They accept them – this is on the OFT website, but there are third parties intervening in hat  
13 and are apparently disputing some of the matters of the proposed settlement, but it is on the  
14 basis of a denial of liability. We had oral hearings, defences, and there was a lot of  
15 evidence in that case, some of which has been transposed into this case in ----

16 THE PRESIDENT: One point at the back of our minds that raises some slight concern is that the  
17 other case might spill over into this case, which might not be appropriate.

18 MR. VAUGHAN: The only point that would happen is all the evidence went to showing that  
19 everyone regarded British Racing as being not just racecourses - the trainers who gave  
20 evidence, the jockeys who gave evidence, the breeders who gave evidence gave evidence  
21 about that. They all see, indeed everyone sees including all foreign racecourse  
22 organisations – France Galop and other jockey clubs around the world – see racing as much  
23 wider than just this narrow little field. We have set out in our lists of appeal elaborate  
24 explanations about various things which do not appear at all in the RCA appeal. For  
25 example, the s.105 onwards dealing with the ATR income stream, because on of the main  
26 points that happened is ATR signed the original notification which said this was a brilliant  
27 thing, they were going to make a lot of money, it was good for everyone, good for the  
28 consumers, and then suddenly they changed their position and came out against it at the  
29 very end. Obviously that is a matter which the OFT do not seem to take any account of but  
30 obviously we want to bring forward in that way. That is a big issue that we want to raise,  
31 and the RCA do not appear, other than on the *volte-face* point, but they do not want to seem  
32 to cross-examine anyone on that, or there is no indication at the moment.

33 On the procedural points, if I can take you through those. Failing to discharge the  
34 burden of proof, probably that is included, but we give a lot of examples of that as  
35 intervener but obviously raise no sort of points if we were an intervener. We raise a lot of

1 points that the RCA do not raise about the conduct of the investigation. Basically our view  
2 is the investigation was shoddy in the extreme, and we are still waiting to see the documents  
3 which they refuse to show us still, documents which they have shown the RCA in this  
4 matter, and we are still waiting to find something. They have offered us now belatedly I  
5 think on Friday, or 10 o'clock last night, very late, they offered us a few things but not  
6 enough.

7 We raise a lot of points on improper use of evidence which I do not think the  
8 RCA raise at all. There is the legal analysis, 169, none of which really in that sort of  
9 context appears in the RCA Appeal. There is a long development of that.

10 THE PRESIDENT: If we may say so that part of the legal analysis ranges pretty widely over  
11 sport in general and a number of quite wide considerations, and we are certainly wondering  
12 at the moment whether an analysis of that breadth is really going to be necessary to decide  
13 this particular case.

14 MR. VAUGHAN: We will seek to persuade you that is a wrong view about this whole thing. It is  
15 like the Premier League. One of our main complaints is that the Premier League case, a  
16 Restrictive Practices Court case, which went into all this in great detail in a very similar  
17 case, came to a completely different conclusion to that the OFT had reached in this case.  
18 Effectively, they decided that it was not anti-competitive using the current language in that  
19 matter. They do not even refer to it in that matter, they do not refer to *Vowters* or any of  
20 those sort of cases about co-operative undertakings or anything like that.

21 The RCA do not deal at all or to a very little extent with the product and the  
22 product market in this sense, and we develop those points in paras. 236 onwards, foreign  
23 market and the counterfactual. One of the main points they make is the ATR paid more  
24 because of the joint selling than otherwise, but given no facts at all to support that. There is  
25 no investigation, it is merely an assertion without anything and, even if they did, they do not  
26 examine – if they got more they do not examine the consequences of that, merely because  
27 somebody has to pay more it does not matter, and anyhow ATR was clearly happy with the  
28 deal they got at the beginning, as the notification shows.

29 So there are a large number of areas which we would want to give which, if we  
30 were merely an intervener, we would find it very difficult – the classical intervener takes the  
31 case he finds, he can introduce new arguments but cannot really introduce new factual  
32 questions or anything like that. So if we were a classical intervener we would find real  
33 problems, because effectively we would be fighting with one hand behind our back.

34 Equally, if we were stayed behind the RCA case we would not accept the Decision in the  
35 RCA as necessarily affecting our case, so we would not be prepared to accept that we would

1 be bound by that case in that way, because we have self-contained arguments which are  
2 sufficient to win the case from our point of view, so setting us aside would not really help  
3 unless you made that Order and obviously we would have to consider the position if you  
4 did. There is a difference between an intervener who is really passive, playing along, and  
5 an appellant who is active in a way, and we want to pursue an active role in this. The  
6 reasons we intervened in the beginning was because we wanted to, and indeed we were the  
7 only people who were really playing an active role during the course of the OFT  
8 investigation, appearing in the oral hearings and so on.

9 If we are not an intervener we have no problems with consolidation, as we say,  
10 there is a joint defence, and I think it is convenient if one looks at the OFT's letter on the  
11 issue of joint defence, which we did not necessarily accept. This is the letter of 25<sup>th</sup> August,  
12 if I can hand in a little bundle – or have you got the correspondence?

13 THE PRESIDENT: We have probably got most of it.

14 MR. VAUGHAN: No, but if I can hand in a little bundle of the ----

15 THE PRESIDENT: We probably have it, Mr. Vaughan. This is the OFT's letter of 25<sup>th</sup> August?

16 MR. VAUGHAN: 25<sup>th</sup> August 2004, when they were asking for a joint defence. We objected in  
17 the letter of 24<sup>th</sup> August. We said there were problems about joining because one has to be  
18 able to identify the different issues that are being dealt with by each person particularly.

19 They replied on that saying essentially that the two cases are the same. Paragraph 2:

20 “The sole argument for objecting is that because of the number of submissions  
21 made in the Notice of Appeal differ from the RCA there is a real risk that a joint  
22 defence will lead to confusion as to which parts of the defence are respondents’  
23 submissions by BHB or respondents’ submissions made by the RCA. Their  
24 concerns are unfounded. Following the application the OFT has begun to  
25 prepare its defence in a joint form.”

26 So this is on 25<sup>th</sup> August they were already assuming that it would be a joint defence, and  
27 they had started work on that.

