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

1073/2/1/06

Victoria House  
Bloomsbury Place  
London WC1A 2EB

23 January 2007

Before:  
VIVIEN ROSE  
(Chairman)

GRAHAM MATHER  
VINDELYN SMITH-HILLMAN

BETWEEN:

**BRANNIGAN**

Applicant

- v -

**OFFICE OF FAIR TRADING**

Respondent

Mr. David Greene (of Edwin Coe) appeared for the Applicant.

Mr. Daniel Beard and Miss Anneli Howard (instructed by the Treasury Solicitor) appeared for the Respondent.

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Transcript of the Shorthand notes of  
Beverley F. Nunnery & Co.  
Official Shorthand Writers and Tape Transcribers  
Quality House, Quality Court, Chancery Lane, London WC2A 1HP  
Tel: 020 7831 5627 Fax: 020 7831 7737  
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1 THE CHAIRMAN: If I may just start by saying good morning to everybody. We have had the  
2 benefit of looking at the OFT's submission for today, and we have just received the  
3 Appellant's submissions which we have all read through briefly but perhaps not had the  
4 chance to absorb quite as much as we have the OFT's submissions.

5 If I could just outline what we see as the main issues to be discussed today: I can confirm  
6 that there have been no requests to intervene in these proceedings and, as I understand it,  
7 nobody is seeking a trial of a preliminary issue in this matter.

8 The first substantive issue then for us to consider is whether or not there are any parts of  
9 the revised notice of appeal to which the OFT should not be required to plead. I think there  
10 are two aspects of that: first, whether we should treat this as an application to amend the  
11 notice of appeal in accordance with Rule 11, that would place on Mr. Brannigan the  
12 additional burdens of satisfying the limited grounds for amendment in Rule 11(3). We are  
13 doubtful at the moment whether it is appropriate to treat a notice of appeal which has been  
14 lodged pursuant to an order under Rule 9, as being a request to amend, or whether it would  
15 be more appropriate to handle the matter less formally as simply whether the OFT should  
16 be required to plead to certain matters raised by it, but that is something on which perhaps  
17 you can address us.

18 The second aspect of that is, of course, what (if any) aspects of the notice of appeal go  
19 beyond what is properly to be raised in a challenge to the non-infringement decision. The  
20 next issue, as we see it, is what relief Mr. Brannigan is seeking bearing in mind in  
21 particular paras.13 and 17 of the OFT's submissions, considering what the test for us to  
22 apply is and also delineating the issues in this case.

23 As regards documents in evidence, the OFT have told us that they do not seek any orders in  
24 this regard, but we need to hear a little bit more from Mr. Brannigan as to how he sees this  
25 going forward. We envisage that Mr. Brannigan would need to file a witness statement to  
26 stand as his evidence in the case.

27 As far as the timetable for proceeding is concerned, clearly that is subject to what emerges  
28 from today in terms of any further additional steps than I have so far mentioned, but just to  
29 give you an indication of how we saw the matter progressing, the filing of the defence  
30 would be by 16<sup>th</sup> February. If skeletons were going to be lodged sequentially and we are  
31 open to consider submissions as to whether that is appropriate or not, we would envisage  
32 Mr. Brannigan filing his skeleton argument together with his witness statement on 2<sup>nd</sup>  
33 March, the OFT then filing their skeleton on 16<sup>th</sup> March and setting down the matter for  
34 hearing for one day on 27<sup>th</sup> March.

1 So that gives you an indication of where we are at at the moment. Mr. Beard, do you want  
2 to address us first?

3 MR. BEARD: Only on one or two matters of housekeeping. I realise that the substantive points  
4 that the Tribunal has raised really lie first with Mr. Greene, although there is the question  
5 precisely in what capacity Mr. Greene is appearing today? This is a matter which the  
6 Tribunal has raised previously, which the OFT has echoed, and has asked for clarification;  
7 none has been forthcoming. We are not for a moment trying to keep Mr. Greene from  
8 speaking today, nor indeed Mr. Brannigan from ensuring that he has the best representation  
9 he can obtain. However, there is a lack of clarity and perhaps Mr. Greene can deal with  
10 that.

11 Turning briefly to housekeeping, one matter that has arisen in relation to the preparation of  
12 this hearing is a review of the multiplicity of bundles that have come about because of the  
13 previous hearings in this case. We believe at the moment there are two core bundles which  
14 may be oxymoronic. There are two sets of authorities. There is also a correspondence  
15 bundle floating around, there is a separate bundle with the revised notice of appeal, and in  
16 addition there is a ring bound version of the OFT's assessments. So in those circumstances  
17 what is suggested is that today we have provided copies to the Tribunal of the  
18 correspondence that has been exchanged between the parties so that the Tribunal has it for  
19 reference, and a copy has been provided to Mr. Greene. That selection of documents is  
20 tabulated so that it can fit into the back of the second core bundle; in other words, the core  
21 bundle that was put together for the October hearing – it may be that it is not necessary to  
22 refer to much of this material, but we are concerned that the Tribunal should have the  
23 material, it probably has a deal of it already.

24 We would suggest that in due course we will sort out bundles and come up with a  
25 consolidated version. Obviously, we will produce indices that can be agreed between the  
26 parties, whoever it is that is to agree these things, whether it was Mr. Brannigan or Mr.  
27 Greene, or whomever it maybe, with a view to having a single bundle of not quite  
28 pleadings but the assessment, the appeals, defences and skeletons, another bundle with  
29 correspondence, a separate bundle with Tribunal material - transcripts, Judgments and so  
30 on; and a further bundle of authorities which will probably need to be supplemented or the  
31 present bundles filleted, or both. Then perhaps a separate bundle containing the  
32 Competition Commission reports which are never the shortest of documents, and it is  
33 unclear to what extent they are going to be referred to and relied upon, but it is necessary  
34 that the Tribunal has copies. We thought that having those separately would be a sensible

1 way forward. I thought it was sensible to clarify that so that any references that are being  
2 made are to the relevant sets of documentation that the Tribunal has.

3 The other matter is simply to apologise on my behalf and those whom I represent because  
4 the references in the outline observations – unfortunately it was late so the sets of bundles  
5 that we have been working off I am not sure are absolutely congruent with those that the  
6 Tribunal has – I think the references are clear enough in the sense that the documents  
7 referred to are clear even if their addresses, as it were, are incorrect and so I apologise for  
8 that. We have prepared outline observations redrafted with the corrected references, but  
9 perhaps that is not necessary for the Tribunal to have?

