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IN THE COMPETITION

Case No. 1048/1/1/05

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

28th April 2005

Before:
MARION SIMMONS QC

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Matthew Cook (instructed by M&A Solicitors, Cardiff) appeared for the Appellant.

Mr. Jon Turner (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

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CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good morning. Mr. Turner?

2 MR. TURNER: There are very few issues between us today, subject to your view. There is no issue
3 on the question of disclosure of starting point percentages to my friend on a confidential basis,
4 as he proposes.

5 THE CHAIRMAN: This Tribunal has a slight problem with that because when we come to give
6 a decision we have to explain how we arrive at the figure and proportionality and we have to
7 be open about that. So, although the agreement between you is very useful and will enable the
8 matter to proceed for the time being, I think it is going to be necessary to deal with the
9 confidentiality issue.

10 MR. TURNER: That is understood and, indeed, in previous cases of this kind the percentages have
11 been made available on an open basis so we will discuss that, but currently I do not apprehend
12 a problem.

13 THE CHAIRMAN: You do not apprehend a problem?

14 MR. TURNER: I do not at the moment.

15 THE CHAIRMAN: Can I leave it with you, that whatever clearance needs to be obtained for that
16 purpose is obtained?

17 MR. TURNER: If there is a problem of which I am unaware the Tribunal will be notified straight
18 away.

19 THE CHAIRMAN: And then we can deal with it?

20 MR. TURNER: Yes.

21 THE CHAIRMAN: It may be that when you reveal the figures that there is not a problem anyway.

22 MR. TURNER: Because there is no need to raise it or take it further.

23 THE CHAIRMAN: Absolutely. So perhaps that can also be dealt with. But if the figures are
24 contentious in the sense that we are going to have to consider whether there is what I call
25 proportionality then they are going to have to be put into the public domain or there has to be
26 a very good reason why they are confidential.

27 MR. TURNER: The second question is whether there is an issue on giving permission for DQS to
28 adduce the new witness evidence from Mrs. Williams and Mr. Stock, and the Office's position
29 is that there is no issue, we do not oppose that provided that we do have a chance to respond in
30 the interests of balance. I can explain the points on which we would propose to lead short
31 responsive evidence, and what it is, if you would wish me to do so now?

32 THE CHAIRMAN: I think that is probably the right course to take.

33 MR. TURNER: We propose to lead short responsive evidence from Mr. Scullion of UOP, the
34 principal person involved at the supplier company, addressing the following points. First,
35 addressing the new witness evidence from DQS from Mrs. Ann Williams, in which

1 Mrs. Williams gives direct evidence as to what was meant by her faxed complaint to UOP.
2 Mr. Scullion was effectively the other party to that conversation. We understand that Linda
3 Marchant, who is mentioned in the document, was effectively the office administrator and
4 a conduit to Mr. Scullion.

5 The nature of the evidence will be that Mr. Scullion will say that Mrs. Williams is
6 mistaken in her recollection and that the natural meaning of the document is to be preferred
7 and is correct. He will say that she was a senior person within DQS, who was certainly aware
8 of and actively taking part in the price match not undercut policy – or at least that is what we
9 understand to be the position. May I pause there and say that we managed to see Mr. Scullion
10 to canvass these points only yesterday, and what I say now is therefore based on the outcome
11 of the meeting that we held with him, and he has confirmed, accompanied by two lawyers, that
12 he would be able to turn around a short witness statement within a matter of days and that he
13 would be able, he thinks, to comply with the proposed timetable in the Office's skeleton,
14 namely to produce a short statement by next week. That is the first point and on that point
15 I note that Mr. Cook in his skeleton accepts that there should be responsive evidence on that
16 issue.

17 The second area is this: as part of the case against DQS you will recall that the
18 Office's decision specifically refers to and relies on a series of complaints that were made by
19 other distributors about DQS cheating on the cartel and during the disputed period, and I went
20 through those last time. There is a conclusion that this was evidence of DQS's involvement;
21 that is in the Decision itself. What has happened in the reply is that DQS now raises in
22 para.16, for the first time, a new allegation that in relation to these complaints made to UOP
23 and Mr. Scullion, Mr. Scullion did not ever pass on the complaints to DQS. In other words,
24 DQS remained in ignorance of all of this. You will not find that allegation in the Notice of
25 Appeal. You will not find it in the administrative procedure. You will find it in para.16 of the
26 reply.

27 The Office, therefore, did not previously have occasion to doubt this, and particularly
28 when one looks at the terms of the complaints which are in issue, there was no reason to
29 suppose, naturally that these were not passed on. Now this issue has been raise and we have
30 simply asked Mr. Scullion about it – he is the right person. We therefore propose to introduce
31 witness evidence from Mr. Scullion on that point in relation to whether he passed on these
32 complaints.

33 THE CHAIRMAN: Do we know what that evidence is going to be yet?

34 MR. TURNER: Yes, well again this is the outcome of the meeting yesterday, so he has still got to
35 put his name to a piece of paper.

1 THE CHAIRMAN: Presuming he signs the piece of paper, yes.

2 MR. TURNER: Our understanding is that what he is going to say is that he cannot remember
3 specific documents when these were placed under his nose, he could not remember precisely
4 the events, but in relation to some of them he noted, for example, names that he had written on
5 of people from DQS, and he is able to speculate, or to say what might have happened, or what,
6 in some cases was likely to have happened. But it is fair to say that his recollection on that
7 point does not appear now to be precise.