28 “In so doing the OFT has taken care clearly to identify which points were raised  
29 by which Appellant (typically by referring to the relevant paragraph numbers in  
30 one or both of the Notices of Appeal). If the Application to submit a joint  
31 Defence is granted, the OFT intends to continue to prepare the joint Defence in  
32 this way. The OFT considers that neither of the Appellants is likely to  
33 experience difficulty in identifying which part of the Defence respond to  
34 submissions made by the BHB and which parts respond to submissions made by  
35 the RCA.

1 “In addition, the submission of a joint defence in this case is supported by the  
2 following considerations:

- 3 (1) The factual background to the arguments of both Notices of Appeal  
4 Is identical; the same industry, the same market, the same parties,  
5 the same agreements.  
6 (2) Many arguments raised by BHB are the same or very similar to  
7 arguments raised by the RCA, and vice-versa.  
8 (3) Even where arguments raised by BHB and RCA are not completely  
9 overlapping, they nonetheless address the same fundamental issues,  
10 and the OFT’s view is the correct legal approach will often  
11 determine and underpin its response to the arguments of each of the  
12 parties.  
13 (4) A joint defence will better enable both the Tribunal and the parties  
14 to understand the OFT’s position in relation to the factual and legal  
15 issues under Appeal.  
16 (5) A joint defence will also save a considerable amount of time and  
17 resources that would result from the duplication that would be  
18 required if separate Defences had to be submitted.”

19 Well we do not necessarily accept that, but basically they were saying they are perfectly  
20 capable of being dealt with in a joint defence identifying the areas where there are  
21 differences. They point out that a joint defence would greatly assist the progress of the  
22 case. “The OFT notes the RCA appears to be neutral”, it shows the OFT’s desire that the  
23 case should proceed expeditiously – so we all agree on that.

24 Then there is the Order made by the Tribunal, leaving it to the OFT to decide, but  
25 obviously the objective was to deal with it in the most efficient, expeditious and cost-  
26 effective way.

27 THE PRESIDENT: Yes.

28 MR. VAUGHAN: Basically they were saying as regards the defence nothing much would be  
29 harmed by having a joint defence, because they are going to deal with it in a way that makes  
30 it clear the points they are responding to. So they have no problem, as it were, with the  
31 cases going along side by side at that stage, although it is clear they have changed their tune  
32 when it comes to their observations we received last night on the consolidation in this  
33 matter.

34 Our view is that the case will not become unmanageable or unduly long if it is  
35 going ahead in the way we have suggested, a joint hearing, we have a joint defence – which

1 we have not seen yet and they have asked for another fortnight to extend time – we will deal  
2 with that when it comes. At that stage we will be able to see to what extent there is overlap  
3 or different issues in that matter. At the moment we have had no documents at all. We  
4 asked for documents on 22<sup>nd</sup> June. They offered, very belatedly on Friday, to give us  
5 documents referred to in the Decision, and we have been asking for those since 22<sup>nd</sup> July  
6 (sic) as you will see from our observations. We think that if there is to be a consideration  
7 we should wait until the Defence is put in and then we can decide what to do. It is not a  
8 procrastination, as it were, because basically our position will not change. We are very  
9 keen that we have our appeal separately. It all arose because the RCA, because of various  
10 internal matters which do not matter, were not prepared to put forward points we wanted to,  
11 and we put forward points in an oral hearing and put forward points in the Appeal which are  
12 different from the RCA's, as Mr. Vajda has said. Any decision that you make, as it were,  
13 has to pick up all these points, because to deal with only half the points, and if you allowed  
14 the Appeal dealing with half the points, then you would still allow the Appeal if you did our  
15 points as well. Equally, if you were to find against them on that point we would still want  
16 our points dealt with, and then you would have a real problem about inconsistent Decisions  
17 – one finding the Decision was valid, and with us finding it was invalid, and we would just  
18 get to a difficult position.

19 THE PRESIDENT: It may be that the way to do it, when we are a little further into the case, is to  
20 try to isolate particular points and particular issues and see how we can deal with those.

21 MR. VAUGHAN: There is no problem at all about that. It is a question of being grown up about  
22 it – it may be clear and self-evident lawyers do not grow up – but we basically have the  
23 same objective. We want to get the case on and we want to get our points dealt with.

24 THE PRESIDENT: But you want to proceed on a broader front than they do ----

25 MR. VAUGHAN: A much broader front.

26 THE PRESIDENT: As far as one can tell.

27 MR. VAUGHAN: Yes, because basically we want to challenge the factual analysis which rests  
28 very much on what ATR belatedly said in 2003, which is completely different from what  
29 they said on the notification, and upon which the OFT rely upon saying this is anti-  
30 competitive. So we want a more active or pro-active role in the way our position is, and we  
31 want to pursue that – it is not just us it is the whole of Racing wants to do that, because it  
32 has been a critical problem for Racing, the collapse of this agreement. Obviously the  
33 Agreement collapsed anyhow, but the anti-competitive point is highly important,  
34 particularly, as you know, there is a claim in part based on this Decision, where there is a  
35 claim for 55 million from the courses. As the Notification says the courses have no money

1 so effectively they and their Committees will all be bankrupted unless they sign up to the  
2 ATR new scheme, because they are not suing the people who have signed up for them, and  
3 we will want to raise questions about that.

4 THE PRESIDENT: Okay. I think we have understood your position, thank you, Mr. Vaughan.  
5 Mr. Thompson?

6 MR. THOMPSON: Good morning.

7 THE PRESIDENT: In some ways it may not be completely clear what solution to adopt in this  
8 particular case, but the general point about parallel appeals and how we should manage  
9 them is something which is a source of interest to the OFT from the point of view of your  
10 resources as well as our resources.

11 MR. THOMPSON: Indeed, it is. I think if I could say by way of general principle, the OFT's  
12 position is that we seek to take our Decision, we have appeals dealt with economy and  
13 efficiency as best we can, taking into account the particular account the circumstances of  
14 this case. We have listened carefully to what Mr. Vaughan and Mr. Vajda had to say. In  
15 terms of the substance, just by way of impression listening to what they say, our impression  
16 is that there are really three areas where the BHB goes materially beyond the RCA. They  
17 take a submission about the relevant market, which may be familiar to the Tribunal from a  
18 somewhat similar submission made in the *Genzyme* Appeal where we had a chance to  
19 appear before the Tribunal, that the approach of the OFT is far too narrow, and that what we  
20 should be looking at is the whole of British Racing rather than at the particular rights sold  
21 under this Agreement.

