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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1044/2/4/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 October, 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR JOHN PICKERING
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

M.E. BURGESS, J. J. BURGESS AND S. J. BURGESS
(trading as J.J. BURGESS & SONS)

Appellants

and

THE OFFICE OF FAIR TRADING
and

Respondents

W. AUSTIN & SONS LIMITED (1)
HARWOOD PARK CREMATORIUM LIMITED (2)

&

THE CONSUMERS' ASSOCIATION (3)

Interveners

Miss Jennifer Skilbeck (instructed by Howell & Co.) appeared for the Appellants

Miss Kassie Smith (instructed by The Solicitor, Office of Fair Trading) appeared for the Respondent.

Mr. Richard Watson (of Messrs. Brignalls Balderston Warren) appeared for the first and second Interveners.

Mr. Andrew Macnab (instructed by the Legal Department, The Consumers' Association) appeared for the third Intervener.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning, ladies and gentlemen. Our normal procedure at Case
2 Management Conferences of this kind is to go through the points that we have already
3 signalled to the parties and then see whether there are any further applications or points that
4 anybody wants to make.

5 In this case, by a letter of 14th October we indicated that we would consider the
6 question of disclosure, the question of the two other cases which are 1037 and 1038, and any
7 other further case management directions required by any party in advance of the hearing.
8 Unless anything anybody wants to raise before we do that, I think that is how we would
9 propose to proceed. Perhaps, before we do proceed I could, if I may just identify who we have
10 here today. We have Miss Skilbeck and Mr. Leek for the Appellant – good morning. We have
11 Miss Smith (from Monckton Chambers) for the OFT, supported by Mr. Brentford – good
12 morning. Mr. Watson appears for the interveners –good morning, Mr. Watson and Mr.
13 Macnab for the Consumers’ Association – good morning. I may say that since this is the first
14 occasion that we have had the Consumers’ Association in front of this Tribunal; we are
15 extremely pleased to have your help, and thank you for coming today.

16 Are there any preliminary observations before we get down to the issues that we need
17 to discuss?

18 MISS SKILBECK: I do not think so, Sir, save that one or two of the matters that I have put in my
19 skeleton have been resolved, but I do not know that I need to mention that to you now.

20 THE PRESIDENT: Let me just open my notebook and see where we are. I have in my head, Miss
21 Skilbeck, and you will be able to correct me, that the principal issues on disclosure that we
22 have are the question of Annex 2A, the question of the “advice” that was allegedly given by
23 the OFT in 2001, and perhaps some other matters, although I am slightly hazy as to what other
24 matters are still being pursued. Is that roughly right, or would you like to put me right?

25 MISS SKILBECK: That is right and I think we will find that the other matters have been resolved.

26 THE PRESIDENT: So we do not need to go into that for the moment?

27 MISS SKILBECK: No, but there might be one or two small matters.

28 THE PRESIDENT: If we deal with Annex 2A to the decision first, the Tribunal, I have to say, is
29 somewhat concerned in this case that we have had to grapple with this issue ourselves without
30 any real effort having been made, as far as we can see, by the OFT to consider this point before
31 it got to the Tribunal. It is not a particularly good use of our time and resources to be dealing
32 with this sort of issue and we would hope that in general preliminary consideration is given to
33 questions of this kind before it reaches this stage.

34 As we see it at the moment, this document, Annex 2A, is a potentially important
35 document, but it does contain some information – albeit three years old – that relates to

1 companies that are not before the Tribunal and arguably contains material as to which those
2 other companies may wish to assert some kind of confidentiality. What we are minded to
3 suggest is that at this stage we should proceed in stages. What has already been suggested is
4 that this document should be disclosed, initially to Burgess's lawyers on a modified basis. The
5 document lists the relevant funeral directors and the extent to which they use the crematorium
6 and the number of funerals in question at the various crematoria that are used. What we have
7 suggested as the first stage is that the document, as edited, should remove the numbers of
8 funerals and should give a range for the relevant percentage of cremations that go to the
9 Harwood Park Crematorium. As a first step that seems to us both to protect the legitimate
10 interests of third parties not before the Tribunal and to give the Appellants the basic
11 information that they need for their appeal. It may be that not having yet seen the document in
12 its redacted or edited form the Appellants are not at this stage able to say whether that solution
13 would or would not be sufficient for their purposes. We would anticipate that it would be
14 sufficient for their purposes – or at least might be sufficient for their purposes – but what
15 seems to us to be the right approach is to go in stages, to take that approach as the first stage
16 and if the Appellants are still unhappy after that they can then come back to us and make
17 submissions as to what further information they really need in order effectively to pursue the
18 Appeal.

