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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1052/6/1/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st November, 2005

Before:
SIR CHRISTOPHER BELLAMY
(President)
MR. MICHAEL BLAIR QC
MS. ANN KELLY

Sitting as a Tribunal in England and Wales

BETWEEN:

THE ASSOCIATION OF CONVENIENCE STORES

Applicant

Supported by

FRIENDS OF THE EARTH

Intervener

and

OFFICE OF FAIR TRADING

Respondent

Ben Rayment (instructed by Edwin Coe) appeared for the Applicant.

Kassie Smith and Alan Bates (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Jennifer Skilbeck (instructed by Friends of the Earth) appeared for the Intervener

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Yes, Mr. Rayment, the matter that we think we ought perhaps to deal with first,
2 just to make sure the position is regularised, is the application to intervene of Friends of the
3 Earth, before we make any particular order in this case.

4 MR. RAYMENT: Yes, Sir, and I think the Tribunal is aware of the ACS's position on that which is
5 that we support the application.

6 THE PRESIDENT: Well we are presently minded to permit the intervention unless there is some
7 new argument that we need to listen to.

8 MISS SMITH: Sir, no. I hope that you and your colleagues have received a very short note that was
9 prepared by the OFT this morning updating the Tribunal on what has happened over the last
10 few days.

11 THE PRESIDENT: Yes.

12 MISS SMITH: And a bundle of correspondence.

13 THE PRESIDENT: Yes, we have received the note, we have not necessarily had the chance to read
14 the correspondence bundle.

15 MISS SMITH: Sir, no, it simply comprises of copies of the correspondence which I think has
16 already been copied to the Tribunal but puts it in one convenient place for ease of reference.
17 Sir, in light of the OFT's position set out in its letter to the ACS of 27th October, that it is
18 willing to withdraw the Decision challenged, the OFT's position on the intervention is that
19 there is no purpose in pursuing that application. However, the OFT has made clear in
20 correspondence to the Friends of the Earth that were the proceedings to continue it has no
21 objection to the Friends of the Earth application to intervene in the proceedings.

22 THE PRESIDENT: We do not need to trouble you, Mrs. Skilbeck. In this case the Tribunal has
23 received a request for permission to intervene by Friends of the Earth dated 21st October 2005
24 in support of the Applicants. The request for permission explains that the Friends of the Earth
25 is an organisation that is dedicated to, among other things, to promoting solutions to
26 environmental problems and works together with the grocery retail trade, farmer suppliers and
27 consumers including the Applicants and submits that the Friends of the Earth have an interest
28 in the OFT's Decision not to make a market investigation Reference to the Competition
29 Commission under s.131 of the Act. In our judgment, for the reasons set out in the request,
30 Friends of the Earth have a sufficient interest to intervene in this case. They make it clear,
31 among other things, that they are a representative association and they limit their request to
32 being permitted to intervene in writing and, in all those circumstances, given that the
33 application is not formally opposed by the OFT we think it right to permit the intervention. So
34 Friends of the Earth are now officially parties to the case.

35 MRS. SKILBECK: Thank you, Sir. Can I make one small observation?

1 THE PRESIDENT: Of course, Mrs. Skilbeck.

2 MRS. SKILBECK: As you mentioned part of the application did give a restriction on the length of
3 the submission and appearance at oral hearings, and we would just like to have liberty to apply
4 to vary that should circumstances suggest it.

5 THE PRESIDENT: Well should circumstances arise you may make an application in due course.

6 MRS. SKILBECK: Thank you, Sir.

7 THE PRESIDENT: Yes, Mr. Rayment?

8 MR. RAYMENT: I am grateful, Sir.

9 THE PRESIDENT: Where are we now in this case?

10 MR. RAYMENT: The ACS's position at the moment, Sir, is obviously that we welcome the OFT's
11 decision to reconsider its decision and not to make a reference to the Competition Commission.
12 I think ACS, as well as the OFT, are understandably keen to draw a line under this particular
13 decision and look to the future. In principle, we are happy to see this Decision quashed and
14 remitted, but I say "in principle" because there is a "but" You may have seen, Sir and your
15 colleagues, a letter sent by ACS on 31st October in which we asked for certain clarification
16 about where we go from here.

