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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case No 1051/4/8/05

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

19<sup>th</sup> October, 2005

Before:  
SIR CHRISTOPHER BELLAMY  
(President)

MARION SIMMONS QC  
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**SOMERFIELD PLC**

Applicant

and

**COMPETITION COMMISSION**

Respondent

Mr. James Flynn QC and Mr. Aidan Robertson (instructed by TLT Solicitors) appeared for the Applicant.

Mr. John Swift QC and Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared for the Respondent.

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**CASE MANAGEMENT CONFERENCE**

1 THE PRESIDENT: Mr. Flynn, I gather there is something you wanted to tell us?

2 MR. FLYNN: Madam, Sirs, yes, good afternoon. There has been a development. I informed my  
3 learned friend, Mr. Swift, as soon as I was told myself. The Tribunal will be aware that  
4 Somerfield recently made an announcement in connection with a proposed bid by a consortium  
5 of investors and that that bid will be recommended to the shareholders subject to various  
6 matters. Immediately before the commencement of this hearing, just before 2 o'clock, we  
7 were given instructions emanating from the consortium as part of the acquisition process, that  
8 ground 1 of this application for review will not be pursued; ground 2 is maintained. As I say,  
9 that instruction has literally been given in the last quarter of an hour.

10 THE PRESIDENT: So those are your instructions on the part of Somerfield PLC?

11 MR. FLYNN: Precisely, Sir. Obviously that affects various issues.

12 THE PRESIDENT: Just to remind you we are in open court at the moment and I assume that what  
13 you have said is something that can be said in open court. You have said it anyway.

14 MR. FLYNN: I have said it and I was told that that was the sort of thing to say, so unless anyone is  
15 going to be telling me now to sit down ----

16 THE PRESIDENT: Well it is said now, it is no use bolting the stable door.

17 MR. FLYNN: That is on the record.

18 THE PRESIDENT: Yes. Well that somewhat changes the shape of the case, does it not? (Laughter)

19 MR. FLYNN: It does, it makes a slimmer, leaner case than might otherwise have been.

20 THE PRESIDENT: Obviously we have not had time to consider it ----

21 MR. FLYNN: And neither have my learned friends.

22 THE PRESIDENT: -- nor the effect on the procedural situation that then arises. A first point,  
23 I suppose, that does occur to one is how far the two parts of the case interact with each other in  
24 the sense that one presumably needs to know something about the geographical and economic  
25 background in relation to the stores to be divested in order to work out whether the divestment  
26 order is itself a proper order.

27 MR. FLYNN: The grounds are unrelated so plainly the Tribunal will need to be aware of some of  
28 the background and the course of the inquiry to rule on ground 2, but in law they are separate  
29 issues. We are no longer pursuing any challenge to the Commission's finding that there was to  
30 be a significant lessening of competition in the 12 identified areas, and ground 2 goes solely to  
31 the remedies to be ordered in respect of those 12 locations. The grounds are wholly  
32 independent.

33 THE PRESIDENT: Yes.

34 MR. FLYNN: If I may say, my first impression as well, and we have not had much time to consider  
35 this in detail the main issue that this is going to affect is timetable. I think in respect of many

1 of the other points on the agenda, with the possible exception of the interim arrangements  
2 things will be probably as they were. That is my first impression, but it may well be that both  
3 sides and the Tribunal will want to ponder this a little further. I can only apologise for the  
4 lateness of this development but, as I say, literally the instruction was given just before  
5 2 o'clock.

6 THE PRESIDENT: Yes, thank you. Do you have any first reaction, Mr. Swift?

7 MR. SWIFT: Good afternoon, Sir, members of the Tribunal. My first reaction is that I have to take  
8 instructions on matters of substance and process.

9 THE PRESIDENT: Yes.

10 MR. SWIFT: As you rightly pointed out this all part of the same decision making process, when one  
11 is looking at remedies one is looking at matters as to whether they are proportionate to the  
12 adverse effects identified, the adverse effects may be of a different quality or extent – the same  
13 product but maybe different geographical markets – and we will just have to consider it. My  
14 first reaction is that I doubt whether it is just the question of timetable. What is going through  
15 my mind at the moment – I have not had a chance of discussing it with the client, nor behind  
16 me, so if I get it wrong I can be told later in the conference room – is that something must be  
17 done to the Notice of Application; something must be done to the connection between what is  
18 in the Notice of Application and Mr. Derek Ridyard's witness statement because they do tend  
19 to go together and to be interconnected.

20 THE PRESIDENT: Yes, I am just making a note of that.

21 MR. SWIFT: It is one matter to resile from ground 1, it is quite another matter to indicate to the  
22 Competition Commission precisely what is admitted in respect of the Competition  
23 Commission findings. Again, I am just trying to think this one through myself as to whether  
24 we would be looking for something further from Somerfield PLC as a result of this change in  
25 their approach.