22 We do not regard that as a particularly strong argument, but it is true that it is  
23 distinctive from the RCA point, and they also take a point that the product which was  
24 identified does not exist, which is not a view that recommended itself either to the OFT or  
25 to the RCA and, in particular, they stressed their role in the supply of data, which again we  
26 do not see as particularly material to this Appeal, but it is true that those points are  
27 distinctive.

28 The second area relates to what might be called the sporting exception where, as  
29 the Tribunal has already pointed out, the BHB goes on at some length, and by reference to a  
30 large number of authorities, that there are distinctive contributions to be derived from the  
31 American jurisprudence, for example, in relation to one-eyed hockey players and matters of  
32 that kind, which again we regard as going well beyond the RCA but not necessarily being  
33 matters that would assist the Tribunal greatly to extend, but we have no objection to the  
34 BHB raising that point.

1                   The third area relates to procedure where there is a distinctive feature in that the  
2 BHB was an intervener before the OFT, and Mr. Vaughan has explained that, but I think it  
3 is probably common ground, or at least it is well established, that in general an intervener  
4 has smaller procedural rights than a defendant in a competition case, in that they do not  
5 have the rights of defence of an undertaking which is subject to penal fines, for example.  
6 So there is a somewhat curious feature in that the procedural rights that are being asserted  
7 here are being asserted by the former intervener which, on the face of it, has the lesser  
8 procedural rights, whereas the RCA as a party appears to be content with the procedural  
9 position. So it is certainly true again that this is a distinctive feature, but we say it is not ----

10 THE PRESIDENT: You are about to say, I suppose, that if your position on analysis is that you  
11 are an intervener in proceedings before the OFT you cannot, by appealing to the Tribunal as  
12 an appellant, gain any wider rights than you would have had in your status as an intervener.

13 MR. THOMPSON: Indeed, you do not automatically achieve them. Our position, and it is  
14 reflected in our letter of last Friday, is that when you appeal if, as we accept BHB is entitled  
15 to appeal, then the relevant question is what your appeal rights require in terms of fairness,  
16 but you do not suddenly transform yourself into a defendant at the administrative stage by  
17 appealing as an intervener at the appeals' stage. That is our core point. We think a lot of the  
18 BHB's more extravagant claims reflect a failure to appreciate that - in our submission -  
19 rather obvious point of principle.

20                   The fourth point that features prominently in the submissions that were put in by  
21 BHB last night is what might be called the *volte-face* point where I think Mr. Vaughan  
22 invited you to find that the RCA is not pursuing that. That is simply incorrect ----

23 MR. VAUGHAN: I did not say that.

24 MR. THOMPSON: -- because paras. 15 to 16 of the Notice of Appeal of RCA does make that  
25 point quite strongly, so that we would not accept is a distinctive feature where BHB is  
26 contributing anything significant to the party. So it is really the first three points.

27 THE PRESIDENT: On that point he wants to cross-examine, as I have understood it, and the  
28 RCA does not, apparently.

29 MR. THOMPSON: There are two points really. Insofar as this is a good point, then it is a matter  
30 that the BHB can pursue on appeal and call evidence if they have it available to them, or if  
31 so advised. If they are making the general point that some of the evidence relied on in the  
32 Decision was not credible because it had a commercial motive which undermined its  
33 credibility, then that is obviously a point that can be made to the Tribunal and the Tribunal  
34 can assess the value of this evidence and, if it is incredible, can dismiss it or take no account  
35 of it and possibly even find that the Decision is undermined by the fact that some reliance

1 was placed on such evidence, but we do not think that it necessarily follows that either by  
2 way of order of the Tribunal or some moral obligation of the OFT that necessarily large  
3 numbers of witnesses need to be called for the benefit of cross-examination by Mr.  
4 Vaughan.

5 THE PRESIDENT: Yes.

6 MR. THOMPSON: Overall, our position is, as reflected by our joint Defence, we see that this is a  
7 single dispute. We see the core of it as being squarely raised by the RCA and, in particular,  
8 on the question of whether it was necessary for some degree of collective action in order to  
9 sell these rights. We see that as the core of the case, and we are perfectly happy to deal with  
10 the case in a unitary form in as efficient a way a possible and we do not in any way want to  
11 shut out the BHB from making the points that it wishes to make in a reasonably economical  
12 form, but we fully agree with the Tribunal's concerns that there is a risk in a case of this  
13 kind that the procedure will get out of control, and we are happy to leave it and to co-  
14 operate with the Tribunal in reaching an appropriate procedural solution.

15 THE PRESIDENT: Thank you.

16 (The Tribunal confer)

17 THE PRESIDENT: We are going to rise for a few moments to talk it over.

18 (The hearing adjourned at 11.40 a.m. and resumed at 11.50 a.m.)

19 THE PRESIDENT: In the light of the points that we have heard submissions on so far our present  
20 view is that we should take no final decision on the relationship between these two Appeals  
21 until we have seen the joint Defence served by the OFT. It may well be the case that a stay  
22 of one or other of the Appeals would not be the right procedural solution in this particular  
23 case. It does, however, appear to us likely that the Tribunal will need to identify in due  
24 course what particular points in either or both of the Appeals it wishes to hear oral argument  
25 on. Since we have in this Tribunal a largely written procedure, and since we do read and  
26 take account of the written material, it is not always useful for time and resources to be  
27 spent redeveloping orally matters that have already been cogently argued in writing.

28 Our present view is that the way to manage this case is to take particular care to  
29 define in advance what issues we need to hear oral argument, and by that means we hope  
30 that the procedure in this case will not spiral out of control. We are not at the moment  
31 addressing two issues that have been floated in argument, one of which is the issue of  
32 further disclosure sought by BHB and the second issue is the question of cross-examination  
33 of witnesses on behalf of BHB. Those seem to us to be separate issues, and we have not yet  
34 heard argument on those points, but at least in a preliminary way those are points which we

1 will no doubt shortly come to as we work through the Agenda of today's Case Management  
2 Conference. That is as far as we can take item 2 on the Agenda at the moment.