19 That is how we are seeing it at the moment, Miss Skilbeck. Do you want to make
20 further submissions to us on that approach?

21 MISS SKILBECK: I would like to, if I may, yes. The information concerned is the principal
22 evidence that there is at the moment of the geographic spread of the use of the crematoria – in
23 fact it is the only evidence. The OFT makes two submissions in terms of geographic market.
24 Their first submission is that if there was a narrow geographic market the crematorium would
25 have introduced price discrimination as between branches of the different funeral directors,
26 charging more to those closer to the crematoria. That would be the economic consequence of
27 them being dominant in a small geographic area.

28 The second submission is that when you look at the geographic spread of users of the
29 crematorium they cover a very wide area, and that is their only other point on the geographic
30 market. Now, when you look at the figures for J.J. Burgess which, of course, we have supplied
31 in Annex 2A, that shows a very strong concentration of cremations being undertaken – the
32 closer you are to the crematorium the higher the proportion of cremations that take place at the
33 crematorium. The OFT have sought to say in their Defence that that is not really quite the case
34 – I do not know if you would like me to take you to some of the relevant paragraphs?

35 THE PRESIDENT: Yes.

1 MISS SKILBECK: There is a paragraph in which they produce the numbers; it is on p.6 of the
2 Annex, para.20. It says:

3 "In practice, the information relied upon by the OFT shows that only around 60% of
4 consumers using Harwood have their funerals arranged through funeral directors in...."
5 that area. They say "only around".

6 "Thus a substantial proportion (40%)... comes through funeral directors in other areas."
7 Well some of the funeral directors in table 2A are well away from the crematorium itself.
8 Then if we look down to footnote 64, there is this use of the word "substantially":

9 "Stevenage, Knebworth and Welwyn are the only areas where Harwood is substantially
10 closer than any other crematorium."

11 So the information they are supplying in this paragraph is very vaguely put and, even if it was
12 not vaguely put it would be impossible for us to address it, but the fact that it is vaguely put
13 makes it even harder and, of course, the point is not a point that is restricted to J.J. Burgess and
14 Austins as funeral directors, it is a point that goes to all the funeral directors.

15 THE PRESIDENT: The point being made here is that there apparently 40 per cent. of the users of
16 Harwood Crematorium come from outside the Stevenage, Knebworth and Welwyn area.

17 MISS SKILBECK: Yes, but some of them come from well outside. Perhaps I could take you to
18 Annex 2A itself.

19 THE PRESIDENT: What version have you got that in?

20 MISS SKILBECK: I have just got the figures for J.J. Burgess and I have just got all the estimated
21 distances, but I have none of the numbers or percentages for anyone other than J.J. Burgess.

22 MISS SMITH: Could I just make the position clear before Miss Skilbeck refers possibly to those
23 figures. As I understand it, disclosure of the Decision document took a number of stages. First
24 of all, the OFT served the Decision document on the parties to the proceedings in a redacted
25 form, gave the Appellants annex 2A with their figures in it, but everyone else is redacted from
26 it, gave Austins Annex 2A with Austins' figures in it but everyone else's redacted from it. The
27 Decision that was published had everyone's figures redacted from Annex 2A, and the Decision
28 that was published was that which is at tab 2 to the Defence. So no one's figures appear in the
29 published version of the Decision – Annex 2A of the published version. It appears that Miss
30 Skilbeck is referring to the Decision that was referred on her clients ----

31 MISS SKILBECK: That is correct, thank you.

32 MISS SMITH: -- before the Decision was published.

33 THE PRESIDENT: Thank you. Yes?

34 MISS SKILBECK: Well you will see, if you look at the estimated distances, which I think I can talk
35 about openly because I believe they are not redacted on anybody's copies, that some of them

1 are a long way from the crematorium, if you look at Austins' branch at Huntingford, for
2 example, and Newlings at Royston (on the second page) 33 kms and Lodge Brothers 33 kms,
3 and so on. It is therefore very difficult to make particularly useful submissions in relation to
4 distance on the basis of these figures. I am not saying it is impossible to make some important
5 very important points on the geographic market without this Annex, there are other plenty of
6 other points to be made, the point is that it is the absolute central point made by the OFT apart
7 from the observation on price discrimination.

8 THE PRESIDENT: Yes.

9 PROFESSOR PICKERING: Is the point that is being made in para.20 of the Annex, or the point that
10 one might infer from this that Harwood Park's required catchment area needs to be greater
11 than Stevenage, Knebworth and Welwyn, so it is not surprising that they are drawing a number
12 of cremations from areas other than those three?

13 MISS SKILBECK: I am sorry, sir, that may be the point they are making, but it is also relevant
14 because market share, as a percentage, is a very conventional way of measuring dominance,
15 and since these are the only figures that the OFT has actually produced on market share they
16 are ones that one feels one ought to be permitted to comment on in a fairly open way.