17 THE PRESIDENT: Yes.

18 MR. RAYMENT: The issue essentially of what happens next? The OFT have responded to our
19 letter and they have provided some clarification, first of all on the question of what all the
20 relevant circumstances are in which they propose to reconsider their Decision, and also they
21 very helpfully indicated that they are prepared, at least in the circumstances of this case, to
22 treat the ACS as an interested person under s.169 of the Enterprise Act, that is to say that they
23 will consult us regarding any decision they propose to make, and that is very helpful.

24 However, the ACS is obviously very concerned, and I have mentioned this concern to
25 my learned friend coming into court this afternoon. The concern is that the OFT at the
26 moment say they are not in a position at present to give any details of the time frame for
27 a reconsideration or what steps they are proposing. In fact, I have been given an informal
28 indication that the OFT may be able to give us an informal indication of a future time frame at
29 some stage, although I do not know whether that is something they can provide us with today.

30 We are also a little concerned about the matter they raise in their response because it
31 seems to indicate to some extent that we are not on the same wavelength, for example in
32 relation to this issue about the pricing issues in the case, and about the low cost selling.
33 Essentially they are asking us for further clarification of what we say they should have done to
34 inform themselves about these issues, and we are a bit concerned about this because we have
35 told them on a number of occasions that it is simply not feasible to expect an organisation such

1 as ACS to get hold of the relevant cost information. Information of such a commercially
2 sensitive nature is simply not available to a party such as us, and suppliers and people in the
3 market who might be interested in co-operating with us. There is a general climate of
4 apprehension in the market about sharing any of this kind of information. So as we have made
5 clear all along it is difficult for us to provide firm evidence. Yes, we can provide pointers and
6 we have tried to do that but there is a limit to what we can do and, at the end of day our case is
7 that the OFT has to use its legal powers and we are totally unclear as to where the OFT are on
8 that particular issue, because we have come all this way and they are still asking us what is it
9 that you want us to do? We have made it pretty clear that the sort of invitation that they issue
10 to the market in March is simply not going to produce this sort of information so we are a bit
11 concerned about the future on that issue too.

12 THE PRESIDENT: It is not going to produce the information – why not? For what reason?

13 MR. RAYMENT: Well, Sir, as you know the Competition Commission back in 2000 found that
14 these were matters that operated against the public interest in the context of the legal
15 framework as it was then. It is also the case that issues such as below cost selling raised
16 potential issues under the Competition Act as well, and we think it is most unlikely that unless
17 formal legal powers are exercised it is most unlikely that the OFT is going to have the
18 information to be able to say that this sort of activity is not going on. I can take you to relevant
19 parts of the documents, both the Notice of Application itself, and also meetings we have had
20 with the OFT where we have expressed these concerns on those sorts of issues.

21 So our position is, as I say, in principle we are accepting that the Decision should be
22 quashed and remitted, but before a final decision is taken on that and before we consider our
23 final position on it we would be assisted by some clarification on those issues. It seems to me
24 that it may be that we want to invite the Tribunal to consider what the extent of its powers are
25 in a situation such as this. I am well aware that it is quite a controversial area at the moment
26 legally speaking, but there may be an invitation that we want to extend to the Tribunal on
27 where we go from here, and what the Tribunal should do.

28 That is pretty much everything I wanted to say at this stage. There is one minor point
29 that we have about the current draft of the order that the OFT have produced, but we could
30 leave that until the end.

31 THE PRESIDENT: I suggest we leave that for the time being, Mr. Rayment, and see how we get on.

32 MR. RAYMENT: I am grateful, Sir.

33 THE PRESIDENT: Yes, Miss Smith. Can I start with two questions? The letter you kindly wrote
34 us indicating your intention to withdraw the Decision specified as the reason “insufficiency of
35 reasoning in the Decision”. The first question is are you able to elaborate at all on what you