8 Related to that, in the same paragraph of the Reply (para.16.2.3) DQS now says that
9 a part of Mr. Scullion's first witness statement, which was produced in the administrative
10 procedure, refers to these complaints as being part of a price support policy which everybody
11 accepts DQS was not involved in and not part of the price match not undercut policy which it
12 is alleged DQS was involved in. So that now is an issue raised about the meaning of
13 Mr. Scullion's existing evidence. We have checked with him to see if DQS is wrong about that
14 and our understanding is that he can say (and will say) that they are wrong about that.

15 There was a third point raised in my skeleton and that was whether we would adduce
16 evidence on the point which has now been raised, namely, even if Mrs. Williams was involved
17 in price fixing there is, as it were, a second line of defence, and the second line of defence,
18 which is in the Reply (para.12) is that she was limited to the South West of England and her
19 responsibilities, influence and contacts within DQS did not extend beyond her region.
20 Mr. Scullion has simply said about that that the internal affairs DQS are beyond his
21 knowledge, and we will not be adducing evidence from him on that question, because it is
22 outside his knowledge.

23 THE CHAIRMAN: So you are not going to adduce any further evidence on that?

24 MR. TURNER: We cannot, and we are not going to go to anybody else. So what it boils down to is
25 short evidence from Mr. Scullion on those two points, of the nature that I have outlined.

26 THE CHAIRMAN: Shall we hear what Mr. Cook says about it?

27 MR. COOK: I am grateful to my learned friend for that explanation of what the Office would like to
28 do here, and I start by explaining the extent of my agreement to what the Office proposes. As
29 my learned says, it was mentioned in my skeleton, we do agree to actually two proposals, one
30 of which has now gone away. The other thing which we do of course agree to is what is meant
31 by the fax from Mrs. Williams to UOP of 19th February 2002. That is something that is a new
32 factual point and we accept that that is evidence therefore the responds to that and that is
33 wholly appropriate.

34 THE CHAIRMAN: The fax is written by whom?

35 MR. COOK: The fax is written by Mrs. Williams.

1 THE CHAIRMAN: And received by Mr. Scullion through this chain?

2 MR. COOK: So we understand, so we have no objection to Mr. Scullion speaking to what was
3 meant by that fax if he can remember. The basis for that acceptance is, of course, that it is
4 hardly a new factual allegation but it is something where you put evidence forward to support
5 a factual allegation and consequently we accept that is a response to that factual evidence.

6 THE CHAIRMAN: I am just wondering, it is how Mr. Scullion interpreted that fax?

7 MR. COOK: Yes.

8 THE CHAIRMAN: Rather than the natural meaning.

9 MR. COOK: I do not think Mr. Scullion could really help you on what the natural meaning is.

10 THE CHAIRMAN: Well that is what I mean, it was put on the basis we will say the natural meaning
11 of the document is preferred and correct.

12 MR. TURNER: In the decision the Office said it is clear, when you look at this document, what is
13 meant and what is meant is that there is a complaint and participation in the policy.

14 THE CHAIRMAN: Yes, the Office interpreted it in one way, and Mrs. Williams says that she meant
15 something else.

16 MR. TURNER: She now says that she meant something else.

17 THE CHAIRMAN: Mr. Scullion's evidence can only be evidence of fact, so it can only be as to
18 how he received that information, how he perceived that information at the time?

19 MR. TURNER: His evidence will be that the document which he received has to be seen in context
20 of his dealings with Mrs. Williams, and when you know what his dealings were with
21 Mrs. Williams, over quite a long period of time and, so far as he recalls specifically in relation
22 to that event, because he may have spoken to her as well – I cannot remember now whether he
23 said he actually did speak to her on that occasion as well – he is clear exactly what they were
24 discussing, because the two of them were discussing a complaint and how to deal with it.

25 THE CHAIRMAN: Because I can see that this is going to get outside the four corners of rebuttal.

26 MR. COOK: Madam, that was the point I was just going to come to. We accept a very narrow
27 scope of this. What my learned friend is now suggesting is essentially a detailed analysis of
28 Mr. Scullion of the whole basis upon which he says we were party to a policy. That is not
29 there at the moment, and it is not a question of rebuttal it is something that the OFT is trying to
30 make its case afresh. I must say, it is exactly the type of concern we had, the reason why we
31 said this matter should be remitted. The OFT at the last hearing persuaded you that the right
32 policy was to carry on on the basis my learned friend expressly said their evidence fell full
33 square within the scope of the Decision and they were very strong on that and it was one of the
34 crucial factors you yourself referred to in your decision saying it should not be remitted.

35 THE CHAIRMAN: And that para.25 was no longer relied on.

1 MR. COOK: Absolutely. They are now going considerably further and that was really the point
2 I was going to come to. There is a very limited scope of what is pure rebuttal here, and the
3 limited rebuttal evidence he can give may be of very limited assistance, to say that he
4 understood it as something different. If he wants to give that evidence I accept that is
5 legitimate for the OFT to put forward. If he is going to say “I enlist the following 15 examples
6 of conduct which demonstrate to me that there was this policy in place and that is why “I think
7 this fax meant that”, those 15 incidents, in my submission are wholly new evidence, not
8 rebuttal. It is the OFT making their case afresh.

9 THE CHAIRMAN: Yes and it may mean that you would want to answer those – we have not seen it
10 yet.

11 MR. COOK: That is the other concern, exactly the type of points my learned friend is going to be
12 making, “We are going to want to go back to Mrs. Williams, Mr. Mitchell” and it might well
13 be half a dozen individuals. The point that concerned me was his reference to scribbled hand
14 written names on some of these letters which might, and I have not been through in the last 30
15 seconds what those names are, I do not know who those individuals are. How many are we
16 talking about? If they are still employed by us – anything of that kind, to find out what their
17 evidence on these points are going to be. In my submission, what my learned friend is talking
18 about is opening a very large can of worms potentially. But regardless of that one has to look
19 at is the limitation that this Tribunal has been very strong on concerns the OFT putting in new
20 evidence on rebuttal points.