17 PROFESSOR PICKERING: Well this is hardly a market share, is it, as it is quoted?

18 MISS SKILBECK: Pardon?

19 PROFESSOR PICKERING: Here, in para.20 it is not a market share, is it?

20 MISS SKILBECK: That might be a point I would make in my submissions. The OFT have said that
21 the relevant market definition is an area of 30 kms around Harwood Park. There is, I would
22 submit, virtually no evidence produced by the OFT to support that. **This** appears to be the
23 evidence to support it.

24 PROFESSOR PICKERING: Thank you.

25 MISS SMITH: Sir, just on Annex 2A, in the light of your comments this morning, if I could have
26 the opportunity very briefly to explain the OFT's approach to Annex 2A. Of course, as regards
27 the information that the OFT can disclose in the Decision the OFT is constrained by Part 9 of
28 the Enterprise Act, and before the Decision was served on the parties the OFT took the view
29 that the information contained in Annex 2A, the second and third columns fell within
30 s.244(3)(A) of the Act as in commercial confidential material. It was therefore redacted from
31 the copies served on the parties as I have explained. Prior to publication the OFT did consult
32 with the third parties who provided the information in Annex 2A and only two of those
33 responded. Both of them, however, objected to the disclosure of that information on the
34 grounds of commercial confidentiality.

35 THE PRESIDENT: Yes, I think we know all this, Miss Smith.

1 MISS SMITH: You have seen those letters. So, Sir, we have considered carefully disclosure of the
2 information in Annex 2A and we felt that ----

3 THE PRESIDENT: But when it gets to the stage of the Defence should the whole issue not be
4 looked at again -----

5 MISS SMITH: Sir, yes.

6 THE PRESIDENT: -- because you are serving things to the Tribunal that the Appellants have not
7 got and (a) that puts the Tribunal in a very difficult position; and (b) it puts the Appellants in a
8 pretty difficult position, and we have to find solutions to these problems.

9 MISS SMITH: Yes, Sir. During the Appeal the OFT is still bound by Part 9 in my submission. The
10 OFT did consider after the Decision was published and the Appeal was launched, whether it
11 could give voluntary disclosure and was, however, still of the view that s.244(3)(A) applied.

12 THE PRESIDENT: But there are ways of doing this, are there not? We know in published
13 Decisions the Oft gives a range of figures sometimes in order to obscure actual figures.

14 MISS SMITH: Sir, yes, the Tribunal made its very helpful suggestion in its letter of 12th October
15 that a range of figures should be disclosed, and the OFT acceded to that suggestion. It was the
16 Appellants who said that “no”, that was not sufficient for their purposes. So, Sir, we did accede
17 to that suggestion and we still do think that is the most sensible way forward. We say that
18 giving a range of figures, in the first instance at least, provides sufficient information to the
19 Appellants. Miss Skilbeck refers this morning to wanting to look at the spread of funeral
20 directors and crematoria. We say that the exact distances between the funeral directors and the
21 crematoria are set out in Annex 2A in the first column and the range of percentages show the
22 spread of the numbers of funerals carried out by those funeral directors at the different
23 crematoria. We then would strongly support the suggestion that in the first stage at least
24 the range of figures is a sensible way of proceeding and I think on 14th October we indicated
25 our agreement with the Tribunal’s suggestion.

26 THE PRESIDENT: Yes.

27 MISS SMITH: Sir, unless I can help you any further I think those are our suggestions. One point
28 only, which is just a point of correction about the age of the data. The suggestion was made in
29 the skeleton that it was two years old in fact the data is 2002. It is only a matter of small detail.

30 THE PRESIDENT: So we are within the three years, you say?

31 MISS SMITH: Yes, it is two years old in July of this year. The two third parties who responded to
32 the OFT’s request indicated that they still felt there were commercial reasons not to disclose
33 that information. It is simply a point of detail.

34 THE PRESIDENT: Thank you.

35 (The Tribunal confer)

1 THE PRESIDENT: I think, Miss Skilbeck, we will order disclosure of Annex 2A in the form we
2 suggested in our letter of 12th October. If, when you have received that, you still have
3 submissions that you want to make then you come back to us in writing within 7 days and we
4 will consider it further.

5 MISS SKILBECK: Thank you, Sir.

6 THE PRESIDENT: Right, that takes us on to the second outstanding document, which is apparently
7 some what is described as “advice”, given by the OFT apparently in the course of 2001. What
8 is your submission on this document?

9 MISS SKILBECK: Sir, we had disclosed to us at the end of last week only, documents referred to in
10 the Defence and they are in the bundle before you, and if I could take you to the letter from
11 Harwood Park to the OFT dated 4th March 2003.