10 (The Tribunal confer)

11 THE CHAIRMAN: Thank you, Mr. Beard, I think we can manage with what we have.

12 MR. BEARD: I anticipated that, thank you, madam.

13 MR. GREENE: Yes, madam Chair. Can I explain the position in relation to our representation,  
14 and I probably need some permission today to speak on behalf of Mr. Brannigan, in that  
15 Mr. Brannigan has been acting in person. I think his financial difficulties and his ability to  
16 obtain representation were referred to by the then President in previous hearings. We have  
17 assisted him along the way in recent months and continue to do so. It was intended, I  
18 think, that he would attend today – I think an email was sent by him, I am not sure whether  
19 you may have seen it – but he could not afford to attend. As he puts it he is living on £100  
20 a fortnight and he could not afford to attend today, so I am here on his behalf. I have put  
21 together some written submissions, which I hope assist, but as you say they are rather late  
22 and I think the point has been made, but I will run through those if it assists.

23 THE CHAIRMAN: Mr. Beard, does that satisfy you as far as Mr. Greene and Edwin Coe's  
24 involvement in the case. I am not sure why it is that you particularly want to nail this  
25 down. Is there a practical reason?

26 MR. BEARD: I believe the reason is purely practical in relation to whom we are supposed to be  
27 communicating with and when. As I say, we do not have any difficulty, we just do not  
28 know what is going on and one of the practical problems is that we get emails from Mr.  
29 Brannigan saying: "I am not going to turn up" with no indication that anything more is  
30 going to be provided, and 10 minutes before the hearing this morning we get six or seven  
31 pages of submissions which are, frankly, contrary to the specific order that this Tribunal  
32 previously set down as to the dates on which this material should be put forward.  
33 In these circumstances the OFT is not trying to prevent Mr. Greene from running through  
34 these submissions, but this is the second time I understand that precisely this has happened.

1 The fact that someone is a litigant in person does not give them any excuse simply to  
2 ignore orders of this Tribunal. The OFT has to comply with them so must solicitors and  
3 litigants in person. It is unfair on the OFT simply to be provided with this material –  
4 material that refers to case law, no copies of which are provided – which it is simply unable  
5 to digest the entirety of in the time available, and then is expected to deal with.

6 The alternative, of course, is that this matter gets further deferred and we do not want that;  
7 we have made that perfectly clear. So it is that sort of practical awkwardness that is our  
8 principal concern. We do not mind who we are dealing with, we just want to know who it  
9 is, and we wish to make it clear that whoever it is they are bound by the requirements of  
10 the Tribunal just as anybody else would be.

11 THE CHAIRMAN: Mr. Greene, I think there are two points then being made there. The first is  
12 the point about with whom the OFT should be corresponding, in particular whether it is  
13 appropriate for them to write back and deal directly with Mr. Brannigan which, of course,  
14 it would not be if you are the solicitors acting for him, or whether they should channel all  
15 their communication through you to him. Perhaps you could deal with that point.

16 The second point is that from hereon in we are setting a timetable by which steps need to  
17 be taken to bring this matter to hearing, and we do expect both parties to comply with that  
18 timetable.

19 MR. GREENE: Well firstly, Mr. Brannigan is acting in person – he is on the record as acting in  
20 person – therefore any communication is with him. He copies us in on those  
21 communications, but certainly he is on the record and any service of documents is with  
22 him.

23 As to the future, I accept entirely there is going to be a fairly tight timetable now I think  
24 towards a hearing. It is right that the matter should be concluded as soon as possible. We  
25 will certainly impress upon Mr. Brannigan his need to meet that timetable, and that the  
26 Tribunal would expect him to meet that timetable, we will certainly impress that upon him  
27 but, as I say, communication is direct with him.

28 I may say, that the alternative is Mr. Brannigan turns up in person, he would make his  
29 submissions, which might be of assistance to the Tribunal – they might not be. All we are  
30 attempting to do today is to assist the Tribunal in relation to the issues that it is now  
31 addressing and we have done that as best we are able in the circumstances and I hope that it  
32 is of assistance.

33 THE CHAIRMAN: Thus far has the OFT copied you into their communications with Mr.  
34 Brannigan, or have you relied on Mr. Brannigan notifying you of what he has received?

1 MR. GREENE: I think we have been copied in.

2 MR. BEARD: We have copied in both Mr. Brannigan and Edwin Coe, indeed we were told at  
3 different times to copy different people at Edwin Coe into correspondence. We are not in  
4 any way trying to be obstructive, we simply need to know in these circumstances, it is only  
5 right and proper as the Tribunal has already pointed out. Thank you.

6 THE CHAIRMAN: Yes, Mr. Greene?

7 MR. GREENE: Might I then turn to the outline observations. Some points I think have been  
8 dealt with, for instance, intervention, but I will, if I may, start with just a little history of  
9 this case thus far, the complaint, and I do that on the first page in para. C. As has been  
10 commented on before the Tribunal, Mr. Brannigan will say that he was financially ruined  
11 by the events that are the background to this Appeal, and indeed is I think an undischarged  
12 bankrupt at the moment, but certainly was made bankrupt as a result. He sold his home to  
13 make the investment in this enterprise, which was the subject of this Appeal.  
14 I have mentioned his absence today already and the assistance we have given him, and  
15 indeed, counsel, Mr. Rayment, along the way. The fact is that Mr. Brannigan has been  
16 acting in person and I would ask the Tribunal to give him some leeway because he is acting  
17 in person. The point has been made in other cases where someone is acting in person – and  
18 I will come on to that – that the Tribunal may give them some leeway in their submissions  
19 and the questions of the Appeal and the grounds of the Appeal we will come on to.  
20 He submitted his own Appeal on 12<sup>th</sup> March following the Decision of OFT on 6<sup>th</sup>  
21 February 2006. The notice of appeal was very short, and I think the Tribunal will be aware  
22 of the handwritten note, but what it contained behind it was a series of documents that were  
23 intended to give the background and indeed the form of the Appeal. I think I am going to  
24 need some help with the bundling, but if one looks at the documents they start with a letter  
25 from Mr. Brannigan to the Office of Fair Trading on 24<sup>th</sup> November 2003, and then there  
26 are subsequent documents submitted and, indeed, part of those documents are letters  
27 between Mr. Brannigan and his solicitor, which were also submitted to the OFT. Finally  
28 there was an advice from counsel that Mr. Brannigan had sought and obtained in relation to  
29 the competition issues. All that documentation was submitted in the Appeal sitting behind  
30 this manuscript document. The Appeal was listed first of all on 28<sup>th</sup> April, the OFT  
31 disputed the timing of the Appeal, the nature of the notice of appeal and whether in any  
32 event it was admissible. On that occasion, as I say, Ben Rayment of counsel, and we  
33 attended to assist the Tribunal and Mr. Brannigan.  
34 Following express concerns of the then President at that hearing the OFT agreed to revisit

1 the complaint, and I am sure the Tribunal will be aware of the transcript of that hearing in  
2 April. For that purpose Mr. Brannigan was then asked to resubmit his complaint, which he  
3 did on 31<sup>st</sup> May 2006. Then the OFT reviewed the complaint and rejected it. That was a  
4 final decision of the OFT at that time and the complaint then made in relation to that  
5 Decision is that there had been no consultation in relation to that final decision. As a result  
6 of that a new Appeal was put in relation to that Decision. There is some confusion, I think,  
7 about the nature of that Decision because it was said to be “without prejudice”, and there  
8 was a degree of confusion as to what that actually meant in the circumstances.