26 On a corporate law matter, I am not familiar with a position when counsel on behalf  
27 of Somerfield PLC expresses a statement of intention which derived from a policy decision by  
28 a consortium which, so far as I know, is not yet in ownership and control of Somerfield PLC.  
29 My understanding is that ownership will pass through a scheme of arrangement, and therefore  
30 again we will need something – or the Tribunal will need something it seems to me – quite  
31 firm from and on behalf of Somerfield PLC that this is an irrevocable decision. Subject to  
32 anything that Mr. Beard suggests I say now, I would rather take counsel from my professional  
33 and lay clients and come back, hopefully in half an hour, with comments on perhaps a new  
34 timetable. I was not going to mention costs, and so I will not mention costs. The prospect of  
35 not having to spend the next six weeks thinking about diversion ratios has certain effects, but

1 the costs may come into the reckoning at some stage. It is quite a change – I am not blaming  
2 my learned friend at all, but I was told at 5 to 2, and it is quite difficult to think through  
3 precisely one’s reaction. So unless there is any point that you wish to raise with me, Sir,  
4 I would rather go back, think it through, and come out with a schedule of points I can put  
5 positively without rambling.

6 THE PRESIDENT: Yes.

7 MR. FLYNN: Sir, might I just make it absolutely clear that my instructions are from Somerfield.

8 THE PRESIDENT: Yes, well I did ask you that question with the point that Mr. Swift has just raised  
9 at the back of my mind, and you assured me that it is on behalf of Somerfield PLC.

10 MR. FLYNN: It is.

11 THE PRESIDENT: It may just be that for good order’s sake we need something in writing to  
12 confirm that ----

13 MR. FLYNN: If it is needed to be confirmed in writing it will be done. I make it on instructions.

14 THE PRESIDENT: -- but I am sure there would be no difficulty with that, just for good order’s  
15 sake.

16 MR. FLYNN: Yes.

17 THE PRESIDENT: I am inclined to say that we will probably rise for 15 minutes or so, perhaps 20,  
18 to give Mr. Swift time to gather his thoughts, and if you need a bit more further time,  
19 Mr. Swift, send us a message. We have one other procedural point to deal with and I am not  
20 sure we are in a position to deal with it, which is the request to intervene. Do we have  
21 anybody here now from the prospective intervener? [No response] Apparently not, so  
22 probably we cannot immediately deal with that matter any further, in which case I think we  
23 will rise until a quarter to three, Mr. Swift, and then see where we are.

24 MR. SWIFT: I am very grateful, Sir, thank you.

25 (The hearing adjourned at 2.15 p.m. and resumed at 2.45 p.m)

26 THE PRESIDENT: Yes, Mr. Swift?

27 MR. SWIFT: Thank you, Sir. Thank you very much for the opportunity we have had to consider the  
28 position. We are not offering a final answer here, but some of our thoughts if I can put them to  
29 you?

30 THE PRESIDENT: Yes.

31 MR. SWIFT: I have had the opportunity of discussing the first three with Mr. Flynn. The first is  
32 good housekeeping. Our submission is that we should have something, we and the Tribunal  
33 should have something in writing by and on behalf of Somerfield PLC that they are no longer  
34 pursuing ground 1 of their application and that it is appropriate for the Competition  
35 Commission to continue to direct any future correspondence in the course of the Tribunal’s

1 hearing to Somerfield PLC and to TLT, their solicitors. We must have it on record and, of  
2 course, we will accept Somerfield's undertakings on this, that it is appropriate to carry on as  
3 we have been carrying on despite the prospective change in ownership of the applicant.

4 THE PRESIDENT: Yes.

5 MR. SWIFT: I do not think there is going to be any dispute on that. We are not going so far as to  
6 ask in a heavy handed way for an order from the Tribunal on this. We are perfectly happy to  
7 accept what Mr. Flynn has said, but we would like it confirmed in writing.

8 The second point, I am not sure whether the Tribunal has been aware of the  
9 correspondence that has been going on in relation to interim undertakings.

10 THE PRESIDENT: No, we are not abreast with that.

11 MR. SWIFT: I think the position is that there is though as between the solicitors for Somerfield and  
12 the Treasury Solicitor as to the precise terms of the undertakings which are currently in place.  
13 Those undertakings will stay in place, what we will not pursue any longer is the undertakings  
14 in respect of the 56 isochrones which we were going to debate with this Tribunal today. Our  
15 argument was that the application to the Tribunal, which includes an application to remit  
16 matters to the Competition Commission, could well as a matter of hypothesis, involve this  
17 Tribunal concluding that the Competition Commission had erred in its conclusions and should  
18 have found evidence of more SLC than it found. That is a possible consequence of any  
19 judicial review, and that is something which the applicants no doubt had in mind when they  
20 brought their application in the first instance. That now falls, so we are no longer pursuing  
21 undertakings in respect of the 56 which is to get us back to what is called Stage 1. I am  
22 probably not making any sense but the 56 isochrones were the starting point before the  
23 beginning of what is called the "Stage 2 Inquiry" to whittle down the number.