3 It is probably premature to make any directions as to what the procedure is going  
4 to be at the oral hearing. If we are working through the Agenda we now do come to the two  
5 points I have just said we have not yet dealt with, which is the question of witnesses and,  
6 secondly, the question of disclosure, there are then issues on confidentiality. It may be that  
7 we are not going to be able to take Decisions today – it may not be right to take decisions  
8 until we have the joint Defence. I think it would now be helpful if we could have at least a  
9 preliminary statement of position from the various parties as to how they see the issue of  
10 witnesses.

11 MR. VAJDA: Yes, if I could perhaps start. If I could ask the Tribunal just to cast a glance again  
12 at p.2 of our note for today – I will leave aside the burden of proof point, because that is  
13 really a separate point. At 4(a)(ii) we say that the OFT should call as a witness any person  
14 whose evidence they rely on. This is really taken from Replica Shirts. I notice from Mr.  
15 Thompson's very helpful outline this morning what he says on terms of OFT witnesses ----

16 THE PRESIDENT: Is there anyone you want to cross-examine?

17 MR. VAJDA: There may well be. Almost certainly if they are going to be witnesses of fact and  
18 they are going to be disputing, as it were, the version put forward in the RCA Appeal,  
19 almost certainly we will wish to cross-examine. Whether we do, obviously, we will have to  
20 wait and see when the witness statement arrived, but I want to flag up ----

21 THE PRESIDENT: So if there is an additional witness statement?

22 MR. VAJDA: It sounds as if there are going to be at least two witnesses, that is what Mr.  
23 Thompson's outline suggests, and Mr. Thompson can help us on that, I assume they are  
24 going to be witnesses of fact, and I assume – but I may be wrong on that – that they are  
25 going to be taking a different view on the facts from those.

26 THE PRESIDENT: Just taking it in stages, Mr. Vajda, so I am clear, at the moment in the  
27 absence of any witness statement from the OFT, is there anybody that you want to cross-  
28 examine on your existing knowledge as far as the case is concerned?

29 MR. VAJDA: At the moment I am reserving my position until I see the Defence. Obviously,  
30 primary fact is very important. Indeed, one of the questions that the Tribunal has asked is in  
31 what area is there agreement on the facts.

32 THE PRESIDENT: Yes.

33 MR. VAJDA: Where there is agreement no doubt the parties will agree, where there is  
34 disagreement, then that may be resolved simply by reference to the documents. It may have  
35 to be resolved by reference to the documents and cross-examination.

1 THE PRESIDENT: Yes.

2 MR. VAJDA: If, as I anticipate, there is going to be disagreement on the facts, then we would  
3 certainly wish to cross-examine the witnesses that would be tendered. So far as the other  
4 witnesses are concerned, as it were, the point the President has been putting to me, we  
5 would reserve our position until we see the Defence.

6 Obviously documents are very important in this case, the contemporary  
7 documents, and if one can do justice to one's case by reference to the documents we will do  
8 so, and certainly we are not saying we are going to insist on cross-examination but, if there  
9 is going to be an issue on that cross-examination will be relevant. Can I in this respect just  
10 refer to the second point on witnesses which is also made by Mr. Thompson at para. 5 of his  
11 submission?

12 THE PRESIDENT: Yes.

13 MR. VAJDA: As I understand it, the OFT is not planning to call the appellants' witnesses for  
14 cross-examination but it says that where the OFT does not accept that as being necessarily  
15 accurate or correct they would be tested against the documentary record. Can I make two  
16 observations in that respect. First, I anticipate that the OFT will plainly point out in its joint  
17 Defence where there are areas of dispute between the evidence that we have put forward  
18 and the documentary record. The second point is that having identified such an area of  
19 dispute it may be that we would wish to call our witnesses. As I indicate, we were not  
20 planning to call them unless they are the subject of cross-examination, but if it is going to be  
21 said "Well, actually what witness X says is different from document Y", and that is  
22 effectively how the OFT is going to be putting its case, it may well be that we will want to  
23 call witness X to deal with document Y, so I just want to put a marker down in relation to  
24 our own witnesses.

25 THE PRESIDENT: Well the correct procedure in that scenario would be to serve a witness  
26 statement from the witness dealing with the matter, and then we would have to see whether  
27 it was necessary to have any oral evidence or not.

28 MR. VAJDA: Yes, well if the Tribunal is happy for it to be dealt with by way of supplementary  
29 witness statement we can do that.

30 THE PRESIDENT: It would have to be dealt with like that anyway, you cannot put a witness into  
31 the box without a witness statement – not in this jurisdiction anyway.

32 MR. VAJDA: We have witness statements, the question of whether one does it in chief, or serves  
33 a supplementary witness statement, but we are very happy to do it by way of supplementary  
34 statement.

35 THE PRESIDENT: Yes.

1 MR. VAJDA: That is what we say about the OFT's case both in relation to its proposed  
2 witnesses and the likelihood I think is that we will cross-examine, in relation to others we  
3 will adopt a "wait and see" attitude until we see the defence.

4 THE PRESIDENT: Thank you. I think, Mr. Vaughan, before we get to you, in the context of the  
5 Racehorse Association Appeal I think I will just see if I can tease out of Mr. Thompson a bit  
6 more information as to what is going on.

7 MR. VAUGHAN: You will do better than me if you do!

8 THE PRESIDENT: Can you give us any trailer, Mr. Thompson, of what is envisaged?

9 MR. THOMPSON: What sort of witnesses?

10 THE PRESIDENT: Yes.

11 MR. THOMPSON: I think Mr. Vajda said "at least", I would say "at most" two, and it may be  
12 fewer. The OFT's essential position is that the issues are dealt with on the documents, and  
13 emerge clearly from the documents, and the last point that Mr. Vajda made may well be a  
14 valid one, but there are certain points not so much of primary fact but assertions of general  
15 view which the OFT may well seek to challenge by reference to the documents in its  
16 possession, and it may be that Mr. Vajda may wish to call further evidence by witness  
17 statement to deal with some of the points that appear to us to emerge from the documents.