21 I have explained what they are talking about with Mrs. Williams’ fax going
22 considerably further than that. If I could just briefly address you on what was the first point in
23 my skeleton essentially, which was what my learned friend describes as a new positive case
24 that we did not pass on comments. On the contrary, if you read the Reply, we do not advance
25 a positive case we say “There is no evidence to show ----”

26 THE CHAIRMAN: Yes.

27 MR. COOK: It is the OFT’s responsibility in the Decision to produce strong compelling evidence.
28 So if you go to my reply it is para.16.

29 THE CHAIRMAN: Yes.

30 MR. COOK: There is no evidence to show – we did not say “Mr. Scullion did not do so as
31 supported by the following three witnesses”, we have said “There is no evidence to show”, and
32 then we go below in the following subparagraphs to point to situations where the evidence the
33 OFT have in fact produced is quite to the contrary.

34 THE CHAIRMAN: There is no evidence to show that Mr. Scullion passed on these complaints to
35 the Appellant.

1 MR. COOK: Yes. What I have done then is analyse what Mr. Scullion did in fact do. The OFT has
2 to show by strong compelling evidence that we were party to some form of policy if it wishes
3 to rely on evidence of complaints, and we say in this context if we did not know about
4 anything we are not party to anything. We need to show something that crosses the line
5 essentially between somebody else and us.

6 THE CHAIRMAN: So the OFT says in relation to that you say there no evidence, Mr. Scullion says
7 he cannot remember.

8 MR. COOK: Well Mr. Scullion says he cannot remember specific incidences but is now going to
9 give some new evidence about things that he may have done. He will not be able to say “I did
10 it on **that** complaint, or **that** one”, but he did it on some of the complaints. The point I am
11 making is what I have done is gone through the OFT’s case here, the case that they are now
12 making as a defence based on their Decision evidence as to exactly why they say they can
13 justify a case against it and I have spotted holes in it and these are one of the holes I say I have
14 spotted in it – whether it is a hole or not is a matter for another day. I say there is no evidence
15 that any of these are passed on. I am simply referring to that omission in the OFT’s case. I say
16 that is a crucial admission, my learned friend may disagree with me.

17 THE CHAIRMAN: Yes, so what are you saying we should do about it? Do you say we should not
18 have Mr. Scullion saying anything about this?

19 MR. COOK: I am saying this is not a point of rebuttal, this is an OFT attempt to improve its case at
20 this stage.

21 THE CHAIRMAN: You say we should not let it in?

22 MR. COOK: We should not let it in. This is exactly the type of point that, firstly, this procedure is
23 not designed for; and secondly, this Tribunal has previously ruled that evidence should go in
24 on rebuttal. This is not a rebuttal, it is not a new factual case that we are putting forward. It is
25 somewhere where rightly or wrongly we say the factual case they advance does not meet all of
26 the tests, it does not tick all the boxes to show an infringement by us. We can argue about
27 whether that factual case does or does not meet those boxes, but it would be wholly wrong for
28 the OFT to be allowed at this stage to improve its case by advancing new evidence, that is not
29 rebuttal, that is simply filling in the blanks – putting forward a new factual case. They have
30 not had any points in their Decision found as a fact that these were passed on, or had any
31 evidence to allow them to do so. They now, realising their omission, want to do so, but that is
32 not rebuttal.

33 So, madam, I say when it is the very limited point of what Mr. Scullion’s
34 interpretation of that fax was, that is a rebuttal point and we can accept that. Anything which

1 goes to the OFT essentially trying to improve or establish its case with new evidence, which
2 does not counter evidence that we have advanced is illegitimate in this forum.

3 THE CHAIRMAN: That is it, is it?

4 MR. COOK: That is, madam.

5 THE CHAIRMAN: My concern is that – and this is why I said “rebuttal” – if what happens is that in
6 the administrative stage there are matters put by the OFT, the potential infringer or the
7 threatened infringer does not have to provide any evidence to the OFT, and therefore the OFT
8 can come to its conclusions without the assistance of that evidence and that, I appreciate,
9 makes it very difficult for the OFT in one sense, because it may or may not come to the right
10 conclusion – if that evidence had been put.

11 We get to this stage and this Tribunal’s jurisdiction is to permit the appellant to put in
12 any evidence but for the OFT only to put in evidence in rebuttal, and not to raise a completely
13 new case here – the OFT have to stand by their decision save in so far as they can rebut what is
14 coming in. Now, if one goes outside rebuttal in that strict sense, one then gets into a situation
15 where the OFT discovers, because it is led down a train of inquiry, other matters which it
16 might quite justifiably not have thought about at the time of the decision because they did not
17 know the bit that was coming in and it is the chain effect of information and then you learn
18 about a bit more and therefore you realise something else and so on. But that means that the
19 Appellant would then want to put in counter evidence. Now that is, I think, where this
20 Tribunal says “no, that has to go back to the OFT; it has to be properly investigated in the
21 proper administrative procedures, a decision has to be made and then it can come here.” You
22 were not able to do it yesterday, I understand that, but the fact is if the statement had come here
23 today and we looked at it we could see where we stood about that. But we do not have the
24 statement so we do not know whether it is something which is purely rebuttal or whether it is
25 going to open up another inquiry area for the Appellant which would mean they would want to
26 put in more evidence the other way and it really needs investigating. That is my difficulty
27 about that.