9 We came back before the Tribunal on 26<sup>th</sup> October, and that was effectively an adjourned  
10 application of the strike-out application, and we attended with Mr. Brannigan on that  
11 occasion. The Tribunal refused the application to strike under Rule 10 and the Tribunal  
12 made an order that the Appellant should file a revised notice of appeal, and that he did on  
13 23<sup>rd</sup> November.

14 The point in relation to the question of amendment is that we have this series of appeal  
15 documents coming through, and we have a series of complaint documents. The complaint  
16 documents consist of the correspondence between Mr. Brannigan and the OFT and the  
17 copied correspondence too, and I would submit they are quite widely ranging.

18 As to the Appeal documents, we have three effect Appeal documents. We have the  
19 original document, which is the handwritten, again with all the other documents attached to  
20 it, which was submitted on 12<sup>th</sup> March. We then have the re-submitted complaint of 31<sup>st</sup>  
21 May, and then we have the appeal of I think it is 9<sup>th</sup> August, which purely deals with the  
22 question of consultation on the decision made following the hearing of 26<sup>th</sup> April. So we  
23 have three Appeal documents in front of the Tribunal and I think the question obviously  
24 relates to the last document, that one on 23<sup>rd</sup> November, as to amendment.

25 Before coming on to that question, can I just go through the agenda in its order.

26 Intervention – I think that is now sorted out obviously. Preliminary issues – we have no  
27 preliminary issues save I do raise, and I have put this **here** in 3.1, exactly what the position  
28 of the OFT is as to admissibility. In the OFT’s skeleton today they say that they will not  
29 pursue the issues of admissibility for the purposes of this Appeal, and in particular the  
30 “exceptional circumstances” – we might come back to that phrase in a moment. What is  
31 unclear is actually what is being accepted here? Is it being accepted by the OFT that there  
32 is an admissible Appeal, or is it some other form? It is quite difficult to tell. As I  
33 understand it, for the purposes of the jurisdiction of this Tribunal they are accepting that  
34 there is an admissible Appeal, but perhaps that might be clarified.

1 Turning then to the respondent's defence where I think the issue of the amendment arises.  
2 As I say, we have three documents of appeal that the Tribunal has in front of it, and I think  
3 we are certainly taking the last one, 23<sup>rd</sup> November 2006, as the comprehensive notice of  
4 appeal. That was prepared and submitted on the basis of the order of the Tribunal. I think  
5 it right that Mr. Brannigan needs permission to amend. Insofar as it is submitted as a  
6 revision, it is a bit difficult to know whether that actually gives that permission to amend  
7 under Rule 11. If I might refer you to Rule 11 of the CAT Rules 2003, Rule 11 says:

8 “(1) The appellant may amend the notice of appeal only with the permission of  
9 the Tribunal.”

10 So insofar as the revised notice of appeal is concerned, Mr. Brannigan would need the  
11 permission of the Tribunal, and I would submit that that is a fairly ordinary permission, as  
12 in any other proceedings, for the amendment, for a simple amendment.

13 “(2) Where the Tribunal grants permission under paragraph (1) it may do so on  
14 such terms as it thinks fit, and shall give such further or consequential directions  
15 as may be necessary.

16 (3) The Tribunal shall not grant permission to amend in order to add a new  
17 ground for contesting the decision unless –

18 (a) such ground is based on matters of law or fact which have come to  
19 light since the appeal was made; or

20 (b) it was not practicable to include such ground in the notice of appeal; or

21 (c) the circumstances are exceptional.”

22 In our submission therefore there are two types of amendment that are then identified in  
23 that Rule. It might be easier to go to the more difficult one which is if an amendment  
24 includes a new ground of appeal then 11(3) applies. If however it is not a new ground then  
25 it is simply permission of the Tribunal as in any other proceedings as to whether permission  
26 should be granted and in other proceedings I would certainly submit that in these given  
27 circumstances permission would be granted, subject to the usual cost provisions that would  
28 apply. I think that is particularly so here because no defence has yet been filed, these  
29 proceedings have been on foot for a little time and from a pleading point of view we are at a  
30 fairly early stage of the procedure, and the OFT has not been put to any additional expense  
31 by amendment.

32 I would submit that insofar as 11(3) does not apply then I would submit that permission  
33 should be granted. I would also submit that in a way that follows on automatically from the  
34 order that was previously made that Mr. Brannigan should submit a revised notice of



1 appeal; there are bound to be amendments in that, I fear that might have been predicted.  
2 What was raised on the last occasion, and I think the position was reserved from the  
3 Tribunal's point of view and from the OFT's point of view was whether there would be  
4 permission granted under 11(3) if new grounds were to be submitted in a revised notice.  
5 As to the revised notice – I have put this in in 4.2 – there are two issues, and those two  
6 issues are: first, are any revised grounds for appeal? Were those grounds or points put to  
7 the OFT in the complaint? I think on the last occasion Sir Christopher did identify saying  
8 that obviously the OFT cannot be criticised for not dealing with points or grounds that were  
9 never put in the complaint.

10 THE CHAIRMAN: Mr. Greene, as far as when the Rule 11(3) test applies, do we have to  
11 compare the revised notice of appeal with the original notice of appeal which only raised  
12 the one ground of lack of consultation, so that anything that is in the new revised notice of  
13 appeal beyond that single ground raised first off has to meet the 11(3) test? Or do you say  
14 that the comparison is with some other document?

15 MR. GREENE: No, I would certainly say I think the comparison is with some other document in  
16 that the comparison is that this appeal process was commenced with the original letter of  
17 appeal, the manuscript letter which then attached to it the documents that have been  
18 submitted to the OFT, and what then happened, following the April hearing the OFT agreed  
19 to take the matter back and review it but, as they said, that was 'without prejudice'. When  
20 they issued that Decision it was stated to be 'without prejudice'.