24 THE PRESIDENT: Yes, and there were some undertakings in relation to those 56 that are still in  
25 force?

26 MR. SWIFT: The original undertakings were agreed in May, at the beginning of the inquiry. They  
27 were then amended substantially on September 21<sup>st</sup>, so as to be limited to the 12 stores at the  
28 request of Somerfield. Somerfield then bring the application which includes a request for  
29 remittal. We said that changes the whole basis, we now must go for pre-emptive order to make  
30 sure that if this Tribunal orders the Competition Commission to do something different and  
31 more severe, then the game has not been lost, we are still able to intervene in those competitive  
32 markets for the benefit of consumers. That is no longer an issue that will concern the Tribunal.

33 THE PRESIDENT: Yes.

34 MR. SWIFT: The third and fourth points are interlinked.

1 THE PRESIDENT: Well before you go too far on that issue, just let us note that that is an issue that  
2 is, as it were, floating around. As far as the Tribunal is concerned, I do not think we want to  
3 take any decisions today about anything.

4 MR. SWIFT: I respectfully agree, Sir. This is our current thinking and we would, in a participating  
5 mode, very much like to hear either today or at some other convenient time what the Tribunal's  
6 thinking is on this. This is our current thinking.

7 THE PRESIDENT: Yes.

8 MR. SWIFT: Loathe though I am to make any concession on the basis of five minutes' notice, or 20  
9 minutes, it does not look as if we are going to be pursuing that.

10 THE PRESIDENT: No.

11 MR. SWIFT: The third and fourth points are connected and it really goes on to the point that I was  
12 raising before the adjournment, and that is: what is the nature of this change? What exactly are  
13 Somerfield admitting? In our submission, the best way in terms of the efficient conduct of the  
14 case is for Somerfield to put in revised notice of application and that makes it clear what they  
15 are now applying for and why they are applying for it, because there is to some extent a read  
16 across between ground 2 and findings of fact at Stage 1 of the inquiry and we are not sure.  
17 Does the Tribunal have a copy of the Report?

18 THE PRESIDENT: Yes.

19 MR. SWIFT: I am looking at the printed copy which has lots of excisions in but it is an easier matter  
20 to handle. Section 10, p.58 of the Report.

21 THE PRESIDENT: We may not actually have the printed copies to hand, but we have the copy that  
22 is annexed to the application. Page 58, yes?

23 MR. SWIFT: That is Section 10 conclusions. As the Tribunal can see, there is (a) and (b):

- 24           “(a) The acquisition may be expected to result in an SLC in each of the local  
25           markets served by the 12 stores referred to in paragraphs 7.18 and 7.37; and  
26           (b) The acquisition may be expected to have adverse effects on consumers in  
27           those markets of higher prices....” etc.

28 I want to make it absolutely clear, are those conclusions now admitted by the applicant?

29 Mr. Flynn said “Yes”.

30 MR. FLYNN: Not quite.

31 MR. SWIFT: Well, exactly.

32 THE PRESIDENT: That is the question, let us not get on to the answer just yet, that is the question.

33 MR. SWIFT: All the more reason, in my submission, that we have a revised Notice of Application.

34 THE PRESIDENT: Just to mention one point so that Mr. Flynn can deal with it in a moment, at the  
35 moment both ground 1 and ground 2 are supported by Mr. Ridyard's evidence, and he is

1 strongly critical of the process of reasoning in which we get to ground 1. If that evidence is  
2 now all effectively abandoned in relation to ground 1 how far can it still be relied on in  
3 relation to ground 2, given that the process of reasoning is still similar throughout the analysis,  
4 for example?

5 MR. SWIFT: A very perceptive question – I am very glad you put it to me, Sir, rather than  
6 Mr. Flynn.

7 THE PRESIDENT: I do not know that I am putting it to you, I am simply enunciating it as one of  
8 a number of possible questions.

9 MR. SWIFT: Indeed, were this adversary litigation no doubt it may go to the credibility of the said  
10 witness.

11 THE PRESIDENT: Yes, it might.

12 MR. SWIFT: Well that is a point for Mr. Flynn, but plainly when we talk about the revised Notice  
13 of Application if there is going to be a red line amendment, then there has to be red line  
14 amendments to those parts of Mr. Ridyard’s witness statement which are referred to. But  
15 again, I leave it to the Tribunal and to Somerfield to decide how they are proposing to deal  
16 with it. In other words whether, applying what is a blue pencil rule, there is anything left in  
17 the Ridyard witness statement.