28 MR. COOK: Madam, from our position, based on what my learned friend says, and obviously
29 recognising what he is saying is just the best estimate the OFT has of what this witness
30 statement will say, it seems almost certain that there will be areas of inquiry for us – whether
31 we call further evidence will depend on whether we can get witnesses who deal with it, fine
32 them and everything else. But when he is talking about, particularly Mr. Scullion saying “I got
33 this complaint in and I talked to Mr. So-and-So and Mrs. X”, then we inevitably want to talk to
34 Mr. So-and-So and Mrs. X and see what they say about it. What has been suggested is almost

1 certainly going to lead us to that train of inquiry, that is simply our position at the moment,
2 though we have the same difficulty as you do, madam.

3 MR. TURNER: It is an important point of principle, so I should deal with this. It is quite true that
4 the Office should not be allowed to make a wholly new case on Appeal and that it should stay
5 within the four corners of its Decision, there is no dispute about that. However, the idea that
6 what is proposed in this case crosses that line is, in my submission, quite profoundly
7 misconceived. If one starts by recalling the cases and examples where this issue has been
8 canvassed in previous cases of the Tribunal one has, for example, the *Napp* case in which the
9 Office was not allowed to put in new survey evidence to back up the primary element of its
10 case, but was allowed to and did put in quite substantial witness evidence dealing with new
11 arguments which had been raised in the Notice of Appeal.

12 Similarly, if one takes *Aberdeen Journals* the Office of Fair Trading was prevented
13 from raising in the Appeal, as opposed to dealing on remission, with some new evidence that it
14 proposed to put in, not responsively, to add to its case on market definition. Now, that
15 obviously will fall on the wrong side of the line. But, if I may just recall the Judgment of the
16 Tribunal in the *Napp* case – I have opened the page and I am looking actually at the *Allsports*
17 Decision which summarises the relevant paragraphs – paras. 80 and 81. In para.51 of that
18 Judgment under the heading “The Tribunal’s existing case law” the Tribunal then set out in
19 blocks the *Napp* Decision, then there is *Aberdeen Journals* and then there is *Argos*, and then
20 there is the distillation of that, so it is conveniently all there. But if you look at para.80 within
21 the extract from *Napp* in para.51 of that Judgment and look down that paragraph the Tribunal
22 is considering questions of proportionality, expedition and so on, by which I suppose that it has
23 in mind the need to avoid a pointless remission which would not have procedural advantages,
24 and also it mentions the consideration of ensuring the parties are on an equal footing. Towards
25 the bottom of that paragraph it says:

26 “Those considerations may militate against permitting new evidence by the Director,
27 but in some circumstances considerations of fairness may point in the other direction.
28 An obvious example is where a party makes a new allegation or produces a new
29 expert’s report which the Director seeks to counter.”

30 So, pausing there, we are not limited specifically to some new evidence of fact, but if an
31 argument is raised for the first time by a party on appeal, and if that argument is not something
32 which is wholly outside the four corners of the Decision then the Director (now the Office of
33 Fair Trading) on the Appeal has to be able to deal with that argument. It cannot be right that
34 he should not be able simply to deal with it and if the alternative is remission the balance has to

1 be struck on the basis of the considerations which are set out here as to whether there is some
2 real advantage in sending it back for that purpose.

3 In para.81 the sentiment is developed and towards the end of that paragraph the
4 Tribunal said:

5 “The Director, at the administrative stage, may not always be able to foresee
6 (although of course he should endeavour to do so) from what direction or in what
7 strength an attack might come at the appeal stage.”

8 THE CHAIRMAN: That is really what I was saying before that it is because you learn
9 things ----

10 MR. TURNER: Things crop up, people say new things.

11 “A situation whereby the Appellant could always have a “free run” before the
12 Tribunal, but the Director was always confined to the material used in the
13 administrative procedure could lead to a significant lack of balance and fairness in the
14 appeal process.”

15 In this case the Decision refers to complaints that were made by other parties, and quite
16 specifically finds that these are evidence that DQS was involved at the time – that is the
17 Decision. In front of the Director, and indeed in its Notice of Appeal, DQS has not said
18 “Actually you have to understand these complaints (which it knew about before) were never
19 passed on by Mr. Scullion to us”. Now, it is saying, as you have seen “Mr. Scullion did not
20 pass these complaints on to us and so we remained in blissful ignorance.” So we are faced
21 with that now. This is in my submission precisely the sort of thing that it is possible and
22 desirable to meet directly in the judicial stage of the process. You go to Mr. Scullion and say
23 “Is that right, did you pass it on or not?” That is what we have done.

24 THE CHAIRMAN: I think what I was summarising before was very much like what you are
25 submitting now.

26 MR. TURNER: Yes.

27 THE CHAIRMAN: It is a matter of the circumstances of the case and how it impacts on the case.
28 Now, if what Mr. Scullion says (which he is not going to, actually) “I did pass them on.
29 I sent them to Mr. X and he has forgotten”, then it may or may not be that there is anything
30 between the parties because when Mr. X is asked he said “Oh, I forgot”. Now, in that sense
31 there would be no reason to remit because there is no further investigation to do on either side.
32 But if what happens is that he says “Ah, I passed them on to Mr. Smith, Mr. Jones” now those
33 people have not been mentioned before, and now the Appellant now needs to ask Mr. Jones,
34 Mr. Smith, and they produce different evidence about what happened. Then we get into an
35 investigation and that gets much further away from where we ought to be dealing with the case

1 on an Appeal on the merits in this Tribunal. Therefore, without having seen what the evidence
2 is it is very difficult to know whether or not it is within the four walls or outside it.