21 THE CHAIRMAN: Perhaps we should just go back to that initial letter which kicked off the  
22 appeal?

23 MR. GREENE: Indeed.

24 THE CHAIRMAN: (After a pause) So there was the 12<sup>th</sup> March 06 letter?

25 MR. GREENE: Yes, 12<sup>th</sup> March 06.

26 THE CHAIRMAN: And that attached to it the previous correspondence and counsel's opinion,  
27 etc.

28 MR. GREENE: Exactly, yes, which in my bundle is sitting behind it.

29 MR. BEARD: This is tab 3 of what is referred to as the "original core".

30 MR. GREENE: Yes, I am on tab 3 of the core bundle for hearing in private on 28<sup>th</sup> April 2006.

31 THE CHAIRMAN: Then following the investigation by the OFT and the two memoranda that  
32 they produced ----

33 MR. BEARD: For completeness, I do not want to interpose, to be fair to Mr. Greene he has  
34 already referred to this bit, chronologically I think the next important document is 31<sup>st</sup> May

1 revised complaint that came after the hearing on 28<sup>th</sup> at which the OFT's undertaking was  
2 given. Mr. Green has already referred to that, but taking it chronologically in terms of what  
3 has been put forward as case I think it is perhaps sensible to have that in mind as well.

4 THE CHAIRMAN: But that cannot be construed as a notice of appeal.

5 MR. BEARD: It is not a notice of appeal in and of itself, but the question as to what it is that the  
6 OFT has been in a position to answer. The OFT is not taking some fine grained point about  
7 these matters, it does give, in Mr. Greene's words "leeway", but if one does not want to  
8 stretch the maritime metaphor too far – some leeway but not a whole changing of course.  
9 Here we have a situation where the OFT is willing to bear in mind and say "yes", we  
10 understand you put forward that notice of appeal that was a handwritten letter enclosing the  
11 correspondence; you put forward your complaint and that was considered, 31<sup>st</sup> May, we  
12 will take that into account. He then raised a further point subsequently. We do not take the  
13 Tribunal thereafter to be only focused upon issues to do with consultation, we take the  
14 Tribunal in those circumstances to be operating a broader view, that it does take into  
15 account other documents that have been put forward. So we are content to deal with those  
16 matters, the question is what is above and beyond that which has come forward and we can  
17 deal with those in our submissions. But to some extent there is not a difference between  
18 Mr. Greene and Mr. Brannigan and the OFT as to the previous material that has been put  
19 forward.

20 THE CHAIRMAN: Could you just point me though to where the notice of appeal in respect of  
21 which the order under Rule 9 was made?

22 MR. BEARD: I am sorry, I misunderstand – the Judgment of 15<sup>th</sup> November, are you referring  
23 to that, madam? It might perhaps be useful to go to that Judgment. Mr. Greene has already  
24 referred to it, it is actually at tab 28. (After a pause) Madam, I am told by those who have  
25 sharper eyes than I do that in fact the clips with tab 28 are just sitting behind Mr. Dhanowa.  
26 You probably have this Judgment in various other places, I am sorry, but it may be useful if  
27 we are all working from the same tabulated ....

28 THE CHAIRMAN: What I am looking for at the moment is ----

29 MR. BEARD: Yes, madam, if it helps I think p.26, paras. 80, 81 and 82 are instructive in this  
30 regard. I was going to refer the Tribunal to para.80, but in this respect I think para.82 is  
31 important.

32 MR. GREENE: Madam, are you looking for the letter of 8<sup>th</sup> August?

33 THE CHAIRMAN: Yes.

34 MR. GREENE: Which is I think the second or third document. I fit helps I am looking at the

1 core bundle for the private hearing on 26<sup>th</sup> October, and it is tab 17, and it is the second  
2 page.

3 THE CHAIRMAN: Where I think we are with this then is that it is accepted by you, I think, Mr.  
4 Greene that as far as what test we are applying to the revised notice of appeal as an  
5 amendment to the original notice of appeal, that the original notice of appeal is the 8<sup>th</sup>  
6 August document.

7 MR. GREENE: No, madam. I think Mr. Brannigan's position is that the original notice of  
8 appeal is that handwritten letter of 12<sup>th</sup> March 2006, that is the commencement of these  
9 proceedings is that notice of appeal. The position, as I say, in August was that a decision  
10 was issued by the OFT following the hearing in April. A request was made, I think, of the  
11 OFT, "Well you have not consulted us", to which the response was "That is the final  
12 decision; you can either appeal it or not." Mr. Brannigan put in his appeal on that decision  
13 and the status of that decision was very fluid at that time, because it was said to be without  
14 prejudice, and he simply put in an appeal against that decision on the basis that he had not  
15 been consulted. I think it is important to have a look at the transcript of 26<sup>th</sup> April – I will  
16 take you to it if it assists – because at that time the question was of course had a decision  
17 been made by the OFT in relation to the complaint for the purposes of establishing the  
18 jurisdiction of the Tribunal. There was considerable debate on that day about the decision  
19 and the decision letter, and I have included in the observations that the particular paragraph  
20 of that letter on which the Tribunal expressed considerable views as to whether or not that  
21 was expressing a decision for the purposes of admissibility. I think, at least on the face of  
22 it, that did appear to be an admissible appeal on the basis of that decision, but that point was  
23 not taken any further at that time because of the agreement of the OFT to take the matter  
24 back in. Certainly, from Mr. Brannigan's point of view there is the original appeal and then  
25 in addition to it there is this letter of 8<sup>th</sup> August.

26 THE CHAIRMAN: So when we are considering under Rule 11(3) what is or is not a new ground  
27 for contesting the decision, where do you say the old grounds are with which we have to  
28 compare the revised notice of appeal?

29 MR. GREENE: I say the old grounds are the original notice of appeal of 12<sup>th</sup> March, because  
30 that is the originating process and it is in the form that it is, but what it attached to it was the  
31 correspondence that Mr. Brannigan understood that that was going to be sufficient to set out  
32 the grounds for his appeal, so I would submit that you are looking really at that document  
33 and the documents that were supporting it at the time. I think it would be fair to say, and I  
34 think on the last occasion in October – again I will go to the transcript if necessary – the

1 then President did indeed summarise the issues in the Appeal at the time, and he certainly  
2 was not saying, as I understood it, there is only one issue on appeal and that is the letter of  
3 8<sup>th</sup> August? He was referring to all the other issues and certainly my understanding at the  
4 time was that all those issues were in front of the Tribunal.