18 In terms of why we might wish to call evidence, there is an issue about what has  
19 happened since the agreement terminated, which has been reported in the press but which  
20 may be relevant to some of the issues in the case, and it may be that that can be put before  
21 the Tribunal in terms of a witness statement, but hopefully not a particularly controversial  
22 one. The other area goes back over the history of the negotiations and it is possible that we  
23 will put in a witness statement about that, but that is a matter that is still under  
24 consideration. Essentially, our case will be very much on the documents.

25 THE PRESIDENT: At the moment, at least, you are not envisaging any "expert" type evidence?

26 MR. THOMPSON: No, I am not.

27 THE PRESIDENT: Very well. Yes, Mr. Vaughan?

28 MR. VAUGHAN: That is most helpful. Two things my friend said. One is the whole thing  
29 becomes clear on the documents, and that is our complaint because we have not seen the  
30 documents, there are 17 files of documents which we have not seen – that is not for today,  
31 but if I can just put a marker down that that is what he was accepting.

32 As regards the witnesses, somebody dealing with the subsequent history is in fact  
33 quite important because it ties back into the previous history, and our points about the  
34 settlement and the claims being made and, indeed, the reasons why ATR got into financial  
35 crisis was because they completely misunderstood and this foresaw how their business was

1 going to develop, and so the business plan originally will come out of that, so we would  
2 want to cross-examine that gentleman almost certainly, not only about what is happening  
3 now where there is a battle between ATR and the racecourses as to who is to conduct what  
4 we are very keen to see as one television programme rather than where you are opting to  
5 watch the 2 o'clock at York on one line and the 2 o'clock at Epsom or wherever at exactly  
6 the same time on another programme. So the whole thing is a mess at the moment.

7 THE PRESIDENT: I just make the remark in passing that there may be other ways of bringing  
8 out the points you want to bring out than cross-examination – it is not always the most  
9 efficient way of bringing out points like that unless there really is a dispute on primary fact  
10 that can only be resolved by cross-examination.

11 MR. VAUGHAN: Exactly, and I see that, but equally if one is making a suggestion that the  
12 whole thing has been dressed up, as it were, one has to put the point fairly to a witness, the  
13 *volte-face* is in fact a tactical commercial *volte-face* because they entered a bargain they  
14 wished they had not done at the beginning.

15 The other area is, as it were, the history of the whole thing. We would very much  
16 welcome that, and there may well be things that we would want to draw out of that because  
17 we are not party to the history of the negotiations, i.e. before the ATR negotiations started,  
18 it has developed quite extensively in Mr. Atkins' witness statement, and shows effectively  
19 there were a lot of people competing in this market and the OFT do not seem to accept that,  
20 but they say there is only one person because everyone else dropped out even though, in  
21 fact, with Carlton my understanding is they offered more but were not acceptable and, as  
22 one saw in the football world, they were very wise not to accept more because they ended  
23 up with less in the football world.

24 We would also want to question him/her personally about the pre-conditions  
25 because our case (and the RCA case) is that the pre-conditions were that the ATR insisted  
26 upon 70 per cent. agreeing, including 30-something racecourses agreeing, and it was  
27 dependent upon that that the whole thing developed on its way.

28 THE PRESIDENT: We have at this provisional, early stage noticed that both the points you have  
29 just made – we do not know what to make of them yet, but we have noticed them – both the  
30 70 per cent. point and the fact that there were a number of interested parties, all of whom  
31 were bidding.

32 MR. VAUGHAN: Yes, I am sorry, I am teaching my grandmother to suck eggs!

33 THE PRESIDENT: Again, it may not be necessary from your point of view to actually cross-  
34 examine on these kinds of issues.

1 MR. VAUGHAN: I just want to highlight that these are issues which are critical to our case, or  
2 extremely important for our case if not critical, and we would want to make the most of  
3 those points and it may well be, as you say, that cross-examination is not the best way of  
4 making the most of a point – there are other ways of skinning the cat, as it were.

5 THE PRESIDENT: Yes.

6 MR. VAUGHAN: So with regard to the OFT's witnesses I think it is likely that we would want  
7 to ask them certain questions but obviously it is not going to be a drawn out cross-  
8 examination – an Old Bailey cross-examination – I reckon if we started on that you would  
9 stop us pretty quickly. I think it will become much clearer once we have seen the  
10 documents.

11 THE PRESIDENT: Yes, let us see how we get on.

12 MR. VAUGHAN: Yes, but obviously it will be much easier if we get the witness statements  
13 earlier, rather than being given them late, so that we can deal with them in pleadings and  
14 that sort of thing, and we have suggested they come with the Defence in that way. Do you  
15 want me to deal with documents?

16 THE PRESIDENT: Just on what you have said so far I think I have already indicated that we are  
17 not too keen on cross-examination unless it is a question of critical primary fact, but there  
18 are many other ways of drawing out what you want us to take on board.

19 MR. VAUGHAN: Yes.

20 THE PRESIDENT: The other question that I had at the back of my mind – before we go on to  
21 documents – is the question of the various persons that I think you mentioned in your  
22 submissions for today from the various television interests, where there was a suggestion  
23 that you may wish to cross-examine really quite a large number of people.

24 MR. VAUGHAN: Well we have heard what you have said on that. Basically our position is that  
25 it is a completely tactical position adopted by the companies (or their solicitors) in that, and  
26 it seemed to us to be wrong when we are saying basically that it is a purely tactical position,  
27 not to put the point to somebody because if you were to make a finding that it was purely  
28 tactical people might be quite unhappy if they did not have a chance to deal with it. We  
29 would certainly be asking you to say that on the basis of the evidence this is a purely tactical  
30 position which the OFT took hook line and sinker without investigating at all.

31 THE PRESIDENT: While we are on witnesses, if we just glance at 5.5 of your very helpful  
32 observations for today, how in practical terms would what is being suggested there actually  
33 work? There are references to the Managing Director of Channel 4, and the Commercial  
34 Director of BSkyB, and the Managing Director of RENO and so forth, how would we go  
35 about doing that?

1 MR. VAUGHAN: My understanding is that at some appropriate time you indicate to the OFT  
2 that it is for them to prove the point.

3 THE PRESIDENT: So they would have to go and get witness statements from all these people?

4 MR. VAUGHAN: Yes, if they rely on these things. Alternatively, we would just ask for witness  
5 summonses, if we needed them, under Rule 22 or 23. But we have obviously listened to  
6 what you have said, and no doubt you will say it again.