18 Those are my third and fourth points. That is a suggestion that we receive a revised  
19 Notice of Application and revised witness statement within 48 hours of today, but again we  
20 are not asking for an order, it was an indication of our thinking, in which case I am on to  
21 timetable.

22 THE PRESIDENT: Can I just interrupt you at that point, Mr. Swift, just to make two points? First,  
23 in relation to the Tribunal Rules there is provision under Rule 57 about consent orders, about  
24 where parties agree the terms to settle, etc., which does not seem to us to apply in this  
25 particular set of circumstances. But there is Rule 12, which is headed “Withdrawal of the  
26 Appeal”, which provides that the withdrawal needs the permission of the Tribunal, or the  
27 President if the case has not yet proceeded to a hearing, and does, under 12.2(c) provide, under  
28 the 2004 amendment, for the publication of any decision by the Tribunal that it would have  
29 made had the Appeal not been withdrawn. We are in a very, very early stage of this Appeal so  
30 it may be that that is not a practical solution, but it does suggest that you cannot just abandon  
31 things just like that, without some sort of judicial supervision of what is going on.

32 It is true that it refers to the withdrawal of the appeal, but our provisional view might  
33 well be that, although you may in the course of a hearing abandon various arguments, if you  
34 effectively abandon a substantive ground that is, to all intents and purposes, the main part of  
35 your appeal that probably falls within the scope of Rule 12 – at least technically speaking. So

1 there is a possible issue there – I am not trying to raise difficulties; I am simply exploring with  
2 the parties the procedural situation that we are in.

3 Thirdly, and perhaps more practical for present purposes, our present feeling is that  
4 we should not really try to decide anything much today. Nobody – neither you nor Mr. Flynn  
5 – has had a real opportunity to think through what the consequences of this new development  
6 are. Having completed our discussion as far as we can we are minded to put this CMC back,  
7 the date we provisionally have in mind is 1<sup>st</sup> November which is Tuesday week, where we can  
8 resume and complete the formalities that need to be completed and see where we are. In the  
9 meantime we fully agree with you that we should try and sketch out what we think the next  
10 steps might be without actually necessarily taking any final decisions today. So shall we see  
11 what Mr. Flynn has to say while you are digesting that?

12 MR. SWIFT: Yes, I am just thinking and playing back to the Tribunal – we did not get to this in half  
13 an hour – would it be in contemplation that when a decision has been taken of this magnitude,  
14 to drop the substance of the Appeal, and to the extent that there are inevitable links between  
15 every section up to section 10 and 11, that the same thing may happen to the application as  
16 may happen to Mr. Ridyard's witness statement, then the whole thing collapses, that the two  
17 are not separable?

18 THE PRESIDENT: Well I do not think our own thinking had got as far as crossing that particular  
19 bridge, I just do not know.

20 MR. SWIFT: Nor has mine, it was just ticking through. Anyway, we have an irrevocable decision  
21 taken to drop ground 1.

22 THE PRESIDENT: Well it still requires, in our provisional view, our permission before ground 1 is  
23 formally out of the proceedings, as it were.

24 MR. SWIFT: Irrevocable decision on the part of Somerfield that that is what they will put to the  
25 Tribunal?

26 THE PRESIDENT: Yes. Let us see where we are. Yes, Mr. Flynn? The practical proposition  
27 I think at the moment is that we adjourn the CMC to 1<sup>st</sup> November and that in the meantime  
28 you specify more precisely than you are able to do at the moment – we completely understand  
29 it – what points are still alive in this Appeal, what points are accepted and, insofar as points  
30 are still alive what is the nature of the point i.e. is it just a point of law, or is it just a point of  
31 fact? Insofar as it is a point of fact upon what factual basis are you inviting us to decide it?

32 MR. FLYNN: Yes, Sir. If I take the points Mr. Swift has just quickly run through.

33 THE PRESIDENT: Yes.

34 MR. FLYNN: He said at one point he was happy to hear it from me but then he would like a letter,  
35 so he is happy and he is unhappy. We are, of course, happy to provide a letter but the fact of

1 the matter is the Applicant is Somerfield, the Applicant's legal representative is specified on  
2 the Notice of Application and we are not changing that, but we will confirm that in writing if  
3 that will assist Mr. Swift and the Tribunal.

4 In relation to the interim undertakings, we hear what he says, we have to discuss the  
5 fine tuning of undertakings in relation to the 12 and that will happen outside this forum.

6 THE PRESIDENT: He was on the undertakings in relation to the 56 I think.

7 MR. FLYNN: 56 includes 12, Sir, so as I understand it he is saying they do not now need anything  
8 in relation to 44, but in relation to the 12 divestment locations there are already interim  
9 undertakings in place.