1 had in mind, which bits of the Decision were matters that you felt were problematic in that
2 regard? If that is an embarrassing question you should duck it and say you cannot elaborate
3 any further. Secondly, and partly picking up what Mr. Rayment has just been submitting, are
4 you able to help us as to what extent “reconsideration” involves a further investigation or a
5 more intense investigation than that already taken place? Or whether it is envisaged that what
6 will happen now is a reappraisal of what you have already got, or something else? What is at
7 the back of our minds in asking both those questions is that the Applicants have already, as it
8 were, expended a certain amount of resource in having got this far and, if it were the case that
9 the OFT were simply reconsidering with a view to re-writing some of the earlier Decision but
10 not in any sense going back in any detail into the underlying substance, we might face the
11 prospect that we all come back here in a few months’ time not much further ahead, and we
12 would not want to lose what has so far happened in this Appeal on the basis of what might or
13 might not be simply a technical withdrawal. But you may want to elaborate on the situation
14 for us and reassure us on that point.

15 MISS SMITH: Sir, I hope I can. Perhaps I can deal with those two points that you have raised, Sir,
16 and then deal with the three points raised by Mr. Rayment for the Applicant?

17 THE PRESIDENT: Yes.

18 MISS SMITH: Sir, as regards the position put forward in the OFT’s letter of 27th October, I hope it
19 was made clear in that letter that the OFT came to the conclusion that the Decision should be
20 withdrawn for reconsideration on the ground of insufficient reasoning, and we elaborated that
21 in the letter to the ACS of 31st October, that was a reference to their fourth ground of
22 application as set out in their Notice of Application and the paragraphs there, para.4.4 and 76
23 to 80 of their Notice of Application. Sir, essentially it was a response to the fourth ground of
24 review put forward by the ACS.

25 THE PRESIDENT: I am just checking to see that I followed it. So para.4.4 on p.3 of the
26 Application is that the OFT had not addressed: “(a) how to approach its Decision under s.131;
27 and (b) rejecting the substance of the evidence and arguments put forward by ACS and others.”
28 That has two limbs, one is a legal limb, what steps you have to follow under s.131 and “(b)”,
29 the second one, is replying to the arguments put forward by ACS and others.

30 MISS SMITH: Sir, both of those limbs are that the reasons given in the Decision do not clearly
31 address those two issues and, Sir, that is elaborated in paras.76 to 80 of the Notice of
32 Application.

33 THE PRESIDENT: I am just glancing at that. (After a pause) Yes?

34 MISS SMITH: Sir, as regards your second question, the OFT’s position is that it will consider the
35 Decision again, afresh, taking into account all relevant circumstances that arise at the date of

1 that fresh determination of the Decision. Sir, I think again we made it clear, I hope, in the
2 letter to ACS of 31st October that those relevant circumstances will include any representations
3 that ACS wish to make on the issues raised in their Notice of Appeal including what they
4 consider to be the information that the OFT is required to gather in order to be able to raise
5 a decision about the issues raised in s.131.

6 THE PRESIDENT: Well they say that is up to you, really.

7 MISS SMITH: Well, Sir, that leads me to the points made, if I may, by Mr. Rayment. As regards
8 that point, the question raised by the OFT in correspondence with the ACS is simply a matter
9 of particularisation requesting them to particularise an allegation made, or an argument made
10 in their Notice of Application.

11 If I can take you back to the Notice of Application at para.63 on p.23. You will see
12 there in the third line of para.63 the ACS submits that the OFT failed to take reasonable steps
13 to inform itself of the extent of such conduct that is below cost pricing and price flexing in the
14 market in order to justify the contested Decision on this basis. Sir, it is in light of that
15 submission that the OFT requested the ACS to say what in its view were reasonable steps. If
16 the response to that question from the OFT on the part of the ACS is “We do not know”, then
17 that is that. But, Sir, it is a submission that is made in the Notice of Application, it is simply
18 a request for particularisation of that submission and obviously an opportunity to ACS to
19 develop that argument.

20 THE PRESIDENT: Well what I understood Mr. Rayment to be saying, and may be they will make
21 this in detail if they make further submissions to you hereafter, is that you will never get
22 evidence of what is thought to be occurring in the market – which may or may not be
23 occurring, I have no idea – without using some kind of legal power to do so, because no one is
24 going to come forward voluntarily, that is their case.