5 MR. BEARD: For clarity, that it is the position the OFT understands as well.

6 MR. GREENE: (After a pause) So just stepping back a little, as I was saying, the President on  
7 the last occasion talked about the entitlement to the OFT not to be faced with effectively  
8 new grounds in the Appeal which had not been presented in the first instance, i.e. in the  
9 complaint and, as I say, I would certainly accept that if something is not complained of one  
10 can hardly then take up a point on an appeal in relation to that point. In this case, the points  
11 made in the complaint are, though wide-ranging, and one needs to look at the letters that  
12 were going back and forth with the OFT, and I think it starts with the complaint of 24<sup>th</sup>  
13 October 2003. I am now looking at the core bundle for 28<sup>th</sup> April 2006, it is in tab 1. I  
14 think we are all agreed that that is the original complaint to the OFT. This makes a general  
15 complaint about the conduct of Newsquest, and I might say in passing when we look at  
16 that, if one looks in the penultimate paragraph on the first page, because the question of  
17 printing is obviously a subject for today, you will see it says there:

18 “We were informed a few weeks after our launch that Mr. Baker, a print manager at  
19 Newsquest, Sussex, although it was his job to fill the slots with outside independent  
20 work we were told that he was dismissed for helping our paper launch. This was  
21 stopped and a different hostile approach was taken against us.”

22 I will not go into the letter in detail, save to comment generally that it is pretty wide-  
23 ranging and includes the conduct of Newsquest, and all of the conduct of which complaint  
24 is made, and continues to be made, and indeed also Johnston Press. You can see behind it,  
25 actually, the course of correspondence. There is the response from the OFT and then the  
26 substantive response comes on 24<sup>th</sup> November in fairly standard terms, for administrative  
27 priorities within the OFT; and the correspondence continues after that. Looking at the  
28 transcript of the April hearing the then President runs through the course of events, and the  
29 way in which Mr. Brannigan attempted to gain the interest and investigation by the OFT  
30 but failed.

31 As part of that process he gave them a letter of 27<sup>th</sup> February 2004 which you will find  
32 ... (After a pause) ... well I am not where the letter of 27<sup>th</sup> February 2004 appears in a  
33 bundle, but can I just mention it, because there were further letters that were also sent in,  
34 but this is certainly a letter that the OFT had in pursuance of the complaint. This letter

1 again sets out in very wide terms the nature of the complaint.

2 MR. BEARD: It probably matters not at all, but we are not sure about this letter actually existing  
3 or being with the OFT, 27<sup>th</sup> April 2004.

4 MR. GREENE: This is 27<sup>th</sup> February 2004.

5 MR. BEARD: I am sorry.

6 MR. GREENE: I know that the OFT did have the letter of 13<sup>th</sup> March 2004, and you will find  
7 this in 28<sup>th</sup> April core bundle, tab 3.

8 THE CHAIRMAN: There is also, I think, the 27<sup>th</sup> February letter you were looking for right at  
9 the beginning of tab 3.

10 MR. BEARD: Page 1A.

11 MR. GREENE: Yes, well let me just turn then to that earlier letter. As I say, a very wide-  
12 ranging complaint, full in its detail, and since we will be talking about printing, if one looks  
13 at the top of p.3 of that letter one sees again the reference:

14 “... before the launch in March 2003 we had agreed a deal with Newsquest in  
15 January 2003 to print the papers. During January and February Mr. Baker, the then  
16 print manager, agreed the price ...”

17 and then it goes through that process of printing and the cancellation of the printing.

18 Then you have the letter of 13<sup>th</sup> March, which opens with:

19 “Dear Carolyn,  
20 With respect to my recent contact with yourself and your request for further  
21 information concerning market domination at both Newsquest and Johnston Press, I  
22 enclose details concerning their market share, both nationally and locally.”

23 I think I am right in saying that that appears at p.15 of 28<sup>th</sup> April core bundle, at tab 3.

24 THE CHAIRMAN: These are both letters to Mr. Brannigan’s solicitor, but they were sent to the  
25 OFT.

26 MR. GREENE: Indeed.

27 MR. BEARD: Just to be clear, in fact they were not initially sent to the OFT, but we are not  
28 taking a point on it now; we have obviously had them for some time.

29 MR. GREENE: Yes, there is a range of correspondence, and I think Mr. Brannigan decided  
30 “Well, I have set out in full to my solicitor the nature of my complaint and I will submit  
31 that to the OFT.”

32 You will see the further correspondence, and I would submit there is a very full  
33 correspondence of complaint, lots of detail, there is obviously a dialogue going on, and I  
34 would certainly submit that the issues which are now raised in the notice of appeal were

1 raised in the complaint to meet that requirement.

2 Finally, one has then the opinion, which again was submitted to the OFT, that is at p.32 of  
3 tab 3, of the same bundle. That is dated March 2004, but I think sent to the OFT in April.  
4 It is quite wide-ranging again in relation to Mr. Brannigan's complaint and the advice  
5 given. One can see for instance on p.5 of that document, that is p.21 of the bundle: "Are  
6 Newsquest and Johnston Press dominant for the purposes of the Chapter II prohibition?" In  
7 para.15 the relevant product market, and then at para.32 cancellation of print slot. What  
8 Mr. Brannigan would say is that all these points were put in the complaint and nothing new  
9 in the notice of appeal that goes outside the complaint. Indeed, I suppose I would say for a  
10 lay person, they are making a complaint to the Regulator, they would then expect the  
11 Regulator to take up the complaint and then to investigate. The facts have been put, as Mr.  
12 Brannigan saw the facts all the facts had been put to the OFT and he would certainly submit  
13 that it was then for the OFT then to take up that complaint, and then to investigate it which,  
14 of course, it refused to do at the time and continued to refuse to do until the final Decision.

15 THE CHAIRMAN: So is your case then that we do not get into Rule 11(3) territory at all here  
16 really, because when one is looking at what is the original grounds of appeal you have to  
17 look at the accompanying documents as well as the letters from Mr. Brannigan to the  
18 Tribunal, and those you say cover everything that is now covered in the revised notice of  
19 appeal?

20 MR. GREENE: I do say that, but I do firstly say insofar as the OFT might say that these matters  
21 were not the subject of the original complaint, because even if they are in the notice of  
22 appeal one can still be met with a case from the OFT: "Yes, they are in your notice of  
23 appeal but you never complained to us in the first place about them, and therefore it  
24 improper, you cannot appeal on them because these grounds were never investigated by the  
25 OFT." So we say on two grounds, the first is that they were in the complaint, so there can  
26 be no criticism from the OFT on that point. Secondly, we say that they were in the original  
27 notice of appeal because again they were in that correspondence which was submitted for  
28 the Appeal.

29 It was in that complaint, and I have put the point in 4.2 , p.3, so having all those documents,  
30 it was on the basis of those documents that the OFT decided the complaint would remain  
31 closed in their letter of 6<sup>th</sup> February, and it is the letter of 6<sup>th</sup> February which is the relevant  
32 letter for the purposes of the originating appeal. It was that letter that was appealed against,  
33 and it is that letter which was the subject of the first hearing and contains the words, which  
34 were subject of comment in the April hearing, the OFT has never had reasonable grounds to

1 suspect an infringement of the Chapter I and/or Chapter II prohibitions under s.25 of the  
2 Act. That, of course, became a matter of debate as to whether that was an admissible  
3 decision or not, giving the Tribunal jurisdiction.