7 THE PRESIDENT: No, I am not pre-judging anything, Mr. Vaughan, this is a fairly open  
8 discussion at this stage.

9 MR. VAUGHAN: Because I think basically one of the things we have to do is to trim the case  
10 because on the notification it speaks for itself, and it is sworn as being true by these  
11 officials, by these very senior executives of these companies, and one would assume that  
12 when they swore it was true they had read it, and it was true at the time. It may well be that  
13 that is probably, on the face of it, sufficient unless somebody comes to say that it was not  
14 really true – have we had arms twisted or something like that? The purpose of this, as much  
15 as anything else, is to put down markers of what we expect the OFT to cover in its joint  
16 defence in this whole question which no doubt they are doing, because it is clear from our  
17 Notice of Appeal these are issues. We obviously need to think about how, for example,  
18 under (c), Miss Theresa Walsh, and how we deal with that. Some of these letters we have  
19 not seen in unredacted form, but the OFT relied so much on these documents in its  
20 Decision. We have seen these documents through the RCA's Notice of Appeal. On witness  
21 we have to think and to adjust – we have to adjust and think carefully about which  
22 witnesses in annex 5 of our Appeal are really important, some of them are interesting, as it  
23 were, Mr. Romanay from France Galop who says that British Racing is brilliant and the role  
24 of BHB and the co-operative organisation of British Racing is a model for the world.

25 THE PRESIDENT: That is not the sort of point we particularly feel we need to decide in this  
26 case! [Laughter]

27 MR. VAUGHAN: Quite, but obviously there are categories of matters we can trim or ----

28 THE PRESIDENT: There is a layer.

29 MR. VAUGHAN: Yes, some of it is interesting background, some of it is important. Basically,  
30 there has been £380 million coming in to the industry under the Agreement over the 10  
31 years, which is of enormous importance for trainers, breeders, jockeys, and punters and  
32 everyone, and the general public, and also there was going to be a great deal of free  
33 advertising by being on television. In fact, it had been very successful, attendances had gone  
34 up and everyone is much happier about racing than they were five years ago.

35 THE PRESIDENT: Well let us see how we get on.

1 MR. VAUGHAN: We will see how we get on, but obviously we will try ----

2 THE PRESIDENT: What is the situation in relation to documents?

3 MR. VAUGHAN: We have already indicated that we would make an application at another  
4 CMC as soon as we get the joint defence, and then we would make an application. We  
5 would suggest that it is much better to deal with it then. They have offered to give us the  
6 documents referred to in the Decision itself, but part of our case is that that is a highly  
7 selective picking of favourable statements by the OFT from a mass of documents which  
8 were adverse to that view, so we all want to see the full documents, but I think it is better if  
9 we make a separate application once we have seen the joint defence on that. We make a lot  
10 of complaints about the whole investigation in this way. Indeed, taking the ATR witnesses  
11 that they accepted what they said without any investigation at all on the *volte-face* point.  
12 They just accept it and put it without any questioning and not even realising it was totally  
13 different from the notification.

14 So broadly, we will make a separate application and on that we are very keen that  
15 the Defence is not delayed, but that is a separate issue. Can I deal with that now, or would  
16 you rather ----

17 THE PRESIDENT: Yes, I think it is time we got on to that.

18 MR. VAUGHAN: They were given originally 10 weeks on the Order of June, and extended from  
19 the ordinary six weeks period – they were given 10 weeks, and there is no problem at all  
20 about that. In mid-August they wrote about a joint Defence, they were already working on  
21 the joint Defence and suddenly, last night, we hear that they have not managed that because  
22 Mr. Thompson suddenly had accepted a brief to become an expert witness in South Africa.  
23 He is going off, it seems, four days before the time expires for issuing the Defence, which is  
24 on 24<sup>th</sup>. There are two weeks now to go and four days could be made up quite easily by  
25 working weekends in order to get up to date. If it delays beyond 24<sup>th</sup> and it goes to 8<sup>th</sup>  
26 October, as they suggest, that would effectively mean they had 12 weeks to put in their  
27 defence, which is an inordinate length of time given the ambitions of the Tribunal. We  
28 would say there is plenty of time for them to catch up within two weeks if he wants to go on  
29 12<sup>th</sup>. If he can delay until 24<sup>th</sup> then he should delay until 24<sup>th</sup>. It is strange he is giving  
30 evidence for two weeks in this matter, and it seems to me that he will be going, we are told,  
31 without any consideration, and therefore facing the Tribunal with a *fait accompli*. The  
32 whole thing should be dealt with by keeping to the time limits, which only yesterday were  
33 suggested to be inconvenient to Mr. Thompson, and getting on with the matter, having a  
34 CMC in early October so that we can resolve the documents and other matters, and so the  
35 whole thing continues. Our ambition is to get a hearing before the end of the year, or it may

1 be January – we do not mind whether it is December or January. We do not want the whole  
2 thing to start slipping away for counsel’s convenience in order to go for Easter or beyond in  
3 this matter. It is very important for racing, and the whole issue is very important for sport  
4 generally – joint selling is a highly contentious issue in competition law anyhow, and  
5 particularly in the sporting context.

6 THE PRESIDENT: If you want to get this matter on reasonably expeditiously the more you can  
7 sharpen and focus the real points that you want to address the easier it is for us ----

8 MR. VAUGHAN: Absolutely.

9 THE PRESIDENT: -- both in terms of managing the case and in producing any Judgment.

10 MR. VAUGHAN: Yes, and you will have noted within the letter in August the OFT at that stage  
11 were very keen on expedition. It is only now, last night, suddenly the expedition was not  
12 quite so important, so we would oppose any extension – it is not as though a day would help  
13 them, they want a fortnight. Basically, that puts the CMC back to middle to late October,  
14 which is a difficult time, and everything drops back not just by two weeks but  
15 proportionally more because it picks up that impetus that time limits are not really strict. If  
16 it were a day or two obviously there would be no point, but a fortnight is a long time, and  
17 anything less than a fortnight will not help him.

18 THE PRESIDENT: Thank you. Mr. Thompson, I think we have taken the question of witnesses  
19 and the question of documents as far as we can at the moment, and that probably does take  
20 us on to the question of the timetable of the case and the question of the timing of the  
21 Defence.