25 MISS SMITH: Well, Sir, if that is the simple point that Mr. Rayment and his clients wish to make,
26 then I am sure they will make that point and we have already indicated on an open basis that
27 we will consider that as part of the reconsideration of the Decision.

28 THE PRESIDENT: Yes.

29 MISS SMITH: Sir, there were two other points that Mr. Rayment raised, first of all the position
30 under s.169. Just to clarify, what was said by the OFT is, regardless of the strict position under
31 s.169 (and we do not want to enter into any arguments on exactly what the legal interpretation
32 of that is) we will be consulting with the ACS.

33 THE PRESIDENT: Yes.

34 MISS SMITH: Then as regards the timetable, Sir, I am in a position to give some informal
35 indication to the Tribunal in open court today as to the reconsideration of the Decision. Of

1 course, I am not in a position to give any formal undertaking. The reconsideration of the
2 Decision, the timetable and exactly what happens will of course depend to a large extent on
3 what comes out during that reconsideration, and also the OFT cannot predict what other
4 administrative priorities it may have to deal with in the next few months. But the OFT can say
5 that a reconsideration of the Decision including an identification of further information
6 required from players in the market, request and receipt of that information, an analysis of that
7 information and possible further meetings with providers of that information or other players in
8 the market, consultation on the proposed Decision and internal reference to the OFT Board and
9 writing up of a Decision is likely to take about eight months, which will take us to the summer
10 of 2006. Sir, we are undertaking to carry out a fresh reconsideration of the Decision and the
11 Decision under challenge itself took about nine months from November 2004 to August 2005
12 – just to put that timescale in perspective.

13 THE PRESIDENT: Sorry, from when?

14 MISS SMITH: November 2004 I think was when the request was made by ACS and the Decision
15 was issued on August 2005.

16 THE PRESIDENT: But you should already be a fair way down the track now if you have already
17 spent that period of time looking at it?

18 MISS SMITH: Yes, I do not think anyone is arguing that we have approached this Decision in any
19 sort of dilatory manner, or that there has been any undue delay, and of course we will try to do
20 this as efficiently and expeditiously as possible, but I think both the OFT and the Applicant are
21 keen to ensure that all relevant matters are taken into consideration and all relevant
22 consultation is carried out. Sir, it is simply an informal indication. I know that those behind
23 me are hoping to get this done as quickly as possible, but that is the indication I am able to give
24 to the Tribunal today.

25 THE PRESIDENT: Well thank you for the indication. Bearing in mind what we are considering is
26 a Decision as to whether to make a Reference and that the Reference itself would then take
27 another period, a total period of 16 months in order to decide whether to make a reference
28 might seem to be somewhat long.

29 MISS SMITH: Sir, yes, I take that point. I have sat down with those instructing me and in light of
30 the complaints that have been made against the OFT, particularly as regards identification of
31 information and consultation that was the timetable that we are able to give. I can say no more
32 than we will, of course, try to do it as quickly as we can, bearing in mind the balance that has
33 to be reached between ensuring that everything is done properly on the one hand, and that
34 everything is done as quick as possible on the other hand.

35 THE PRESIDENT: Yes.

1 MISS SMITH: Sir, unless I can help you or your colleagues further, I think those are the points that
2 have been raised today. We have put in a draft order, it is simply a proposal, to the Tribunal.
3 Obviously, we are in your hands as to how you take this forward, but we would suggest that it
4 might be a helpful way of taking it forward to make an order in the terms we have suggested.

5 THE PRESIDENT: Yes, thank you, Miss Smith.

6 (The Tribunal confer)

7 THE PRESIDENT: Mr. Rayment, I do not know what your response to that is. It seems to us in
8 practical terms we have probably got two procedural choices. One is effectively to follow the
9 course suggested by the OFT, which is to allow the Appeal, make an order, send it back for
10 reconsideration, that is one possibility. The other possibility is perhaps to maintain the Appeal
11 on foot, at least for the time being, on the basis that there may be that there is still life in the
12 three other grounds that have not been conceded in order to guard against the possibility that
13 what has been so far invested in bringing this Appeal is not wasted because hereafter a defect
14 of form is corrected in a way that does not really address the underlying substance of the case
15 your clients want to make. Those are perhaps the possibilities. I will ask Miss Smith for her
16 reaction in a moment, but what is your position in the light of what the OFT has just indicated?