12 THE PRESIDENT: Yes. Page 54 of this little bundle.

13 MISS SKILBECK: Miss Austin says:

14 "I wish to express my disappointment at finding it necessary to defend our position in
15 this way. You will recall ----“

16 THE PRESIDENT: Yes, you have no need to read it. What does this document tell us?

17 MISS SKILBECK: This document tells us that the crematorium had some suspicion that what they
18 might be planning ----

19 THE PRESIDENT: They were assured, I see, yes.

20 MISS SKILBECK: What they were planning to do might be either unethical or anti-competitive and
21 so quite properly they sought the advice of the Office of Fair Trading. The Office of Fair
22 Trading and the crematorium supporting the view of the Office of Fair Trading have relied on
23 the following submission that even if there is an abuse of a dominant position that is not
24 unlawful if the intention of the crematorium was not anti-competitive but was based on a
25 proper refusal to supply.

26 THE PRESIDENT: Yes.

27 MISS SKILBECK: We have already been down the route, to some extent, of the use made of the
28 correspondence between the crematorium and J.J. Burgess and in the Decision we had a bit of
29 a battle over the redaction of the conclusions that the OFT drew. If I may take you to the
30 Defence, the correspondence is referred to. There are several references but if I can take you
31 in particular to para.33, p.14, half way down that paragraph it says:

32 "Indeed, it is submitted that much of the correspondence relied on by the Applicant
33 supports the OFT’s conclusion that Austin’s refusal to allow the Applicant access to
34 Harwood arose from a breakdown in the relationship between the firms rather than from
35 exclusionary/anti-competitive intent. In particular the correspondence between 10

1 August 2001 and 16 January 2002 (when access was refused) plainly discloses the
2 antagonism ...” etc.

3 This advice was sought from the OFT during that period.

4 THE PRESIDENT: In late 2001.

5 MISS SMITH: Sir, I may be able to pre-empt the submissions in this regard. This request came at a
6 very late stage, about 3 o'clock yesterday afternoon, and it was only this morning that I was
7 able to talk to Mr. Watson, for the crematorium, about the disclosure of this letter, so I have
8 not been able to speak to Miss Skilbeck before we stood up this morning. The OFT is prepared
9 to disclose a copy of this letter in the unusual circumstances of this case, stressing that we do
10 not usually, as a matter of course disclose informal correspondence of this nature, but to make
11 it clear that the advice given by the OFT to Harwood Park in late 2001 was no more than a
12 letter to their solicitors of 6th November giving standard general advice on the application of a
13 Chapter II prohibition.

14 THE PRESIDENT: Yes.

15 MISS SMITH: I have managed to speak to Mr. Watson. He has no objection to us disclosing that
16 letter; therefore that letter can be disclosed.

17 THE PRESIDENT: Good, I am delighted to hear it.

18 MISS SMITH: And we will do that this afternoon.

19 THE PRESIDENT: Thank you very much. I think that was a good decision, Mr. Watson, if I may
20 say so. It may help your clients. It certainly helps us to have everything on the table as far as it
21 can be.

22 Good, that deals with that, what else is left on the disclosure issue?

23 MISS SKILBECK: Sir, that deals with everything as far as the OFT is concerned. In my skeleton,
24 starting at para.28 I made various requests of the Interveners. I am sure I need not say to the
25 Tribunal that we were unfortunately unable to take these matters forward earlier because the
26 Statement of Intervention was only served late on Thursday and we only had sight of the letter
27 just referred to at the end of last week, otherwise naturally we would have pursued these not in
28 front of the Tribunal in the first instance. Paragraphs 30 and 31 we have dealt with with Mr.
29 Watson and so those matters no longer need to be considered. In para.32 the prices of Harwood
30 Park are going to be disclosed. That comes under the next matter, which is this figure of 9.3
31 per cent. as being the percentage of cremations attributable to J.J. Burgess in 2002. I would
32 just like to point out to begin with that Austins, as funeral directors, have the percentage
33 figures of all funeral directors using the crematorium, and so in this respect they obviously and
34 inevitably have confidential information on their competitors.

35 THE PRESIDENT: Yes.

1 MISS SKILBECK: But this figure is used to say that it did not intend to benefit from the exclusion
2 of J.J. Burgess because in some sense the implication must be that it was a rather small user of
3 the crematorium. In order to establish that point we would like disclosure of the figures
4 relating to the other users – it could be on an unnamed basis. In addition it goes very much to
5 the points we were talking about before, namely, the catchment area of the crematorium. The
6 crematorium has said that the catchment area is 10 miles and these figures would tend to
7 support it – the totally unredacted version of that would support it or not, as the case may be.

