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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1049/4/1/05

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

1<sup>st</sup> April 2005

Before:  
SIR CHRISTOPHER BELLAMY  
(The President)  
PROFESSOR PAUL STONEMAN  
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

**BETWEEN:**

UNICHEM LIMITED

Applicant

and

OFFICE OF FAIR TRADING

Respondent

supported by

PHOENIX HEALTHCARE DISTRIBUTION LIMITED

Intervener

Mr Mark Friend (of Allen & Overy LLP) appeared for the Applicant

Mr Daniel Beard (instructed by the Treasury Solicitor) appeared for the Respondent

Mr John Markham (of CMS Cameron McKenna) appeared for the Intervener.

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**Proceedings on handing down judgment**

1 THE PRESIDENT: We are handing down judgment in this case today. In the judgment,  
2 para.176 under the heading “Overview” the Tribunal says this:

3 “176. In our view there is no doubt that the OFT conducted a full investigation in  
4 this case and considered carefully and professionally a large number of relevant  
5 issues. On many points the OFT’s conclusions are either undisputed or within the  
6 bounds of reasonableness, as we show below. However, the central difficulty that  
7 arises in these proceedings is that the OFT purported to make findings of primary  
8 fact about the logistics and economics of UniChem’s distribution system,  
9 UniChem’s past pattern of success in East Anglia, and UniChem’s service levels, on  
10 the basis of information supplied largely by the merging parties, without checking  
11 certain facts with UniChem or discussing with UniChem the inferences about  
12 UniChem which the OFT was minded to draw from the material supplied by the  
13 merging parties.

14 “177. UniChem now disputes many of the facts relied on by the OFT. In our view,  
15 it is impossible to say, in the context of judicial review, that UniChem’s points are  
16 not material to the OFT’s reasoning in the Decision or are without substance. Nor is  
17 the Tribunal able, in the context of a review, to resolve disputed issues of fact. To  
18 adopt that approach, in our view, would be to substitute ourselves for the decision  
19 maker. It follows that we see no alternative but to remit this matter to the OFT to  
20 enable a new decision to be adopted.”

21 At para.279, the Tribunal concludes that:

22 “In those circumstances we are unanimously of the view that we have no alternative  
23 but to quash the Decision and remit the matter to the OFT for re-consideration, in  
24 order for the OFT to take into account what UniChem has said in these proceedings.  
25 That reconsideration is not at large but is limited to paragraphs 34 to 38 of the  
26 Decision, insofar as those paragraphs concern the points made by UniChem, namely  
27 the matters raised in the evidence of Mr Johnson and Mr Baker. It is for the OFT to  
28 decide whether it accepts or rejects that evidence, the weight to be given to it,  
29 whether that evidence is or is not outweighed by other factors, and the reasoning to  
30 be adopted in a new decision. We see no reason why a new decision should not be  
31 taken rapidly. This judgment does not in any way prejudge or decide the question of  
32 whether it is or may be the case that the proposed merger may be expected to result  
33 in a substantial lessening of competition within the meaning of the Act.”

1 That being the Tribunal's judgment, unless there are any other applications we will simply  
2 adjourn today.

3 MR. BEARD: Sir, one matter – not to deal with consequential issues today in any event – but just  
4 prior to the Tribunal coming in the question of whether any material in this judgment is  
5 confidential in any way was raised. This relates in particular to Phoenix and EAP, and  
6 UniChem's concerns as to any particular figures or indications, and if it were to be dealt  
7 with early next week would perhaps be a sensible way forward.

8 THE PRESIDENT: We are not aware of any confidential issues because nothing was really  
9 signalled as being confidential and, of course, it was a public hearing, despite the fact that  
10 certain figures are slightly masked in the decision nobody seemed to take objection to the  
11 actual figures being discussed in the case.

12 MR. BEARD: As I say that is not a matter that the OFT is querying for perhaps the same reasons  
13 but it was simply to alert the Tribunal that having had a short discussion with those  
14 representing the Appellant and Intervener.

15 THE PRESIDENT: Well if there is something in here that is critical, then I think we had better be  
16 told as soon as possible. I do not think there is, otherwise I am sure we would have been  
17 told by now. Thank you for the point any way. Thank you all very much indeed. I am  
18 sorry, Mr. Friend, did you wish to say something?

19 MR. FRIEND: Sir, I just wished to say that I agree with Mr. Beard's comment and certainly my  
20 clients have not had the opportunity to see this as of yet, and therefore I have not been able  
21 to take instructions, but if we could say by close of play on Monday we would come back?

22 THE PRESIDENT: The only problem is that we need to put it on the website and no one has so  
23 far alerted us to any confidentiality issues throughout the case, so it is a bit late now.

24 MR. MARKHAM: Sir, I appear behalf on behalf of Phoenix.

25 THE PRESIDENT: Yes, good morning.

26 MR. MARKHAM: We support what is being said. We had a discussion with Mr. Beard just  
27 before you came in. We do not think there is going to be a confidentiality issue but we  
28 certainly cannot say for sure that there is not, and we would appreciate until close of play  
29 Monday just to check and come back to the Tribunal with a final answer.

30 THE PRESIDENT: Yes, just a moment.

31 (The Tribunal confer)

32 THE PRESIDENT: Yes, if there are any points on confidentiality can we have them please by  
33 noon on Monday? We will not put it on the website until then.

1 | MR. FRIEND: Sir, thank you very much for that. Can I just mention one other point on costs?  
2 | We will in due course wish to make an application for costs, could I suggest that that be  
3 | done by way of written submissions?

4 | THE PRESIDENT: Yes, make your application in due course and make the suggestion when the  
5 | time comes. Thank you all very much.

6 | (The hearing concluded at 10.40 a.m.)