10 THE PRESIDENT: He is saying that his thinking is that they would not need undertakings in  
11 relation to the 44 on the assumption that ground 1, or anything that might flow from ground  
12 1 is no longer in the case.

13 MR. FLYNN: Which is the case, so we should be able to agree that with him I trust, so that will be  
14 done outside. In relation to the consequences of Somerfield's changed position, may I say  
15 first of all that this is not abandoning the main part of the case, or the guts of the case, it is  
16 abandoning one of the grounds. We had two grounds and one of those remains. You can  
17 measure them by weight or length of pages if you like but they are independent grounds and  
18 one of them remains. The purpose of this case management conference to be adjourned is to  
19 decide how best the Tribunal would like to handle that case.

20 If I may say so, Sir, this is not a question of withdrawing the Appeal precisely for that  
21 reason and you may remember and Professor Stoneman may remember the discussion we had  
22 about this in the *Pernod Ricard* case where, at the last hearing, Pernod effectively withdrew  
23 everything because they were not asking for relief, but after discussion and argument the  
24 Tribunal decided in that case that neither Rule 57 nor Rule 12 was applicable to the  
25 circumstances of that case but they would take it from Pernod that relief was not being  
26 pursued and the Tribunal would make no order. We think that is the appropriate way to  
27 proceed in relation to ground 1.

28 The way to view this, in my submission, is that as a result of Somerfield's decision  
29 today no relief is being sought on ground 1. What is being sought is the relief that we have  
30 claimed and argued for in relation to ground 2.

31 THE PRESIDENT: So if we take that, we go back to your Notice of Application and translate that  
32 into what the application says.

33 MR. FLYNN: If you wish to see ground 2 as a whole that is at para.100 on p.25. Obviously there  
34 are introductory parts and summary at the beginning.

35 THE PRESIDENT: Under "Relief Sought".

1 MR. FLYNN: Under “Relief Sought” we seek an order quashing in whole or in part sections 7–11  
2 of the Report and the Summary and the Findings. In my submission, Sir, there is no formal  
3 need to amend that in relation to our challenge in relation to ground 2. The Tribunal will rule,  
4 as it feels appropriate in ground 2, and should it agree with us on anything in ground 2 it will  
5 make an order quashing the relevant parts of the report.

6 THE PRESIDENT: Have you not got to be a bit more precise than that, Mr. Flynn?

7 MR. FLYNN: Well can I just go on to the ----

8 THE PRESIDENT: Yes, go on, I am interrupting you. You are saying you can do what you want to  
9 do without our permission. That is your submission at the moment?

10 MR. FLYNN: That is my submission; it is a regular practice in the courts and, in my experience, in  
11 this Tribunal for a party to say “We are not pursuing that ground”. I think that is something  
12 we can do and I would remind the Tribunal of what happened in the *Pernod Ricard* case.

13 THE PRESIDENT: We may have to go back to *Pernod* and have a look at it.

14 MR. FLYNN: But certainly, Sir, that neither Rule 57 – which I think is rather cumbersome – nor  
15 Rule 12, which relates, as the Tribunal said then, to the withdrawal of the whole of an Appeal  
16 was appropriate in the circumstances. This is clearly a change, we are only advancing ground  
17 2, does it require wholesale amendment of the Notice of Application? In my submission that  
18 is not really necessary. One looks at ground 2 as a self-standing ground. As I said before you  
19 rose, Sir, there will be facts and matters and descriptions of who the parties are and the  
20 procedure followed that may be relevant. It would be unfortunate if those were red-lined out  
21 of our application. We would then possibly need to put in some other document that  
22 replicated those relevant bits. The important point is we are not seeking any relief in respect  
23 of ground 1. So when Mr. Swift says “What is our position on Section 10 of the Report?”  
24 – he asked did we admit it and said that I had said “yes” – I did not say “yes”, I said we are not  
25 challenging it. That is the position, we are not challenging it. Somerfield’s views, if it still  
26 has any, are not relevant, but there will be facts and matters in the earlier parts of the  
27 application that are necessary for the Tribunal to have before it to understand what we are  
28 saying, but all we are seeking is what we set out under ground 2.

29 THE PRESIDENT: From the Tribunal’s point of view, what I am particularly anxious to avoid is  
30 a situation where we find ourselves led into what might turn out to be a rather unsatisfactory  
31 or even a false position where we are asked to decide the divestment point on the basis of  
32 certain hypotheses, but when you go into the arguments on the divestment side you find that  
33 the hypotheses are in fact more in issue than one might have supposed.

34 MR. FLYNN: I understand that is a concern, Sir, but we are no longer bringing any challenge to the  
35 Competition Commission’s finding that in those 12 identified locations an SLC has been

1 created or may be expected to occur. No challenge is pursued. Ground 2 raises two simple  
2 points, essentially points of law. Is it right for the Competition Commission to specify which  
3 of an acquired store or an existing store Somerfield must divest, and is it or is it not right for  
4 the Competition Commission to specify to whom we may sell divestment stores?