8 THE PRESIDENT: Have you sought this information from the crematorium?

9 MISS SKILBECK: No, Sir, because this figure of 9.3 per cent. was only mentioned in a Statement
10 of Intervention which we got on Thursday evening. Sir, I think the information, quite apart
11 from assisting us in making relevant submissions would be of direct interest to the Tribunal in
12 taking a view itself of these matters.

13 One further point is that the OFT has made the submission that if there is an abuse of
14 a dominant position it does not matter if some competition is eliminated as long as some
15 competition remains, and in that respect they have relied on the competition supplied to
16 Austins by the Co-Op. So in order to make that point good it would be useful to see what
17 proportion of cremations are attributable to the Co-Op vis à vis Austins.

18 (The Tribunal confer)

19 THE PRESIDENT: Miss Skilbeck, at this moment I think what you should do in the first instance is
20 wait and see what you get from the edited version of Annex 2A, and then write to the
21 crematorium (the Interveners) to see whether there is further information that you want from
22 them, and whether there is something that can be conveniently agreed, and then if it cannot be
23 agreed then write to us and put the argument again.

24 MISS SKILBECK: Sir, can I point out that the skeleton argument of the Appellants is due next
25 Monday, and this could have been dealt with weeks ago had we had a proper response from the
26 parties.

27 THE PRESIDENT: Yes. Mr. Watson, do you have any position on this? It is desirable that as the
28 Tribunal we get a picture, but we do not necessarily want to have detailed information of
29 names and precise figures and all the rest of it. I think what Miss Skilbeck is looking for is
30 some feel for how important Burgess was in the totality of the crematorium's position
31 presumably in 2001 and 2002.

32 MR. WATSON: Sir, yes. I think the argument is probably better put in relation to comparison
33 between 2001 and 2002 rather than saying that you need all the detail as to the breakdown of
34 the others, because on the face of it that figure is effectively free-standing and in its own right
35 as a percentage of the whole. It is unnecessary to then say what is the rest, the other 91-odd per

1 cent. made up of specifically. I do not see how it assists the Tribunal in reaching a decision. It
2 should identify obviously the specific percentage that the Co-Op which may be considered to
3 be one of the other main rivals in use, but I am not sure that that actually assists the Tribunal at
4 this stage.

5 THE PRESIDENT: I am not sure whether I know whether this is right or not without having gone
6 more into detail in the papers, but one might imagine that it might be interesting background to
7 know whether, despite the fact there is a percentage there, every other user of the crematorium
8 had a lower percentage so that although they had X per cent. everybody else had, say, 1 per
9 cent. for argument's sake, or that that percentage showed that they were actually the fourth
10 largest user, or tenth largest user, or 21st largest user, or the second largest user, or whatever.

11 MR. WATSON: Would that not also introduce the comparison in terms of the size of the other
12 funeral directors, because obviously there are other factors at work in terms of the amount of
13 business they can put to a crematorium?

14 THE PRESIDENT: They are larger companies?

15 MR. WATSON: Yes, so that would be a distortion if it was taken at face value as to simply the
16 number of cremations that took place from any given user. It obviously opens a slightly wider
17 picture.

18 THE PRESIDENT: We will need to try to form some sort of picture, looking at it from
19 a competition point of view, of how significant Burgess is in the competitive situation in the
20 Stevenage/Knebworth area and further afield, depending on how the argument goes – whether
21 they are on the periphery, somewhere in the middle, very important, or what. So let us just
22 reflect for a moment. (After a pause) We are going to have a further discussion on this point to
23 see what the right solution is.

24 (Short Break)

25 THE PRESIDENT: We have had a brief discussion about what we think might be helpful to the
26 Tribunal. What we think might be helpful to the Tribunal in order to understand the case, in an
27 ideal world, would be the preparation of a small table that was perhaps headed "Use of
28 Harwood Park Crematorium" or something of that kind, and ideally covered 2001 and 2002,
29 and preferably 2003 so one had a full comparison, which gave indicative ranges of percentages
30 of customers using the crematorium for Austin, for Burgess, and for the two next largest
31 customers without identifying those customers. We have what is said to be the actual
32 percentage for Burgess, and what would be envisaged for Austin would be to say the range is
33 X per cent. to Y per cent. within, say, a 10 to 15 per cent. spread, and then for the next largest
34 customer (without identifying that customer) and then for the next largest after that, so that we
35 get some picture of the extent to which (without revealing precise figures) the crematorium is

1 used by Austin itself, by Burgess and by the two next largest customers, and that would just
2 give us a bit of background that we would find helpful, without I think disclosing anything
3 sensitive from your client's point of view. Do you follow me, Mr. Watson?