17 MR. RAYMENT: I think my clients regard with considerable concern the length of time we may be
18 dealing with here and I think I would very much value if the Tribunal is willing to let me have
19 a few minutes with my clients just to discuss the options that you have set out.

20 THE PRESIDENT: Yes, I suppose the third and more controversial alternative is either by way of
21 order, or by way of indication, to attach some kind of indicative timetable to what should
22 happen next, which has certain practical difficulties apart from anything else.

23 MR. RAYMENT: That third alternative is something that we did have in the back of our minds, but
24 we are not jumping up and down about that at this stage, until we had probed a bit further.

25 THE PRESIDENT: Well we have in mind to rise anyway for a few minutes just to consider the
26 position.

27 MR. RAYMENT: One matter that strikes me is this whole issue, that if we are really looking at
28 another nine months one starts to wonder what exactly this screening – it may be that
29 “screening” is not the right word – what this preliminary investigation is all about, because in
30 each case it seems to be being investigated all the way to a decision not to refer which, in
31 a sense, is possibly going too far at this stage, I say no more than that at the moment.

32 THE PRESIDENT: Miss Smith, the basic legal threshold you have to cross – I am just turning up
33 the Act, which I am sure you know by heart, just remind me of the section – 130?

34 MISS SMITH: 131, Sir.

35 THE PRESIDENT: You have to have reasonable grounds for suspecting.

1 MISS SMITH: Sir, yes.

2 THE PRESIDENT: It cannot take a particularly long period.

3 MISS SMITH: Absolutely, Sir. I am rather surprised by the statements that are being made about
4 the time, because we were facing in this Appeal arguments that we had not done enough work
5 and that we had not obtained enough information, we had not talked to enough people, and we
6 had not undertaken a thorough enough investigation before making a Decision under s.131.
7 Sir, obviously we are alive to those criticisms and, as I have said, it is the balance between
8 ensuring that a proper job is done on the one hand and that a decision is reached as quickly as
9 possible on the other hand. There are parties represented in this Tribunal room that will wish
10 to make submissions and will wish to make representations but there are many other parties
11 that are not represented; we will also wish to make submissions and representations. Sir,
12 I gave the indication of the timetable to this court in an effort to be as helpful as possible.

13 THE PRESIDENT: It is very helpful, Miss Smith, to expose what your thinking is, of course.

14 MISS SMITH: And the OFT will, as I have already said, make its decision as quickly as it can, it is
15 in the OFT's interests that it acts quickly in this matter as well, and we are very much aware of
16 it.

17 THE PRESIDENT: What is going through my mind, it is entirely provisional and without the
18 opportunity of prolonged reflection, is that the structure of the Act envisages two stages
19 – a stage in which the OFT decides whether it has reasonable grounds to suspect, and then
20 a Competition Commission investigation.

21 MISS SMITH: Sir, yes.

22 THE PRESIDENT: I think the 2000 investigation lasted two years or something of the kind.

23 MISS SMITH: Sir, that is the time limit under the Statute.

24 THE PRESIDENT: Thank you for reminding me of that, yes, but it would be the sort of
25 investigation that probably would last two years, one could imagine. If one turns the first stage
26 – or the first screen stage, or the preliminary stage, or whatever you like to call it – into a major
27 operation one is looking at a time scale for investigation that in total stretches to three and
28 a half to four years.

29 MISS SMITH: Sir, we are very much aware of that point.

30 THE PRESIDENT: And can that really be the intention behind the legislation? Is it not the intention
31 that the first stage, the OFT stage, is not intended to be a deep and prolonged investigation in
32 which every avenue is exhaustively looked at? That is for the CC stage. It is intended to be no
33 more than a reasonable ground for suspecting kind of stage. You may say, having had a quick
34 look, we have no reasonable grounds for suspecting, in which case that is the end of it, subject

1 to any challenge that may be made, or I suppose you may say “We have reasonable grounds
2 for suspecting but for this, that or the other reason we are not going to make a reference.”