22 MR. THOMPSON: Yes.

23 THE PRESIDENT: I am afraid we have, in other cases, had to be very, very strict with  
24 timetables, and it is not normally our practice to take account of the personal situation of  
25 particular advisers who may be instructed in particular cases. So at the moment we are not  
26 really minded to extend the time in the way that you invite us to do.

27 MR. THOMPSON: I am aware of that fact, but the reality is that today is 14<sup>th</sup> and although Mr.  
28 Vaughan invites me to work at weekends there are a limited number of weekends between  
29 now and 6 o’clock on Saturday when I leave.

30 THE PRESIDENT: Well according to your observations you have a Junior, the OFT has a  
31 considerable number of lawyers and a very able chief legal adviser, it does not seem to us  
32 beyond the wit of man that a document, which is presumably already in a fairly advanced  
33 state, could be produced by 24<sup>th</sup> which is already 10 days away from now.

34 MR. THOMPSON: Indeed, Sir, if that is the position of the Tribunal then that obviously will be  
35 met. In terms of efficient management of the case, I would simply put it before the Tribunal

1 because in my submission, given the issues that have been raised today, Mr. Vaughan  
2 himself has indicated that they may involve quite a substantial rethink of his case. It was  
3 not entirely clear what issues might be of particular interest to the Tribunal, and the fact is  
4 that there have been a number of constraints on time, so I put it before the Tribunal because  
5 in my view, knowing what I know, I considered that that would be the most efficient way  
6 forward, but if the Tribunal takes a different view we will obviously comply with what you  
7 say.

8 THE PRESIDENT: Well, Mr. Thompson, I appreciate your personal circumstances, but we have  
9 to take a tough line on all these things, and it is a horizontal policy decision, we simply have  
10 to keep to deadlines, otherwise cases slip, so I am afraid that in this case we must try and  
11 have the Defence in on the due date. If it was a question of a day or two that might be  
12 another matter, but 8<sup>th</sup> October is not a practical proposition in circumstances where the  
13 original Appeal was lodged on 12<sup>th</sup> July.

14 MR. THOMPSON: Thank you.

15 THE PRESIDENT: In the light of that, and on the assumption that the OFT's Defence is lodged  
16 on 24<sup>th</sup> December, it is a joint Defence, it does appear that what we next need to do is to fix  
17 a further Case Management Conference to pick up some of the matters we have discussed  
18 today and generally review the case. I think at that next Case Management Conference we  
19 ought together to try to identify a bit more precisely what the main issues in the case are,  
20 and to see when the main hearing can be set down for. It may not be possible for us to  
21 actually do all that now together, but we shall have a go, shall we?

22 MR. VAJDA: We have flagged up in our note that if the issue of documents – I have no idea how  
23 long it is going to take – if it is more than *de minimis* we would really not wish to be  
24 present, and therefore if it is more than *de minimis* if it could be done on a separate  
25 occasion?

26 THE PRESIDENT: It would probably have to be a separate part of something.

27 MR. VAJDA: Or a separate part, yes.

28 THE PRESIDENT: It may be that the way to deal with that is at the end of the next Case  
29 Management Conference, but it is not something you need to be involved in or spend  
30 money on worrying about.

31 MR. VAUGHAN: On that, Sir, before we knew of Mr. Thompson's difficulties we have sketched  
32 in the first full week of October, because we will have had time to peruse that. It is highly  
33 inconvenient because we are flat out on *Genzyme* that week but I think personal  
34 convenience – what is sauce for the goose is sauce for the gander ----

35 THE PRESIDENT: And you are not the only one who is flat out on *Genzyme*.

1 MR. VAUGHAN: That is another weekend gone!

2 THE PRESIDENT: The Tribunal's own timetable is getting a little compressed. We need time to  
3 absorb the OFT's Defence. (After a pause) A date that would be convenient to the Tribunal  
4 is Friday, 8<sup>th</sup> October – there is 7<sup>th</sup> October as an alternative.

5 MR. VAJDA: I am afraid I am at a Judicial Seminar on Friday, 8<sup>th</sup>, but that is obviously my own  
6 position.

7 THE PRESIDENT: Shall we go for the 7<sup>th</sup>?

8 MR. VAJDA: I could do the 7<sup>th</sup> – but what about other people?

9 THE PRESIDENT: Well we will fix it for 7<sup>th</sup>.

10 MR. VAUGHAN: I was meant to be in Budapest, but it does not really matter – what is sauce for  
11 the goose is sauce for the gander.

12 THE PRESIDENT: Well I was actually meant to be in New York. It causes havoc with all our  
13 arrangements.

14 MR. VAUGHAN: It is probably better for my health that I do not go!

15 THE PRESIDENT: We will say 7<sup>th</sup> October at 10.30 for the next Case Management Conference.  
16 Very well, are there any other points that anyone wants to raise.

17 MR. VAJDA: Could I just raise the question of the fixing of the main hearing, and I do that  
18 because my clients are obviously concerned in the light of the practice of the Tribunal not to  
19 lose my services. I am aware perhaps to the Tribunal that the convenience of counsel does  
20 not often figure, and it would be very helpful if one was to give an indication now because,  
21 of course, diaries get full and if we can give some thought now as to when a date could be  
22 made available, and I have actually bought my diary along for what it is worth. My theory  
23 is that if we do not fix it until October and everybody's diary begins to fill up, that the  
24 Tribunal may be faced with an invidious decision. I do not know whether the Tribunal  
25 wants to go down that route but rather alarmingly, and this is simply my own diary, I would  
26 be able to do a date in January but not before then.

27 THE PRESIDENT: Well I think it is unlikely, given the state of the Tribunal's list that we will  
28 get to a hearing in this case before January. I think the best thing, Mr. Vajda, is for you to  
29 contact the Registry and let them know what your position is.

30 MR. VAJDA: Yes, I am very grateful.

31 THE PRESIDENT: Others may do the same if they wish.

32 MR. VAUGHAN: So they know, we would have no problem with the second half of January.  
33 Perhaps if it could be pencilled in the Tribunal's diary then you will obviously need to  
34 consult with your colleagues.