3 MR. TURNER: Yes.

4 THE CHAIRMAN: That is my difficulty.

5 MR. TURNER: I certainly understand that.

6 THE CHAIRMAN: It is not saying "in every case we must remit". It is saying that we have to look
7 at it and see whether this is something which is part of an investigation which needs to be
8 investigated before it comes here, or whether it is something which we can deal with here.
9 There may be new evidence which is rebuttal but slightly outside rebuttal, which is not
10 objected to by the appellant, therefore there would be no reason to remit. So that is why you
11 need to look at each case, the circumstances and what the evidence is. That is why I think
12 yesterday the Referendaire indicated that it would be helpful if we had that evidence today.

13 MR. TURNER: If we had?

14 THE CHAIRMAN: If we knew what the evidence was ----

15 MR. TURNER: Oh I see, yes, if you had an explanation of the evidence.

16 THE CHAIRMAN: In the same way in the courts the courts do not give permission for additional
17 evidence near the trial without actually seeing the evidence and seeing whether it is relevant
18 evidence.

19 MR. TURNER: That is quite right.

20 THE CHAIRMAN: So it is a different reason here but it is very difficult to make any decision
21 without actually seeing the witness statement.

22 MR. TURNER: That is understood. May I begin by reminding the Tribunal that this new allegation
23 has not arisen in the Notice of Appeal, it has arisen in the Reply, and so to the extent that this is
24 late in the day ----

25 THE CHAIRMAN: This is the not passing on.

26 MR. TURNER: The not passing on point. It is not our fault that this arises at this stage, in case that
27 were an issue. Secondly, turning to the circumstances in which remission is
28 appropriate ----

29 THE CHAIRMAN: You have picked on the passing on of the complaints, but what about the email
30 or fax?

31 MR. TURNER: Yes.

32 THE CHAIRMAN: Because if what Mr. Scullion is going to do is to put in a whole lot of evidence
33 in relation to the context in which that fax was sent, possibly introducing new documents – I
34 do not know – then again it has a perception at the moment that it is going outside the four
35 corners, but without knowing what he is going to do it is very difficult or impossible to say

1 whether it is something which should go back for investigation or whether it should be here. It
2 depends how it is put.

3 MR. TURNER: Yes. The evidence will be along the lines I have described – obviously it will need
4 to be written down and he will need to give his approval – but essentially it will be his
5 understanding of what was meant, and necessarily that will be based on the context of their
6 discussions and their relationship.

7 THE CHAIRMAN: But then if he is going to say that “I had other conversations with ...” then that
8 is going to raise further evidence on the other side about whether he had those conversations
9 and what they were – possibly; it may not. Unless we know what he is going to say we do not
10 know whether it is within the four corners or outside the four corners.

11 MR. TURNER: Then this discussion may best be resolved by saying we should produce the
12 evidence and the Tribunal will be able to form a view.

13 THE CHAIRMAN: Well that is the way my mind ----

14 MR. TURNER: Yes. At the moment we are discussing simply a question of principle without the
15 benefit of being able to argue it, and I understand that that after a while is arid.

16 THE CHAIRMAN: I think so.

17 MR. TURNER: Nevertheless, may I conclude on the point of principle with the following additional
18 point, because I know it is of general concern to my client? The circumstances in which the
19 Tribunal can hear an Appeal after a new point has been raised by the appellant, or new
20 evidence has been adduced, and that leads to counter evidence, cannot be construed over
21 narrowly, or with undue technicality. The judicial process is well able to accommodate
22 development of that kind within an appeal and, in my submission the Tribunal should be
23 prepared to deal with events of that nature with robustness. Madam, you will be aware
24 – I forget which of the cases it is – I think two of the previous cases quote the extract from
25 Hansard in which the intention of the legislator ----

26 THE CHAIRMAN: I am well aware of that passage.

27 MR. TURNER: -- is not to have too many remissions. But the judicial process is not that delicate
28 that it cannot absorb some kind of development of the case. The question you were
29 canvassing, as I understand it before I entered this case, was where the line is to be drawn, and
30 one has to take into account these questions of fairness, of balance and what is expeditious and
31 cost-effective and all of that will come into play.

32 THE CHAIRMAN: I think quite importantly two bites of the cherry.

33 MR ROTH: And two bites of the cherry.

34 THE CHAIRMAN: Because this is an appeal, and the legislation set up an investigation stage and
35 an appeal stage.

1 MR. TURNER: Yes, but one cannot take that literally or completely because if that were right
2 whenever a new allegation was raised in the Appeal that would only be one bite at the cherry
3 so there would need to be a remission.

4 THE CHAIRMAN: It depends how important it is and whether it is something that requires
5 investigation.

6 MR. TURNER: Yes, absolutely.

7 THE CHAIRMAN: I think that is where the line is?

8 MR. TURNER: Absolutely, it is which process is more suitable, and all of that.

9 THE CHAIRMAN: Absolutely, yes.

10 MR. TURNER: From my own experience, particularly in the replica kit case of which the *Allsports*
11 Judgement that we were just looking at was the fruit, there was very considerable new
12 evidence and development of the case. That judgment is specifically concerned with what
13 happened when *Allsports*, which had kept its powder dry before the Office of Fair Trading,
14 unleashed new arguments and evidence at the appeal stage, and then argued that the Office of
15 Fair Trading needed to be confined to the existing case. Not only was there a decision that the
16 Office did not have to be so confined, but the case was not remitted because the judicial
17 process was well able to absorb the new hurly-burly of allegation and counter allegation and
18 the new evidence that came up. It was a rough and tumble trial.