5 THE PRESIDENT: Well if they are points of law in the sense that they turn on the construction of  
6 the Statute and the vires that the Competition Commission has under the Statute, that is one  
7 thing. But if they are points that take one into the factual matrix that surrounds each of the  
8 stores in question which would seem at first sight to be possibly the case that is another thing.  
9 You are immediately into a mixed question of fact and law, and that immediately takes you  
10 back to some of the analysis in the earlier part. I was just trying to put my hands on  
11 Mr. Ridyard's evidence to see what he was saying about all that.

12 MR. FLYNN: It is Annex 2 to the application, Sir.

13 THE PRESIDENT: Are you relying on his evidence in relation to ground 2?

14 MR. FLYNN: We are, Sir, explicitly. His evidence, like the Notice of Application, deals both with  
15 ground 1 and ground 2, as it were, and his reasoning, his expert view on ground 2 starts at  
16 para.76 on p.23 of his report. I was surprised to hear Mr. Swift suggest that this might have  
17 any implication on the credibility of Mr. Ridyard. He has simply given his expert view on  
18 certain matters which Somerfield no longer wishes to put into question. It cannot possibly  
19 affect his credibility. In exactly the same way as in the Notice of Application there are  
20 passages in the economic expert report of Mr. Ridyard which are directed to ground 2, and  
21 there are other passages which are, if you like, background or descriptions of factual matters to  
22 which the Tribunal may find it convenient to have regard in assessing ground 2. But there is  
23 no possibility for Somerfield, in my submission, to bring in by the back door a ground  
24 1 challenge to the SLC finding.

25 THE PRESIDENT: I do not want to tie you down today, Mr. Flynn, because I know you have not  
26 had a full chance to review the whole thing, but just for argument's sake, if you take para.78  
27 of Mr. Ridyard's expert report which you tell us you rely on, towards the bottom of the page  
28 there towards the end of that paragraph he says, for example:

29 "If the proximity store is sold the diversion ratio is reduced and the CC's SLC theory  
30 fails the threshold and SLC is remedied. The extent of the reduction in diversion ratio  
31 can only be an issue when there are multiple proximity stores."

32 I suppose the question in my mind is whether that kind of argument, if you are making it, does  
33 not take us straight back into the whole question of diversion ratios and what implications we  
34 should draw from that and how that affects divestment?

35 MR. FLYNN: In my submission it does not, Sir. It accepts the CC's methodology and conclusion

1 – this is what they did and this is how they did it, and the question is what is appropriate to  
2 remedy the SLC they found?

3 THE PRESIDENT: This expert is being put in the somewhat difficult personal position of saying  
4 that he does not actually accept the methodology, which is what he has devoted the first 22  
5 pages of his paper to.

6 MR. FLYNN: If I might just say on that, we have consistently and throughout accepted that the  
7 diversion ratio methodology is an appropriate one for the Competition Commission to use in  
8 this inquiry. What we were challenging in ground 1 is the choice of an extremely low  
9 threshold for saying that diversions were a problem.

10 THE PRESIDENT: Yes, which is what he is talking about in para.78. I may be making difficulties  
11 where none exist because I can see----

12 MR. FLYNN: He is not criticising the methodology there.

13 THE PRESIDENT: -- that there is a connection between part one and part two that it is a little bit  
14 difficult to entirely separate.

15 MR. FLYNN: In my submission, Sir, that is a reason for not approaching this as an issue of  
16 amending and striking out passages. It is an argument for leaving it in and sorting out, if  
17 necessary, as we go along what is relevant to ground 2, which is the only basis on which we  
18 seek relief. But I do not think that passage is a criticism of the methodology. The question is,  
19 having found SLC and having done so on the basis that the Commission did which is that  
20 stores offer competition to each other equally, that the SLC can be remedied by selling one or  
21 other of the stores, and that is what Mr. Ridyard is saying there. He is saying in that last  
22 sentence if you sell the proximity store the diversion ration will go down and therefore there  
23 will no longer be SLC, that is the point he is making there.

24 MR. SWIFT: May I just add a point on this, Sir without wanting to prolong it? The point that the  
25 chairman was making even more forcefully, I submit, in para.84 in which Mr. Ridyard  
26 addresses the CC's analysis on the product market, there is no such separate product,  
27 secondary shopping, and so on and so forth. This is getting right back into the Stage  
28 1 analysis.

29 MR. FLYNN: Stage 1 analysis is not how the Commission finds SLC. Stage 1 analysis is the  
30 approach by which the CC identifies possible problems. Stage 1 and, indeed, now Stage  
31 2 methodology is not in question in this Appeal. What is being said here is that they should  
32 not have excluded certain categories of potential purchasers of divestment stores from those to  
33 whom Somerfield is able to sell, and that does not re-open the SLC finding which we are no  
34 longer pursuing under ground 1.