4 Moving on then, so they are all part of the complaint, and they are all part of the Appeal. I  
5 am just going to my observations: as far as just ordinary amendment is concerned, it is  
6 important, in our submission, that the Tribunal considers the history of this matter, which is  
7 – as the OFT has itself said – exceptional. I do not think, to be fair to the OFT, that they  
8 use that description for the purposes of 11(3)(c) but I would submit that the circumstances,  
9 if we come to that point of needing permission to alter the grounds, that the circumstances  
10 here are exceptional, and should be granted. But our first point is that there are no new  
11 grounds and that the three identified, I think partly by the Tribunal itself, and now by the  
12 OFT are actually not new grounds, and we might just turn to those – I think it is in para.15  
13 of the OFT’s submissions. I am content to deal with this now, I am not sure whether my  
14 learned friend wants to put the points as an issue?

15 MR. BEARD: I am sorry, maybe I am misunderstanding, but I thought that is what these  
16 submissions were going to. I would have thought it was more sensible for Mr. Greene to  
17 wrap up on what he was actually saying about these matters, and then he will obviously  
18 have a chance to reply.

19 MR. GREENE: Yes, they are set out at para.15, and it is over the page at the top **there**. The first  
20 is:

21 “... the addition of the National Geographic Market Definition and allegations of  
22 collective dominance against Trinity Mirror and DGMT in both the national market  
23 and the regional East Sussex market, along with new evidence as to market shares  
24 of the main publishers based on advertising revenues.”

25 I think as I have pointed out that these points were raised in the documents which were  
26 submitted to the OFT and which formed the appeal documents.

27 THE CHAIRMAN: You drew us in that correspondence to certain passages relating to the  
28 printing matter, are there any passages in those earlier letters that you would like to show us  
29 as supporting that submission that the allegation of a national geographic market, and  
30 collective dominance including all four publishers is something that was alleged in the  
31 complaints to the OFT?

32 MR. GREENE: I think I drew your attention to, for instance, the opinion of counsel at tab 3 of  
33 the first core bundle for 28<sup>th</sup> April. At para.13 counsel there dealt with whether they were  
34 dominant for the purposes of Chapter II prohibition:

1 “In order to fall within the Chapter II prohibition it must be established that  
2 Newsquest and Johnston Press have a dominant position. The determination of  
3 whether the companies are in a dominant position requires a two stage analysis.”  
4 I do not propose to express a final conclusion as to relevant market definition and  
5 whether Newsquest and Johnston Press are dominant in the market, in particular  
6 because such determination is ultimately a matter of economic analysis.”

7 Then over the page she dealt with the relevant product market, and then going on, in 20, the  
8 relevant geographical market, and then dominance.

9 Then in para.27 she repeats the point:

10 “The question of market definition and dominance is one that ultimately requires  
11 economic analysis. The most I am able to say at this stage is that from the above  
12 figures, it seems likely that either Newsquest or Johnston Press will occupy a  
13 dominant position in the market for the sale of advertising space, but it is not  
14 possible to determine which of the two has greater market power.”

15 Similarly, in the letter of 13<sup>th</sup> March 2004, which is at p.15, which you had been looking at  
16 previously again there is on the first page, dealing with market domination, general facts,  
17 and then at para.33 of that letter:

18 “Within the UK Johnston Press and Newsquest have a joint market share of 41.85%  
19 relating to 544 titles ...”

20 and then it goes on to the geographical area of East Sussex over the page.

21 We would submit on behalf of Mr. Brannigan that he raises the point about dominance,  
22 about market definition. He supplies what facts he has to the OFT, and as I was saying in  
23 relation to a lay person he has made his complaint, he is now expecting the OFT to take up  
24 the cudgels and to regulate. So what I would submit on his behalf is that in relation to (1)  
25 this is first of all a matter of the complaint and is not a new ground. (2) deals with the  
26 printing question. Again, I have already referred to the questions of printing that were  
27 raised both in the correspondence and in counsel’s opinion that was submitted to the OFT,  
28 so again I would submit that that is not a new complaint, it is not a new ground.

29 The third item is the challenge to the OFT’s alleged practice in continuing with disputed  
30 facts and concerning its administrative priorities. I would submit that that does not amount  
31 to a new ground in any event. It obviously was not a matter of original complaint,  
32 obviously it was not in the original complaints, but it is not a new ground, it does not  
33 amount to a new ground. It is simply saying that when one looks at the merits of this, it is a  
34 background fact as to the way in which possibly more recently the OFT has been setting



1 administrative priorities which have been the subject of I think at least two other appeals.  
2 So when one looks at Rule 11 our primary submission is that these are not new grounds  
3 falling within 11(3) they do need permission, if this be taken as an amendment under 11(1)  
4 but do not have to overcome the hurdle set by 11(3)(a), (b) and (c).

5 Just in passing, I have mentioned in these observations the observations in *Floe* about the  
6 Tribunal's approach (with which you will be familiar) to a complainant raising new  
7 arguments in support of matters as opposed to new grounds of appeal. I have set out, and I  
8 think we have gone over this now, in 4.9 the three items and the way in which they have  
9 been already raised. So if we are wrong about that, and we have new grounds of appeal,  
10 should the Tribunal exercise its discretion under 11(3)? Let me deal with 11(3)(a), and I  
11 will deal with the three points made at para.15. What Mr. Brannigan would say in relation  
12 to (i), which is market definition and collective dominance, is that these are matters that  
13 have come to light to him since the appeal was made, and I would invite the Tribunal to  
14 take a fairly wide approach to 11(3)(a) in these particular circumstances where you have a  
15 litigant in person. I do not say that (3)(a) applies to (ii), which is the printing question, but I  
16 do say it applies to (iii) because (iii) are matters, i.e. the OFT's practice in relation to  
17 administrative priorities and closing files that have arisen since the appeal was made.  
18 As to 3(b): "it was not practicable to include such ground in the notice of appeal", again I  
19 submit that the Tribunal should take a fairly wide approach to practicability, where one is  
20 dealing with a litigant in person.

21 We have been looking this morning at the initial notice of appeal, which is short in its  
22 terms, and in manuscript, and what Mr. Brannigan did was clearly scribble something out,  
23 as one might see in his letter, but attached everything to it that had been previously  
24 provided and he treated that as his notice of appeal. For him it was not practical to go  
25 beyond that, he did what he thought was right in submitting it to the Tribunal.