19 THE CHAIRMAN: At what stage did the new evidence come up?

20 MR. TURNER: The new evidence came with the Notice of Appeal served by Allsports. New
21 witness statements for the first time from the chairman, and from other people in the company,
22 and new allegations which had not been made before, but it was dealt with within the trial
23 process and the way in which the Tribunal in its final Judgment interpreted the phrase “The
24 four corners of the OFT’s Decision” was broadly and robustly, so it was only in respect of one
25 issue that the Office was found to have travelled outside, and that was when it sought to say in
26 the Appeal that the cartel agreement extended not just to newly launched replica shirts, which
27 had been the whole basis of the Decision, but to some old shirts which were sought to be
28 “jobbed-off” at low prices.

29 Leaving that aside, in particular an entire, new allegation relating to complaints and
30 pressure brought to bear by Allsports, or at least a heavily developed allegation was canvassed
31 and dealt with within the context of the Appeal and was dealt with satisfactorily. That is why
32 I say, coming back to what has happened in this case, for the first time we are now told “If
33 complaints were made they were not passed on to us.” Plainly we must be able to deal with
34 that and, in my submission, to send it back for remission to the Office of Fair Trading (absent
35 very exceptional circumstances) would not be right.

1 THE CHAIRMAN: I think it depends on what Mr. Scullion is going to say.

2 MR. TURNER: It will depend, but you will see that this is not a case for remission.

3 My final comment on that is that in the event of a remission, which is prompted by
4 a party suddenly playing a card on the Appeal, which it could have played before, yet could
5 have played, the costs of remission should lie in general with the Appellant who has prompted
6 that course of action to be taken, because otherwise the risks of ambush of the Office in an
7 Appeal are very great indeed.

8 Madam, if it pleases you, we will crack on with producing this short
9 statement ----

10 THE CHAIRMAN: When are you going to manage to do it by?

11 MR. TURNER: I believe there may be a bank holiday this Monday?

12 THE CHAIRMAN: There is.

13 MR. TURNER: And I am also in a trial on Tuesday on Wednesday.

14 THE CHAIRMAN: And we have a hearing here on Thursday.

15 MR. TURNER: Thursday or Friday, we were proposing Friday 6th May.

16 THE CHAIRMAN: What, to produce the statement?

17 MR. TURNER: To produce the statement. If you consider that that is too late we will see what we
18 can do. The trouble is it is not within our control – Mr. Scullion has to sign it, we can crack on
19 but we cannot guarantee the outcome.

20 MR. COOK: Madam, I just want to raise what I think must be everyone's concern at this stage,
21 which is are we in fact going to be able to have an Appeal on the dates we have currently set
22 aside to do so.

23 THE CHAIRMAN: We must try and do so.

24 MR. COOK: We must try and do so and the Office should not be allowed to do something which is
25 actually going to put those dates in doubt. The grave concern we have is that if this is delayed
26 until 6th May and if it is the type of evidence that by the sound of it it is going to be – it is
27 probably right to say the case against my client on the “price match not undercut” policy is
28 basically circumstantial – we would say wrong, but circumstantial – what my learned friend is
29 now talking about doing is actually creating a direct case against us for the first time, putting
30 forward to Mr. Scullion direct evidence of contacts with particular members of my client in
31 which ----

32 THE CHAIRMAN: Well we do not know what he is going to do.

33 MR. COOK: Well, it is moving in that direction. I appreciate that, but it is moving in that direction.

1 THE CHAIRMAN: There are two points: first, we do not know what they are going to do; and
2 secondly, we have explored it this morning and the way that that evidence will be put will be
3 considered against what has been said this morning about the four corners, so ----

4 MR. COOK: I appreciate that, but the point I wanted to make – without going over the whole
5 argument again – is simply limited to the following which is, if it happens on 6th May, and
6 I appreciate fully the Office’s difficulty in trying to do it earlier than that, **if** it happens on
7 6th May then if, as by the sound of things is going to happen, there are going to be names
8 mentioned or even worse, if the OFT tries to avoid mentioning names in order to bring itself
9 back within the four corners and we are left with unspecified discussions with unspecified
10 individuals, it is far worse. If we are going to have names mentioned, then my client is going
11 to be in the position of having to go and find those individuals. Now, now it is four years
12 ago ----

13 THE CHAIRMAN: Yes, but the OFT will, I am sure be considering how much of this evidence is
14 necessary for the purposes of the Appeal. I am not saying whether it is or it is not, so we do
15 not know what is going to be in that statement at the moment, what evidence they consider
16 needs to be put in to rebut what you are saying.

17 MR. COOK: I was simply making the point for now, madam, so that both you and the OFT are
18 aware that if evidence comes in on 6th May ----

19 THE CHAIRMAN: It is too late.

20 MR. COOK: Well it is not just that it is too late; I shall explain what the consequence is going to be
21 for my client. My client is going to have to go and find those individuals. It is four years ago,
22 we do not know ----

23 THE CHAIRMAN: There is a stage before that.

24 MR. COOK: -- I was making the point if there are individuals – I am speculating ----

25 THE CHAIRMAN: No, but there is a stage before that because the question is whether they are
26 going to be allowed to put it in or put the whole of it in.

27 MR. COOK: No, but I think the current expectation would be, certainly what I thought you were
28 leaning towards was them going away, producing the statement and us coming back to think
29 about it at that stage. Am I right in thinking that is at least a consideration?

30 THE CHAIRMAN: They produced the statement. We have a look. You will be entitled to make
31 submissions and it is then decided whether it can all go in or some of it, or whether this is
32 completely new evidence which falls on the side of investigation having regard to the
33 economics of it and expedition and everything else.