4 MR. WATSON: I do indeed, Sir. May I take instructions?

5 THE PRESIDENT: Yes, please do.

6 MR. WATSON: (After a pause) I am most grateful, Sir. Yes, indeed we would be very happy to
7 proceed on that basis.

8 THE PRESIDENT: The matter has come to a head so there is a degree of urgency.

9 MR. WATSON: I appreciate that. I believe all the figures are available so it should not take too long
10 to extrapolate those and put them in, as you say, 10 – 15 per cent. bands for those three years.

11 THE PRESIDENT: Yes, if someone could possibly do that by the end of the week we would be
12 extraordinarily grateful.

13 MR. WATSON: Sir, yes.

14 THE PRESIDENT: Thank you very much. There you are, Miss Skilbeck.

15 MISS SKILBECK: Yes, Sir. It is back to the advice given in November. The OFT have agreed to
16 disclose the advice with your encouragement, and we just ask also that the crematorium
17 disclose the letter requesting the advice. Perhaps I can take you to their Statement of
18 Intervention.

19 THE PRESIDENT: Well unless there is a major problem I would have thought that the OFT is
20 disclosing the letter the OFT sent. In order to understand that letter it is probably quite useful
21 to have the letter to which that letter is an answer, as it were. So unless there is some major
22 objection – I do not know, Mr. Watson, whether there is?

23 MR. WATSON: Since I do not, I must confess, have the copy of the letter with me, so I just hesitate
24 to that extent, but I do not have any reason to think that it would disclose any ----

25 THE PRESIDENT: Let us hope it would be sensible to disclose both of them.

26 MR. WATSON: Sir, yes.

27 THE PRESIDENT: Just leave it on that basis. Does that deal with all disclosure issues, as far as you
28 can tell at the moment, Miss Skilbeck?

29 MISS SKILBECK: It deals with everything that I wanted to raise.

30 THE PRESIDENT: Thank you very much. As far as the two other cases are concerned, the Tribunal
31 has had a very similar situation in other proceedings called *Albion Water*. What we did there
32 was to say that the case in which the Tribunal ordered, by consent here, interim measures
33 should remain, because there is an agreed interim measure in this case and it is undesirable that
34 we should do anything to disturb that until these proceedings have finished.

1 As regards the other case, it is probably sensible simply to leave that case where it is
2 with a direction that no further action should be taken in relation to that case until the end of
3 these proceedings. One never quite knows, there may be some issue of costs, or there may be
4 some collateral issue that nobody has thought of which means that it would be perhaps unwise
5 at this stage to dispose of the case in formal terms. I think in formal terms both those cases
6 should probably be simply left where they are for the time being and dealt with at the end of
7 this case in a general sweep up of all outstanding procedural issues.

8 MISS SKILBECK: Sir, if I may just say, it is the OFT that has been pressing for their withdrawal.

9 THE PRESIDENT: Thank you. That is our view at the moment, Miss Smith, which is more or less
10 what we did in *Albion*.

11 MISS SMITH: Sir, yes, we are happy that an order be made on both those cases on the same basis it
12 was made in *Albion*, that there be a stay, no steps in the proceedings to be taken until after the
13 hearing and costs to be reserved.

14 THE PRESIDENT: Yes, thank you. Anything else from the Appellants?

15 MISS SKILBECK: Sir, two other matters. I have set out in my skeleton the kinds of further
16 disclosure that we might make including an offer to introduce witness statements in respect of
17 some of them. On the question of witness statements, there is evidence – which I think we have
18 probably dealt with adequately – produced by the Interveners which is not supported by
19 evidence or witness statements, but we are happy to leave that to one side, but I would just
20 simply suggest that if any of the other parties have any objections to us introducing any of
21 these classes of information perhaps they could say so – it is set out in para.46.

22 THE PRESIDENT: Yes. Well I think you should basically take your own line on this at the moment,
23 Miss Skilbeck, and if there is some objection we will deal with it as and when it arises.

24 MISS SKILBECK: Thank you, Sir.

25 THE PRESIDENT: Just bear in mind that this is an attack on the Decision so we are interested in the
26 analysis in the Decision above all, on the competition issues that arise. We are not so
27 interested in collateral issues. Strictly speaking I think at this stage any evidence, or further
28 material that you seek to introduce should be in response to something that has arisen since
29 you made your first Notice of Appeal, because in this Tribunal we are not comfortable with
30 matters simply snowballing as we go along unless there is a good reason for it.

31 MISS SKILBECK: In my view none of these are collateral matters. It is really just a matter ----

32 THE PRESIDENT: That was the point, I think, that Miss Smith was about to get up to make.

33 MISS SMITH: Sir, I would simply say that obviously you are aware that Rule 8(6), which provides
34 that the Notice of Appeal should include the documents and statements on which the Appellant
35 relies.