26 Finally, are the circumstances exceptional? Well I would submit that they are exceptional  
27 and I do take up the word used by the OFT itself, because of the course of events here. I do  
28 not think I need to go into that in any greater detail; I do say that they are exceptional.

29 Those are our submissions on that aspect. I do not know whether it might be now for me to  
30 sit down?

31 THE CHAIRMAN: No, I think you should go on and make your submissions on the other  
32 aspects, please.

33 MR. GREENE: As to issues and nature of relief, which I think is the next item on the agenda, as  
34 I say in the observations I think we have some sympathy with the observation from the

1 OFT that the Tribunal should not act as the investigative body. It is difficult in adversarial  
2 circumstances for the Tribunal to do so. It has done so in the past, but we appreciate the  
3 difficulties. What we do say, however, is that in fact whilst the appeal remains live the  
4 Tribunal does have the ability to remit a request to the OFT for further investigation. So far  
5 as the Tribunal is called upon to make a decision as to infringement of the Act in the  
6 particular circumstances it is able to do so, and as part of that process under the CAT Rules  
7 and the Enterprise Act, can remit things back to the OFT where it feels an investigation  
8 should be undertaken, and I do not know if I need to take you to the Rules 19(2)(j) and then  
9 Schedule 4 of the Enterprise Act. As I said in the observations, what from this side we  
10 would like to see is what Defence is now put forward by the OFT before coming back on  
11 the nature of relief that we would seek from the Tribunal.

12 THE CHAIRMAN: Just to be clear then, your position is that you are not asking us at the  
13 moment to make any such directions, but depending on what the OFT say in their Defence  
14 you may then seek to do so?

15 MR. GREENE: Yes. The remaining issues are documents and disclosure. We do not foresee  
16 seeking any further disclosure from the OFT. We do, however, foresee that we may seek  
17 disclosure by third parties either by application or by witness summons. In particular, to  
18 take an example, Mr. Baker, obviously retains documents relating to his employment  
19 Tribunal case in which, our understanding is, he argued that he was dismissed unfairly  
20 because of the print run that he had given to Mr. Brannigan, and that was a matter of issue  
21 in front of the Tribunal. That case was settled, but subject to a confidentiality agreement  
22 so giving rise to his difficulties, and we may seek a witness summons in order to produce  
23 that documentation.

24 As for confidentiality, I do not think any issues arise, and I think that the OFT have made  
25 that point. As to oral evidence, and I think you made the point yourself that there has to be  
26 a witness statement from Mr. Brannigan – I have to say I am not quite sure if he would be  
27 giving oral evidence, maybe that is a point to be discussed.

28 THE CHAIRMAN: Generally, the practice is that the witness statement stands as the evidence-  
29 in-chief and therefore oral evidence is only required if the OFT applied to cross-examine  
30 the witness.

31 MR. GREENE: Exactly, I think I would see it that way. Whether there might be other oral  
32 evidence I could not say at the moment, again possibly Mr. Baker, and I think the OFT  
33 identified previously potential witnesses. I suppose I could see a practical difficulty for the  
34 Tribunal setting the time of how long the hearing is going to take if there is oral evidence.

1 MR. BEARD: If it assists Mr. Greene, as is I hope clear from the OFT's submissions, there is no  
2 intention to call any oral evidence.

3 MR. GREENE: Then finally timetable, and I think at the beginning of today's proceedings you  
4 mentioned a draft timetable at least. I will sit down now.

5 THE CHAIRMAN: Thank you very much, very helpful, Mr. Greene.

6 MR. BEARD: Madam, thank you. I will work through the issues, if I may, taking them in order.  
7 First, next procedural steps and intervention: I can confirm that the OFT has heard nothing  
8 from any potential interveners. In relation to next procedural steps I can confirm that the  
9 OFT is wholly content with the timetable that was proposed or floated by the Tribunal at  
10 the outset.

11 In relation to preliminary issues it is confirmed that there are no preliminary issues on either  
12 side.

13 THE CHAIRMAN: There was one point that Mr. Greene made about what exactly was meant,  
14 what exactly the OFT's position is in relation to the admissibility?

15 MR. BEARD: The point is simply this, Mr. Greene and Mr. Brannigan have brought a challenge  
16 to the OFT and the way it has dealt with his complaint. The OFT put out its two  
17 assessments in June; he challenges them and says they are admissible decisions that are  
18 appealable under s.46, we take no point on that. In those circumstances, we are content for  
19 the matter to proceed on that basis. It has been made clear that that is not some general  
20 concession, there are particular circumstances.

21 I will touch on relief since we are going past it in terms of preliminary issues, the Tribunal  
22 has heard what Mr. Greene has to say about the question of relief, that actually that it is the  
23 possibility of partial remittal. We await his skeleton with interest in response to our  
24 defence, and we would expect, and we will put down a marker here, that it is made very  
25 clear in that skeleton precisely what sort of relief is being sought in relation to what matters,  
26 because at present, even the revised notice of appeal is rather vague in relation to these  
27 matters, but that is not a matter that disturbs the general course of the issues before the  
28 Tribunal now.

29 Turning now to the filing of the Defence and Rule 11(3), as I understood the Tribunal's  
30 question the matter that we are concerned with is a matter that was raised by the Tribunal in  
31 its letter of last week raising three points in respect of which a question was asked as to the  
32 application of 11(3), and it was to that that the submissions were put by the OFT. As I  
33 understand it, madam Chairman, you were asking this morning whether or not, apart from  
34 the issue that Mr. Green has raised, whether or not these constitute new grounds for the

1 purposes of 11(3), there is a broader question to be asked here, whether or not actually there  
2 is any extant notice of appeal, because if there were no notice of appeal then in those  
3 circumstances there would be no question of a notice of appeal being amended. If I am  
4 wrong about that, then the question must then move to how 11(3) applies, and if it is of  
5 assistance to the Tribunal it is very clear from the Judgment given in November, that in  
6 those circumstances where the Tribunal was considering whether or not the notice of appeal  
7 that was put forward was adequate, it clearly directed its mind not just to the consultation  
8 issues, but to the wide range of issues that have been referred to in the complaint and in  
9 subsequent documents as matters that it was considering through the Rule 10 glasses it was  
10 wearing at the time, in other words, it was assessing whether or not the matters raised in  
11 those various documents, not just in the letter of 9<sup>th</sup> August were matters that were arguable  
12 bases for appeal. We have proceeded on that basis and therefore the question that arises is  
13 whether any matters in the revised notice of appeal go beyond what has been put forward  
14 in, what has been referred to variously as “complaint documents”, “attachment to complaint  
15 documents”, “notices of appeal”, “attachments to notices of appeal”, the additional letter of  
16 9<sup>th</sup> August which is said to constitute a “further notice of appeal”, we take no point on any  
17 of that. We say that you can treat that as the background notice of appeal, what the Tribunal  
18 was telling you to do was to get that in order – indeed, it said so in explicit terms in para.80  
19 of the Judgment.