34 MR. COOK: Madam, I was just simply making the point ----

1 THE CHAIRMAN: But having regard to economics and expedition and everything else that goes to
2 the OFT side as well as to whether it is required for the purposes of the Appeal.

3 MR. COOK: Madam, I take that point. I am perhaps grandstanding in order to make the point to the
4 OFT, the steps we will have to take in order to deal with that. If there are individuals
5 mentioned with whom we do not already have contact, not employed by us, it is going to take
6 will take us some time.

7 THE CHAIRMAN: We do have the bank holiday on Monday, which is a problem because it is
8 a short week next week, and there is a hearing that I am involved in here on Thursday, so I do
9 not think we can do this on Thursday, which means that on that timetable that the only day
10 next week that we could hear this again would be Friday – to hear it on Wednesday probably
11 does not give the OFT or you enough time.

12 MR. COOK: The key thing for us is how long it is heard after we get the evidence.

13 THE CHAIRMAN: No, but you are going to have to consider the evidence that the OFT are seeking
14 to put in in order to make submissions.

15 MR. COOK: Yes, that is what I was saying, the key time difference for us is how long after we get
16 the statement that the hearing is as opposed to when the hearing is in abstract terms.

17 THE CHAIRMAN: What I am saying is it could either be I think on Wednesday or on Friday
18 – I will just have to check that, but I think either on Wednesday or on Friday, but I doubt
19 whether Wednesday gives you enough time having regard to the Monday being a bank holiday
20 Monday.

21 MR. COOK: We would certainly need 24 hours in order to review it, that is the minimum
22 requirement.

23 THE CHAIRMAN: So if we worked on the basis that we would have a hearing on
24 Friday ----

25 MR. COOK: (After a pause) I am sorry madam, we were discussing dates, could we have a few
26 minutes to do so? Could we invite you to rise for a few minutes so we could discuss the
27 matter?

28 THE CHAIRMAN: Yes.

29 MR. TURNER: Thank you very much.

30 (The hearing adjourned at 11.25 a.m. and resumed at 11.30 a.m.)

31 MR. COOK: Madam, thank you for allowing us that short adjournment. There may be
32 developments in the case going forward and we just wanted to make sure that any timetable
33 that was being agreed might be prejudicing those, or resulting in costs being incurred when
34 things may happen.

35 THE CHAIRMAN: Absolutely.

1 MR. COOK: I will not put it any higher than that. What, subject to your approval, we are in
2 agreement on is if we could try and hold the hearing on the Monday.

3 THE CHAIRMAN: Ah, just a moment.

4 MR. COOK: Is that going to be a difficulty from your point of view? (After a pause) Anyway,
5 madam, the thinking was that we have the hearing on the Monday allowing the OFT to serve
6 the witness statement by close of business on the Thursday and thereby giving them an
7 opportunity – obviously Mr. Scullion is not under their control – to ensure that it is done in
8 time, and then give us a reasonable opportunity to review it prior to the hearing.

9 THE CHAIRMAN: Monday the 9th, is it?

10 MR. COOK: That would be correct.

11 THE CHAIRMAN: We are concerned how that affects the timetable. The skeletons were on the
12 9th, so it would put back the skeletons, it would put back everything else; and I think we
13 mentioned last time that all the documents have to get out to the members so that they can read
14 it all well in advance of the hearing.

15 MR. COOK: Madam, that is certainly an understandable concern. The nature of his evidence, if we
16 have to put in counter evidence, is going to mean the Appeal date is going to be seriously
17 prejudiced in any event – the point I was making earlier, for us to find witnesses, put witness
18 statements in is going to take again probably a week.

19 THE CHAIRMAN: If that is the consequence then it may well be that the OFT should not be
20 allowed to put in that evidence.

21 MR. COOK: As you say.

22 THE CHAIRMAN: Because then it looks as if it is going outside the Decision. That is why, unless
23 one sees how it is put ...

24 MR. COOK: Of course, absolutely. If it is the case that putting in that witness statement is the final
25 stage, in effect, I think my learned friend proposes 13th May, was it, in his skeleton argument?

26 MR. TURNER: Yes.

27 MR. COOK: And I think that would be realistic if that was the final stage.

28 THE CHAIRMAN: If they came in on the 13th, the Friday, how do we get them out to the members
29 so that the members can read all the material before Monday week, that is why it was made on
30 the 9th, because the members would also have diarised this and made time to read it.

31 MR. COOK: Madam, I think almost regardless of what the date is if we have the hearing on the
32 Friday again it is going to be difficult to ----

33 THE CHAIRMAN: Well if we have the hearing on the Friday and know where we are, then
34 possibly we can move the skeletons until the 11th or something of that sort? I am anticipating
35 that the result of all this – without pre-judging it – is that it will not require further evidence.