1 THE PRESIDENT: We will have to see, the first half of January is also unlikely. The second half  
2 of January may not entirely depend on this case, but it may depend on other cases and  
3 where we are, so we will have to leave that open, but that is the kind of probable window  
4 that we are looking at.

5 MR. VAJDA: All counsel we should then send to the Registry office some ----

6 THE PRESIDENT: Well it might be a useful precaution from your point of view to be in touch  
7 with the Registry. I should say perhaps on that that there are some wildly different estimates  
8 in the observations we have had as to how much time we should aside for the hearing.  
9 Absent major developments we would not see this case taking more than two to three days  
10 in argument at the most.

11 MR. VAUGHAN: Also it depends on the cross-examination, because a lot of ours is covered by  
12 the cross-examination.

13 THE PRESIDENT: It partly depends on witnesses but certainly the argument should not take  
14 more than two days at the most.

15 MR. VAUGHAN: I accept that.

16 THE PRESIDENT: And let us hope that we do not have to devote too much time to cross-  
17 examination.

18 MR. VAUGHAN: As you pointed out, the law for example, it is very difficult to see how we can  
19 say it at greater lengths than we have already.

20 THE PRESIDENT: It is a very full submission, Mr. Vaughan. It is very clear and we have it.

21 MR. VAUGHAN: Yes, and so I do not think one will be taking over much time, as it were,  
22 repeating all that. There is only one point, on the CMC date, Miss Lester and Mr. Lee, my  
23 instructing solicitor, cannot do the Thursday, but they could do the Friday.

24 MR. VAJDA: I cannot do the Friday.

25 THE PRESIDENT: He has a Judicial Studies Board appointment.

26 MR. VAUGHAN: Very well, we will stick to the Thursday.

27 THE PRESIDENT: What I think we would envisage in relation to the Thursday is if you are  
28 making a disclosure application that will probably have to be argued as a separate issue.

29 MR. VAUGHAN: Yes.

30 THE PRESIDENT: We would do our best to deal with the case management issues first and then  
31 Mr. Vajda can devote himself to higher things, and we will then hear the disclosure  
32 application, if there is one, separately.

33 MR. VAUGHAN: Yes. The problem is the files, there are 17 files.

34 THE PRESIDENT: Which you do not have.

1 MR. VAUGHAN: There are two problems, one is the 17 files, the other is the documents the  
2 OFT has not put in the files because they have not relied on them, which is also the issue.  
3 So that raises the *Soda Ash* point. Anyway, we will put our submissions in writing in  
4 advance.

5 THE PRESIDENT: We will not do it now, but we will need to set a sensible timetable for the  
6 exchange of written submissions on this point in advance of that date.

7 MR. VAUGHAN: One thing that would be helpful is if the OFT said they would give us all the  
8 documents referred to in the Decision and their joint Defence. It would be very helpful if  
9 they could give us, at least when they serve the Defence, the documents they accept we are  
10 entitled to.

11 THE PRESIDENT: I understood they have accepted in principle.

12 MR. VAUGHAN: Yes, they have accepted that.

13 THE PRESIDENT: And now you actually want them! [Laughter]

14 MR. VAUGHAN: We want them, say, during the course of the next 10 days, if they can look at  
15 the question of redaction, because it will help a great deal if we know what we are actually  
16 going to get, because then we can decide what we have not got, as it were, and where we  
17 really want to pursue things.

18 THE PRESIDENT: And you may get from them enough grist for your mill for you not  
19 necessarily to proceed on a wider basis.

20 MR. VAUGHAN: Yes, so it would be very helpful if the other part of the OFT could be doing  
21 that exercise – obviously Mr. Thompson will be too busy – if others could be giving us  
22 those documents and see what redactions they need to make to them, if any at that stage, so  
23 we are forearmed and forewarned, and therefore we can decide what application to make.

24 MR. THOMPSON: Subject to checking the confidentiality issue ----

25 THE PRESIDENT: It does not sound a tremendous issue in this case, but anyway it may be.

26 MR. THOMPSON: I hope it is not, but I do not know if there are some tensions between BHB  
27 and RCA or other individuals which may create confidentiality issues, but that seems to be  
28 the only question. I should perhaps say that if quantity is relevant I understand that the  
29 documents appended to the Decision amount to some five files, so it will be a substantial  
30 amount of paper, though whether or not it will provide the grist that Mr. Vaughan seeks is a  
31 matter for him. That is the position.

32 THE PRESIDENT: Mr. Vajda, is there some difficulty about the RCA providing BHB with the  
33 documents?

34 MR. VAJDA: We have never been asked, so far as I am aware.

1 MR. VAUGHAN: One of the troubles is under the Enterprise Act there are very strict provisions  
2 that you are not allowed – I think I am right, you know the Enterprise Act better than I do --

3 THE PRESIDENT: You should not assume that, Mr. Vaughan!

4 MR. VAUGHAN: There are penal provisions, I think.

5 MR. THOMPSON: Yes, there are.

6 THE PRESIDENT: It is all right you have consent. I just wondered if there was another way of  
7 skinning that cat.

8 MR. VAUGHAN: We thought about that, but then we thought they may have real problems in  
9 communicating.

10 MR. VAJDA: That is probably why we were not asked.

11 MR. VAUGHAN: No, that is why we did not ask them because of the problems they might have.

12 MR. THOMPSON: It is pointed out to me by Mr. Gregory, that it is not simply the Racecourse  
13 interests ----

14 THE PRESIDENT: No, there are other interests.

15 MR. THOMPSON: Who are quite substantial commercial interests.

16 THE PRESIDENT: And it may be difficult for them to hand over things that relate to third  
17 parties.

18 MR. THOMPSON: It is not simply a token exercise.

19 THE PRESIDENT: No, no.

20 MR. THOMPSON: If I could just say finally – I think it is a point I made earlier – our  
21 reservations in relation to disclosure of documents to BHB reflect the fact that it was an  
22 intervener at the administrative stage and any submissions it may want to make would need  
23 to deal with the question of whether *Solvay*, for example, extends to the position of  
24 someone in the particular circumstances of BHB.

25 THE PRESIDENT: Yes, thank you very much. Thank you all very much indeed. We will  
26 adjourn to 7<sup>th</sup> October.

27 (Adjourned until Thursday, 7<sup>th</sup> October at 10.30 a.m.)