1 THE PRESIDENT: Yes.

2 MISS SMITH: And we would suggest that if the Appellant wishes to rely on further evidence or
3 material they need the Tribunal's permission to produce that new material. At the moment we
4 would resist an application to put in this new material on the ground essentially that this is
5 a complainant's Appeal, and in *Claymore* the Tribunal gave some indication of the sort of
6 issues that it would be concerned with in a Claimant's Appeal, in para. 109 of the latest
7 *Claymore* Judgment:

8 "...whether the OFT has made any material error of law, whether it has carried out a
9 proper investigation, whether its reasons are adequate and whether there are material
10 errors in its appreciation:"

11 It is not entirely clear to us at the moment how relevant or necessary this material contained in
12 paras. 45 and 46 of Miss Skilbeck's skeleton actually is the matters in issue and to the
13 challenge to the OFT's Decision, in particular para. 45(c) – "...figures showing the extent of
14 private ownership of crematoria in England and Wales." At the moment it is not clear to me
15 how that is relevant to the challenge to the OFT's Decision – "references obtained by Burgess
16 at the time of the initial refusal to supply" – subpara. (f). The problem we will be facing is if
17 this material comes in willy-nilly in the skeleton, we have, of course, applied to the Tribunal
18 that it should be excluded, but we are under quite significant time pressure at that stage to
19 respond and the last thing we want to do in our skeleton is to start responding to matters that
20 we believe are of peripheral relevance to the real issues in the case.

21 We simply say that if this information is to be put in there should be a proper
22 application which we would resist at the moment on the basis of this skeleton. Related to that
23 point is another concern which I should raise, arising from para. 43 of the Appellant's skeleton,
24 where she sets out the large number of grounds on which she says she wishes to rely. My
25 concern is that these appear to be multiplying outside what is now in the Notice of Appeal, in
26 particular the last line. She draws attention to supplying J.J. Burgess only in respect of specific
27 postcodes. As I understand that supply came about as a result of the agreed order, consent
28 order, for interim measures for this court. To now start trying to bring that into the Appeal as
29 well, there is a danger that things are multiplying and the focus is being lost. So it is on that
30 basis that I would express the OFT's concerns about allowing this material in with the
31 skeleton, simply on the basis that we could then turn round and object to it. Unless the
32 Appellant has given good reason why this further information should be put in or is relevant to
33 the Appeal we would resist any permission being given to put this in at this stage.

34 (The Tribunal confer)

1 THE PRESIDENT: Miss Skilbeck, our view at the moment is this. The Notice of Appeal sets the
2 framework for the case. There is some latitude in the Tribunal's case law which says that an
3 Appellant can add in further material in response to matters raised in the defence, which it has
4 not had a chance to deal with before. The skeleton argument is not, in principle, the time for
5 advancing a new case beyond the case that has been set in the framework for the Appeal. We
6 will not make any orders at this stage, but if you do wish to put in new matters, please bear
7 those considerations in mind and ask yourself whether it is really necessary and relevant and
8 justified at this stage to put it in. There is obviously a certain tension between the procedural
9 economy that we aim for in this Tribunal, and the need to go into the case fully and to give the
10 Appellant the fullest opportunity to make its case. It may be in cases of this kind one has
11 a little more latitude than one has in other cases involving large and better resourced
12 companies who could have acted differently earlier.

13 MISS SKILBECK: Thank you, Sir. May I just quickly explain why each one is relevant, since my
14 learned friend has raised the point? (a) Both parties rely on the exchange of correspondence
15 between the parties and this is just the addition of a later letter. (b) Is a response made to
16 a point made in the Statement of Intervention which was received on Thursday night. (c) Goes
17 to the effect on competition which is a matter the OFT relies on substantially. (d) Harwood
18 Park's price list is relied on by the Interveners and is going to be supplied by them. e) This
19 relates to the commercial dispute – if people do not want to see the cheque stubs that relate to it
20 I am happy to exclude those.

21 THE PRESIDENT: Do we need the cheque stubs?

22 MISS SKILBECK: There is talk of a commercial dispute which can only be the apparent non-
23 appearance of two cheques sent by the Burgess's, and these are cheque stubs which show that
24 the cheques were issued and must have got lost in the post – it is a tiny matter, one page.
25 (f) I am happy to omit those if there is a complaint about it. (g) This is a matter that one
26 would have expected the OFT to have produced – a map showing the 30 sector area.

27 THE PRESIDENT: Yes.

28 MISS SKILBECK: That is all, para. 47 just deals with any request for witness statements to
29 accompany any of those bits of information. So, Sir, the information sought to be supplied is
30 extremely limited and relevant.