1 MR. TURNER: Madam, I am unable to give a cast iron guarantee ----
2 THE CHAIRMAN: I appreciate that.
3 MR. TURNER: -- but the high likelihood is that there will be no need for counter-evidence and my
4 friend will appreciate that immediately. This really is going to be very limited. This is not
5 going to open up cans of worms as is feared. However, having said that, from our point of
6 view, if there is a hearing on Friday Mr. Cook very fairly draws to your attention that that
7 places us under quite a degree of pressure and if there are, as he puts it, developments in the
8 case this week, it may interfere with the ability to progress those, that is the mutual consent.
9 We would be grateful for some form of flexibility.
10 THE CHAIRMAN: If you are right then it is not going to put back the skeletons for a week, because
11 it is going to be of a very limited nature.
12 MR. TURNER: Yes, the difficulty though is that the time that would have been spent writing the
13 skeletons is spent doing other things instead.
14 THE CHAIRMAN: That, I understand, might have happened anyway.
15 MR. TURNER: It is a question of the pressure and flexibility.
16 MR. COOK: And, madam, the difficulty from my point of view is that it is difficult for me to accept
17 my learned friend's suggestion that it will not make any difference, so I prefer not to write
18 a skeleton that may turn out to be different, depending on what happens.
19 THE CHAIRMAN: If it requires a whole lot of new evidence then one has to consider very carefully
20 whether that is appropriate, whether the evidence is needed for the Appeal and whether there
21 should be a blue pencil test effectively.
22 MR. TURNER: Yes, as for that again we cannot pre-judge it, but if there is a suggestion that
23 evidence is not going to be allowed which is material to the question of infringement we would
24 be concerned, unless there was remission. In that event the question of the costs of remission
25 will arise.
26 MR. COOK: Madam, I am not going to address you on costs of remission, it is too far away.
27 THE CHAIRMAN: I am concerned that there was not a witness statement today that we could
28 consider.
29 MR. TURNER: We ourselves only received the Reply plus the witness evidence – the witness
30 evidence came with the signatures the day before yesterday. We saw Mr. Scullion the very
31 day after that.
32 THE CHAIRMAN: But we have known, I think, for a long time what the points were.
33 MR. TURNER: With respect, we did not know whether either Mrs. Williams or Mrs. Stock were
34 going to say that they would sign up to that and give evidence on my friend's behalf. Indeed,
35 we had some reason to think that at least one of them would not do so.

1 THE CHAIRMAN: Mrs. Williams's statement is the one that you took.

2 MR. TURNER: Yes, madam, we took that statement.

3 MR. COOK: Madam, they are both the ones that the OFT took.

4 MR. TURNER: Yes, that is fair enough. There is, however, the question of whether they would be
5 prepared to sign the statement of truth and say that it was their evidence in accordance with the
6 Tribunal's letter to my friend's solicitors.

7 THE CHAIRMAN: It sounds as if it has to be Monday.

8 MR. COOK: Madam, I was going to suggest Monday, then if we did skeletons by close of business
9 on the Thursday that would give us three clear days after the hearing to write the skeletons, and
10 give you sufficient time to send them out for Monday week.

11 THE CHAIRMAN: Monday the 9th – if it turns out that Mr. Turner is correct in his anticipation,
12 then it may well be that it does not open up any new evidence and we will not need the hearing
13 because you will say that you are quite happy with that.

14 MR. COOK: I think we are currently suggesting getting it by close of business on Thursday. If it is
15 the case that we waive any form of complaint or anything else about it, and we do not feel that
16 any form of civil evidence at all is required, we will contact both the OFT and the Tribunal on
17 the Friday to say so. Madam, what you will get on the Friday anyway is some form of written
18 submission from me and it will either be very short saying there is no need for a hearing – it
19 might not be from me in those contexts – or you will get a detailed submission saying “It is
20 a big problem for the following reasons”.

21 THE CHAIRMAN: So the witness statement is going to come in on?

22 MR. COOK: Close of business on Thursday.

23 THE CHAIRMAN: That is the 5th?

24 MR. COOK: The 5th as you say, madam.

25 MR. TURNER: Madam, again we will let you know immediately if there is a difficulty with that on
26 Mr. Scullion's part, but we do not anticipate that at the moment.

27 THE CHAIRMAN: I am surprised that it is going to take you that long, actually.

28 MR. TURNER: Until next Thursday?

29 THE CHAIRMAN: Yes. It may be because other things are going on that we do not know about.

30 MR. TURNER: It is partly that, it is partly that he has to sit down because he has to take time out of
31 his day to review it and think about it, and there is also the consideration that he has lawyers
32 representing him who will sit and read it.

33 THE CHAIRMAN: So that is Thursday the 5th, CMC Monday 9th, and then we move back skeleton
34 arguments to the 11th.

1 MR. TURNER: The 12th, madam, we discussed, the Thursday, with any skeletons in relation to the
2 hearing on Monday, as my friend suggested, to be delivered to the Tribunal on Friday.

3 THE CHAIRMAN: Yes.

4 MR. TURNER: My solicitor reminds me in relation to bundles, can that also
5 be ----

6 THE CHAIRMAN: When were the bundles supposed to be?

7 MR. TURNER: Perhaps by the 9th.

8 THE CHAIRMAN: Shall we make them the 12th as well.

9 MR. TURNER: To the 12th as well if that would be convenient.

10 THE CHAIRMAN: Is there anything else that has a knock-on-effect, or was that it?

11 MR. TURNER: We believe that that is everything.

12 MR. COOK: It is everything from our side as well.

13 THE CHAIRMAN: Are there any other matters to consider today?

14 MR. COOK: No, madam.

15 THE CHAIRMAN: All right, well then I reserve the costs of this, but I am very concerned about the
16 fact that we are having two hearings where we could have had one hearing.

17 MR. COOK: Two hearings on this issue?

18 THE CHAIRMAN: Yes.

19 MR. COOK: With respect we could not have produced evidence for this hearing. The Reply was
20 produced which makes the new points, apart from anything else, only at the end of last week.

21 THE CHAIRMAN: You have said that, yes.

22 MR. TURNER: That was the Reply, before I was mentioning the signing of the statements.

23 THE CHAIRMAN: Well let us adjourn that until Monday and see what transpires over the week.

24 MR. TURNER: I am obliged.

25 THE CHAIRMAN: Is that all right?

26 MR. COOK: Yes, madam.

27 THE CHAIRMAN: Thank you very much.

28 (The hearing concluded at 11.45 a.m.)