1 THE PRESIDENT: But he is suggesting there that what is described here as “secondary shopping”  
2 is not a product market as the CC found it to be. If that point is pursued we have to go into it  
3 all, do we not?

4 MR. FLYNN: Sir, but that does not get you into ----

5 THE PRESIDENT: Maybe the point is not being pursued, I do not know.

6 MR. FLYNN: No, Sir, this is ground 2, the basis on which certain competitors and potential  
7 purchasers of divestment stores have been excluded from the category to whom we can sell  
8 the stores. This argument supports that ground, but it does not go to challenging the  
9 Competition Commission’s SLC finding. Success on this ground will not undermine the  
10 Competition Commission’s SLC finding. If I may just say, in case there is any confusion,  
11 ground 1 and Stage 1 are two entirely separate things.

12 THE PRESIDENT: No, no, quite, I understand that. You have probably not yet had the chance to  
13 discuss the situation that has arisen with Mr. Ridyard ----

14 MR. FLYNN: No.

15 THE PRESIDENT: -- from the point of view of his personal position, and I would have thought that  
16 it probably is appropriate to draw his attention to the situation that has arisen and see what his  
17 personal position about his evidence is.

18 MR. FLYNN: Of course that can be done, Sir. I am just at this stage, and I am aware that you  
19 intend to adjourn the conference, but I am just making the point that from our perspective we  
20 do not think that the appropriate course will be to strike out large parts.

21 THE PRESIDENT: So your suggestion is what then?

22 MR. FLYNN: You leave it on the books as it is and we pursue ground 2 only.

23 THE PRESIDENT: So we leave the Notice of Application as it is.

24 MR. FLYNN: Take due note of the fact that we are not pursuing ground 1, and ----

25 THE PRESIDENT: Pages 25 to 27 is the effective scope of the Appeal, paras.100-114 and treat  
26 Mr. Ridyard’s evidence at paras.76-87 as unaffected by the abandonment of ground  
27 1.

28 MR. FLYNN: I think in the same way, Sir, we would not, as it were, strike out or withdraw  
29 Mr. Ridyard’s evidence. What is being withdrawn is our reliance on ground 1. Those parts of  
30 Mr. Ridyard’s evidence are those that are particularly addressed to ground 2, but so that you  
31 know who the LADS are there may be parts earlier in his evidence, there may be parts earlier  
32 in the Notice of Application which will inform you of that. It is for information. The legal  
33 argument we make, the legal challenge we bring is only as regards ground 2.

34 THE PRESIDENT: Yes. So in your submission there is really nothing more to do, we simply go on  
35 on that basis, and we can presumably go on fairly rapidly according to you on that basis?

1 MR. FLYNN: That would be my submission, Sir, yes, and obviously the Competition  
2 Commission's Defence only need address ground 2 and they only need supply such evidence  
3 as they feel is necessary to deal with ground 2. Their SLC finding is not challenged in these  
4 proceedings.

5 THE PRESIDENT: Yes.

6 (The Tribunal confer)

7 MR. SWIFT: Sir, I am not sure if the Tribunal is going to make a Ruling, but there is a point I would  
8 like to make in relation to Ridyard 2.2 at some stage.

9 THE PRESIDENT: Yes, why do you not make it now, Mr. Swift?

10 MR. SWIFT: When I put to Mr. Flynn Section 10, the conclusions – 10.1 – and if I misunderstood,  
11 I apologise, I thought he said that he accepted, but Mr. Flynn says he does not challenge it.  
12 I take “does not challenge” as a pretty strong statement. It is like giving him a glass, he takes  
13 a sip and says “I do not challenge”. What I am saying to him “You take that glass, you have  
14 to drink it.” If you do not challenge the conclusions you cannot challenge the reasons. As this  
15 Tribunal knows we are concerned not just with local geographic markets, we are concerned  
16 with product markets. The product markets have been defined by reference to secondary  
17 shopping and to a competitor mix. That is precisely what Mr. Ridyard is challenging in s.2.2  
18 of his witness statement. You cannot say “I do not challenge the conclusions” and still say  
19 “but I am prepared to challenge basic reasoning by reference to which you have arrived at  
20 your SLC on a product and geographic market.”