31 THE PRESIDENT: Well let us see how we get on in this respect. Was there another matter that you
32 wanted to raise, or was that it?

33 MISS SKILBECK: It was only, Sir, in the light of the large number of issues, whether we might get
34 some guidance on the timing for the hearing itself, and also whether, in the light of any points
35 made today and the information to be supplied by the crematorium, the position in respect of

1 the Appellant's skeleton, which is due on Monday night, and whether, if necessary, a short
2 appendix might be added or might be delayed – whatever the Tribunal would think fit – to take
3 advantage of any new information.

4 THE PRESIDENT: Well I would have thought in principle if there is new information you have not
5 had a chance to deal with in your principal skeleton then in principle you should be entitled to
6 add to it. In general, the issues in this case are: relevant geographic market, dominance in any
7 alleged geographical market, the question as to how far refusal of supply of the kind that
8 occurred here is an abuse; and lastly, objective justification. So there are those four issues.

9 MISS SKILBECK: Sir, if I may, on the question of objective justification, that is not an issue raised
10 by the OFT or the Interveners as has become clear from the Defence and the Statement of
11 Intervention, and so it is not my intention to deal with that.

12 MISS SMITH: Sir, I think that is correct, the OFT does not rely on an argument of objective
13 justification. As regards the timetable for the hearing, we would suggest it may useful to have
14 a detailed timetable for the two days, but that the most appropriate time for considering that
15 may be once the skeleton arguments have been exchanged.

16 THE PRESIDENT: Well we are certainly not in a position to set out a timetable today.

17 Mr. Watson, could I just say one thing to you, that obviously we are extremely anxious that
18 Austins should have the fullest opportunity to put their point of view to us. Your Statement of
19 Intervention, quite understandably, draws very heavily on the OFT's position, but you are fully
20 entitled to put in whatever evidence or matters you want to lay in front of us on those issues
21 that I have just mentioned, either on geographical market, on dominance, or on the issues of
22 abuse, they are all issues into which the Tribunal may wish to go in some detail, and there are
23 perhaps three possible scenarios that you should, as it were, be aware of so that your clients
24 can think about the situation. The first scenario is that the Appellants lose on one or more of
25 the issues, in which case the Appeal is rejected and that is it.

26 The second scenario is that the tribunal is unhappy with one or more parts of the
27 Decision and decides to send it back to the OFT. The third scenario is that the Tribunal
28 decides to decide itself on one or more of the issues with a view to either deciding the case in
29 part and sending another part back to the OFT, or reaching some solution in terms of the order
30 that it makes that will, in one way or another, resolve the case without having to send it back,
31 or whatever. So I am just saying that so you are aware of all the possible outcomes in this
32 case, and can put whatever material or submissions before us that you would wish to put with
33 a full understanding of all the possible outcomes that there may be.

34 MR. WATSON: That is very helpful, Sir, thank you.

1 MISS SKILBECK: Sir, you have just explained, quite properly, to us that we are constrained by our
2 Notice of Appeal. It seems to me only appropriate that the Statement of Intervention constrains
3 the Interveners.

4 THE PRESIDENT: Well I mean within the framework of the Intervener, but I do not want the
5 Intervener to not do something that they might otherwise do because of a possible
6 misunderstanding as to the various outcomes that the case might result in. I am not
7 anticipating that we should get an avalanche of material from the Intervener, but I think it is
8 legitimate to draw the Intervener's attention to his chance to make an effective intervention.
9 Let us just see how we get on.

10 Now, Mr. Macnab, for the Consumers' Association, how do your clients see their
11 participation in this matter from herein on? I do not think we have had any written document
12 from you so far, is that right?

13 MR. MACNAB: Oh, I hope you have had our Statement of Intervention?

14 THE PRESIDENT: Oh we have, yes, absolutely.

15 MR. MACNAB: It is quite a lengthy document.

16 THE PRESIDENT: Absolutely, yes.

17 MR. MACNAB: At the moment we do not see our intervention going much further than the
18 Statement of Intervention.

19 THE PRESIDENT: What you have already told us.

20 MR. MACNAB: Yes. We are not seeking to call any witnesses or anything like that, Sir. I would
21 imagine that our involvement at the hearing would be fairly short and sweet. Obviously we are
22 going to see what Mrs. Skilbeck has put in her skeleton argument, and I should imagine that
23 we are going to be largely agreeing with what she says. As regards how long I shall be
24 speaking on the actual day itself I really cannot say at this stage, but I do not see our
25 intervention going much further than what you have seen already.

26 THE PRESIDENT: No. Thank you. Are there other matters that anyone now would like to raise
27 while we are all here? (After a pause) Apparently not. Very well, thank you very much indeed.
28