3 MISS SMITH: Sir, absolutely, there is the residual discretion as you recognise. Sir, we adopt very
4 much, absolutely, the points that you make.

5 THE PRESIDENT: I am not being in the least bit critical of the submissions that are being made;
6 I am simply trying to work out how this is all supposed to operate in the context we happen to
7 be in. We are all in a somewhat new area at the moment.

8 MISS SMITH: Well absolutely, Sir, the test as you have indicated is reasonable grounds for
9 suspecting. The OFT’s position is that there has to be at least some evidence to support
10 a finding of reasonable grounds for suspicion but that this is not meant to be a full investigation
11 into the market. The Act envisages that the Competition Commission will undertake such an
12 investigation. Sir, I do not think I can say much more in that we agree with you that it is
13 a preliminary stage in determining whether or not there are reasonable grounds to suspect, and
14 the decision at the end of that preliminary stage will either be that there are reasonable grounds
15 to suspect or there are not. In the present Appeal the decision reached was that there were not;
16 we have offered to reconsider that decision and we are not in a position to pre-judge the
17 decision that we reach at the end of that reconsideration.

18 THE PRESIDENT: No.

19 MR. BLAIR: I wonder, Miss Smith, if I could ask you a question? This may be looking at it too
20 simply, but there was a finding by the Competition Commission in 2000, as Mr. Rayment
21 mentioned, which had a fairly strong finding of there being distortion of competition. No
22 remedies were proposed then. The law has now been changed, why can you not take the 2000
23 findings as worth more than you appear to give credence to?

24 MISS SMITH: I am not sure, Sir, on what basis you say that we do not give credence to the 2000
25 findings. They were the starting point and continue to be the starting point for the OFT’s
26 reconsideration of the matter.

27 THE PRESIDENT: But if you start with the 2000 report, as Mr. Blair suggests, you already have
28 a finding of prevention, restriction or distortion of competition and, in the normal run of things,
29 I would have thought a finding by the CC would give you reasonable grounds to suspect, and
30 then you go on from there.

31 MISS SMITH: Sir, we have that finding. There is also a finding from the CC that it was not
32 prepared to impose remedies. The OFT has to consider ----

33 THE PRESIDENT: But we are not in the remedies stage at the moment, we are in the ----

34 MISS SMITH: No, Sir, absolutely, and here I am again thinking off the top of my head and without
35 instructions, but if one were to say simply that there is a Competition Commission finding

1 therefore that prejudices the decision that the OFT will make under s.131, it rather cancels out
2 the purpose of s.131 because there is that decision in place.

3 THE PRESIDENT: It happens to be in this particular case there is a previous decision. It would not
4 normally be the case probably.

5 MISS SMITH: I do not think, with the greatest respect that a discussion about the role that the 2000
6 Competition Commission findings will play in the reconsideration of the Decision is the sort of
7 discussion that I properly should be having today with the Tribunal.

8 THE PRESIDENT: I think what we are trying to get a feel for is what your view is of the height of
9 the hurdle is, as it were, under s.131(1), or what the height of the hurdle may be, and I suppose
10 what is of perhaps some concern is that if you put that hurdle too high and try and dot every
11 "i" and cross every "t" at the "reasonable grounds for suspecting" stage then the entire process
12 gets unduly prolonged, and for all we know adverse effects occur in the meantime, because for
13 one reason or another the system has not responded to the tiller within a period that is a useful
14 period. That is the concern that I am airing and, like you, it is rather off the top of one's head
15 without any deep thought about it.

16 MISS SMITH: Sir, I hear what you say and I hear what your colleague says. The OFT is absolutely
17 aware of the fact that s.131 is a preliminary stage. There is a two stage process for the carrying
18 out of market investigations and the statute gives the OFT and the Competition Commission
19 different roles, and that the power under s.131 is to make a reference if there are reasonable
20 grounds for suspecting, and that the OFT is not to reach its own conclusion in any sense as
21 what the results in a market investigation will be.

22 THE PRESIDENT: We are going to rise and I think we will rise for at least 15 minutes. We just
23 want to reflect on the position.