21 THE PRESIDENT: I think our view at the moment, Mr. Flynn, Mr. Swift, is to make no Ruling at  
22 all today. We will adjourn this case management conference to 1<sup>st</sup> November. By a date to be  
23 agreed, but is probably around 25<sup>th</sup>/26<sup>th</sup> October we would invite Somerfield, after having had  
24 chance to reflect, to put in some written submissions to us as to what they say the correct  
25 procedure to be followed now is, and in particular whether or not there is any need to amend  
26 the Notice of Appeal, whether or not there is any need to withdraw, adapt or modify  
27 Mr. Ridyard's evidence, and whether and to what extent ground 2 can be considered  
28 completely independently of any of the issues that arise under ground 1. To those  
29 submissions, if not agreed, the CC can then have a short period to reply in writing by, say,  
30 Monday 31<sup>st</sup> October – we may have to adapt the timetable in a moment – and we will  
31 reconsider the whole matter on 1<sup>st</sup> November, when we ourselves have had time to consider  
32 and deal with all outstanding procedural issues with a view to making directions as to whether  
33 there should in fact be any amendment to the Notice of Appeal, whether permission is needed  
34 to withdraw and, if so, whether it should be given, and what (if any) directions are needed as

1 far as the CC's Defence is concerned, and the further conduct of the case. I think that is as far  
2 as we can probably take it today.

3 That being so, I think all we need to do is to think about timing. Today is  
4 Wednesday, 19<sup>th</sup> – would 25<sup>th</sup> be all right for you, Mr. Flynn?

5 MR. FLYNN: Yes, Sir.

6 THE PRESIDENT: And perhaps if the CC would be kind enough to put in any submissions in reply  
7 by Friday, 28<sup>th</sup>, so we get them before the weekend, that would also be a kindness.

8 MR. SWIFT: Yes, I am sure we can work with that timetable. There is a matter of uncertainty as to  
9 where we are at the moment.

10 THE PRESIDENT: Yes, there is uncertainty.

11 MR. SWIFT: There is one matter, Sir, the Tribunal may wish to dispose of today, and I am sure it is  
12 entirely in accordance with due process. The Intervener not having intervened, and the  
13 Intervener's reasons for intervening being so hopeless, it might be appropriate to dismiss that  
14 rather than having him back on 1<sup>st</sup> November.

15 THE PRESIDENT: Between now and 1<sup>st</sup> November we will deal with the question of the  
16 Intervener. Thank you, Mr. Swift. If that completes that part of the discussion can I raise  
17 a point of comparative obscurity which we consider does not arise, but I want to put it on the  
18 record in case anybody thinks it might arise. In relation to the disputed stores, and I have not  
19 checked back to see how far this still applies to the ones in issue under ground 2, a significant  
20 proportion are in Scotland. Does that mean that we are both a Tribunal sitting in England and  
21 Wales, and a Tribunal sitting in Scotland for the purposes of these proceedings? Our view at  
22 the moment is not, because if the CC had to enforce any order that it made it would be able to  
23 enforce it in England against Somerfield PLC, which is an English company, and that  
24 Judgment would then be enforceable in Scotland under the normal enforcement of judgments  
25 provisions. It would not be necessary for the CC itself to apply for an interdict in Scotland.  
26 So our provisional view is that this is a Tribunal sitting in England and Wales unless anybody  
27 disagrees. I simply mention that in case the point is taken hereafter.

28 MR. SWIFT: I am sure we agree with those thoughts. I have to say, Sir, I am getting a lot of red  
29 coming up from the back in relation to a deadline of 28<sup>th</sup> October, it is including half-term.  
30 I am beyond those considerations.

31 THE PRESIDENT: We are all affected by half-term, Mr. Swift.

32 MR. SWIFT: I am just wondering whether there is some way in which, after this hearing, we may be  
33 able to arrive at ----

34 THE PRESIDENT: Well I think if you get some submissions on 25<sup>th</sup>, and it is only a legal point as  
35 to how we proceed procedurally, it does not go into the substance of the matter, or involve an

1 enormous amount of complication, I would have thought that it is desirable if we are meeting  
2 on the 1<sup>st</sup>, which is the Tuesday, that we get something in before the weekend. We have to  
3 circulate it around – not everybody is in London – and I think the Friday is not unreasonable.

4 MR. SWIFT: It is just that we are in difficulties, we have been going – if I use the expression  
5 – “Hell for leather” on the Defence and the witness statements on the whole of ground 1----

6 THE PRESIDENT: Well I should stop work on ground 1 for the time being, and see where we are.

7 (Laughter)

8 MR. SWIFT: I am very glad you gave that advice to them rather than my having to come back  
9 again.

10 THE PRESIDENT: No, if you need more time later of course we will be sympathetic to the situation  
11 you have been put in.

12 MR. SWIFT: I am obliged.

13 THE PRESIDENT: Very well, I think that is as far as we can take it for the moment.

14 MR. FLYNN: Sir, might I just ask whether you have set a time for the hearing on 1<sup>st</sup> November?

15 THE PRESIDENT: Yes, we have, 11 o'clock. Thank you very much.

16 (The hearing concluded at 3.30 p.m)