24 MISS SMITH: Sir, excuse me, I do not know whether, before you rise, you want me to make any
25 submissions on the three options that you suggest.

26 THE PRESIDENT: Yes, if you have a comment on that before we go, Miss Smith, that would be
27 useful.

28 MISS SMITH: Sir, simply that we would urge you to go with the first option. The second, to
29 maintain an Appeal on foot, we say would be difficult and unusual in light of an indication by
30 the decision making authority that it is withdrawing the Decision that is the subject of the
31 Application.

32 THE PRESIDENT: He has not withdrawn the Appeal. You have tried to withdraw the Decision but
33 he has not withdrawn the Appeal.

34 MISS SMITH: No, Sir, but the Decision that is the subject of the Application has been withdrawn.

1 THE PRESIDENT: I do not know whether you recall the *Association of British Insurers'* case in
2 which Mr. Justice Lindsay was the Chairman of the Tribunal. The Tribunal was faced with
3 a somewhat similar position where the OFT withdrew the Decision but the Tribunal effectively
4 said "Hang on a minute, what is going to happen next", and made certain comments and made
5 certain arrangements that took the matter on to another stage. So the fact that you are
6 withdrawing the Decision is not necessarily the complete end of the matter in this particular
7 jurisdiction.

8 MISS SMITH: Sir, I recognise that, which is why the suggestion is made in the draft order that we
9 have put before the Tribunal that in effect the OFT submits to judgment that the Decision be
10 quashed.

11 THE PRESIDENT: Yes.

12 MISS SMITH: Sir, as regards the third option, the indicative timetable, if you and your colleagues
13 are considering putting a timetable in the form of an order then I would wish to make
14 submissions on the power to do that, you are well aware of the position in the *Floe* Appeal, Sir,
15 and the position that the OFT has taken in that Appeal.

16 THE PRESIDENT: Yes.

17 MISS SMITH: So we would just ask for the opportunity to do that if you were minded to go down
18 that route.

19 THE PRESIDENT: Fine, we will rise.

20 (The hearing adjourned at 2.40 p.m. and resumed at 3.25 p.m.)
21 (For Ruling see separate transcript)

22 THE PRESIDENT: I think that takes us on, Mr. Rayment, to the question of the wording of the
23 order?

24 MR. RAYMENT: Yes, Sir. Are you specifically referring to the point that I mentioned at the
25 outset? I referred to the fact that I had a point on the drafting of the order?

26 THE PRESIDENT: I am, yes, and any other points that arise on the order.

27 MR. RAYMENT: I think ACS is very content with the Tribunal's Ruling so far.

28 THE PRESIDENT: What is your point on the order itself?

29 MR. RAYMENT: Do you have a copy of the OFT's note for CMC?

30 THE PRESIDENT: Yes, we do.

31 MR. RAYMENT: Paragraph 7 of that document refers to the direction that the OFT is proposing, do
32 you see that?

33 THE PRESIDENT: Yes.

34 MR. RAYMENT: "... refer it back to the OFT with a direction to reconsider the matter and make

1 a new Decision”. I just merely note that in the actual draft order para.1 gets as far as “...
2 reconsider the matter”, and we would add “...and make a new Decision.”

3 THE PRESIDENT: The same point had occurred to us.

4 MR. RAYMENT: I am grateful.

5 THE PRESIDENT: Subject to that, you are content with the order as proposed?

6 MR. RAYMENT: (After a pause) Yes, Sir, we are content with that.

7 THE PRESIDENT: Yes, Miss Smith, “... to reconsider the matter and make a new Decision”?

8 MISS SMITH: Sir, yes, I have to take responsibility for the drafting, we are very happy to add those
9 words “and make a new Decision”. Sir, I would also say on behalf of the OFT that we take on
10 board very much the comments that you have made about dealing with this Decision
11 expeditiously.

12 THE PRESIDENT: Yes. Very well, no further observations from Friends of the Earth I take it? We
13 will therefore make an order in the terms of the draft before us, subject to that correction, and
14 let us hope this matter gets resolved as quickly as it can be. Thank you very much.

15 (The hearing concluded at 3.45 p.m)