20 The issue that we raise in response to the Tribunal’s question is whether or not those  
21 particular issues highlighted by the Tribunal are ones where the criteria of 11(3) have been  
22 met. In doing so, one must ask oneself whether or not each of those matters constitute a  
23 new ground and, if so, whether or not those new grounds fall within any of the categories  
24 3(a), (b) or (c) and therefore amendments should be permitted by this Tribunal. Obviously  
25 it is a matter for Mr. Greene and Mr. Brannigan to make out whether or not that is fulfilled.  
26 His primary submission is that the points raised are not new grounds. Well, with respect to  
27 Mr. Greene, his traversing quite a lot of the background material here actually served to  
28 illustrate – in particular in relation to the matters set out at what is referred to as (i) in our  
29 outline submissions and was the first issue raised by this Tribunal in its letter of last week –  
30 the issue to do with geographic market, the involvement of Trinity Mirror in some sort of  
31 national collective dominance and the relevant market shares that underpin that and  
32 whether or not that constitutes a new ground. Mr. Greene, in referring to counsel’s  
33 opinion, various letters, correspondence internally with Mr. Brannigan’s own previous  
34 solicitors and so on, was not able anywhere to identify a suggestion that there was a

1 national geographic market definition in which there was collective dominance by the four  
2 major local newspaper players. Indeed, I imagine he would struggle to find any reference  
3 to Trinity Mirror or DGMT in the material at all, and certainly not in the context of a  
4 collective dominance suggestion, certainly there is nothing in counsel's opinion to which he  
5 referred, there is nothing in the letter of 27<sup>th</sup> February to which he referred, which even  
6 hints at that matter. It is not enough in these circumstances simply to say "We have raised  
7 dominance, we have raised Chapter II here, in those circumstances that is our ground". It is  
8 not, the grounds are the discrete arguments that underpin your allegation of infringement.  
9 Now, one can get into fine grain theological discussions of precisely where one draws the  
10 line between different grounds, but we say in relation to this Mr. Greene has not given any  
11 good reason why this argument, which is discrete, should be seen as having been trailed  
12 previously. In those circumstances it clearly is a new ground. Then one would need to turn  
13 to the criteria under 11(a), (b) or (c). Perhaps I can do that when I have just gone through  
14 the other two matters, specific separate matters. If one looks at (ii) that is a new head of  
15 abuse based on an alleged exclusion of Brannigan from the newspaper printing services  
16 market. Now, Mr. Greene was at pains to suggest that the word "printing" and refusal to  
17 supply printing services by Newsquest, Sussex, was part of the allegation right from the  
18 outset. We do not dispute that in the slightest. What we do say is that simply referring to  
19 printing and allegations of breach of competition in relation to printing do not found a new  
20 head of abuse in relation to an entirely new market definition that has not been proffered in  
21 any new materials to date.

22 The allegation that has been previously put forward repeatedly, and the OFT has considered  
23 is the cancellation of a print slot as a form of refusal to supply by a dominant undertaking,  
24 and the dominance is in relation to the newspaper market. In other words, the allegation  
25 has been made that it used its printing services that it had at that plant to make life harder in  
26 the newspaper market, not that there is some discrete printing services market that  
27 Newsquest is dominant in and is abusing that dominant position – there is nothing there.  
28 Simply referring to printing is insufficient, and the canvassing of all the documents simply  
29 reveals that this has never been trailed before.

30 The third point, the challenge to the OFT's alleged practice in dealing with disputed facts,  
31 well the OFT's view is that this is tendentious and in the main amounts to little more than  
32 abuse. It does not reflect the OFT's policies, it is a new ground, the OFT is perfectly happy  
33 to answer these matters, it thinks that they are quite wrong to make these allegations. There  
34 is no foundation for them whatsoever, but strictly speaking again it is for Mr. Greene to

1 satisfy this Tribunal that the criteria in 11(3)(a), (b) or (c) are fulfilled, and he had not done  
2 that. He simply said “We do not like the way the OFT dealt with this matter.” We  
3 recognise that, we picked that up from the dealings between the parties over the course of  
4 the last year or so. However, that is not the same as making particular allegations that the  
5 OFT is operating different sorts of policies from those that it actually puts forward in its  
6 published documents. So each of those can be dealt with as new grounds.

7 When one turns to 11(a), (b) and (c) Mr. Greene recognises that 11(a) does not apply in  
8 relation to the second allegation, in other words, the allegation in respect of the printing  
9 services market. 11(3)(a) says: “such ground is based on matters of law or fact which have  
10 come to light since the appeal was made ...” That phrase cannot mean, “I decided not to put  
11 it forward earlier”, or “If I had made reasonable inquiries I could have put it forward  
12 earlier.” It is clear that if Mr. Brannigan had wanted to make allegations about the  
13 involvement of Trinity Mirror and Daily Mail Group, and their involvement at a national  
14 level in relation to a national geographical market he could clearly have done so. To  
15 suggest that he could not, whether he is a litigant in person, or receiving advice as he had  
16 done periodically, it is simply disingenuous to suggest that 11(a) could possibly apply there.  
17 Similarly in relation to the third matter, he challenged the OFT’s alleged practices in  
18 dealing with disputed facts, that is actually something that if he had wanted to raise he  
19 could have done at an earlier juncture. So 11(a) does not apply to any of the three.

20 11(b) – practicability – it is very difficult to see how it was impracticable to raise these  
21 matters earlier. They are relatively bald allegations that have been made, they could have  
22 been made sooner. Mr. Greene, to be fair to him, did not unduly press the point of  
23 impracticability, save that he referred to the fact that the Appellant is a litigant in person.  
24 With respect, in these circumstances that is not a relevant issue.

25 The third head is “exceptional circumstances”. Mr. Greene was ready to adopt the fact that  
26 OFT has said that there was something exceptional about the procedure here; the OFT  
27 accepts that. What the OFT does not accept is that there are any circumstances that are  
28 exceptional that require any of these three matters to be admitted as amendment now when  
29 they could clearly have been raised earlier on in the process. Again, the fact that someone  
30 is a litigant in person is not in and of itself exceptional and, indeed, given the course of  
31 these proceedings, Mr. Brannigan and those who have represented him, or advised him  
32 from time to time, have had ample opportunity to put these matters to the OFT in the course  
33 of their dealings.

34 In the circumstances, madam, Tribunal, the OFT having listened to what has been said

1 today by Mr. Greene finds it hard to understand how any of those three heads are fulfilled  
2 in relation to any of the three matters raised by the Tribunal and in those circumstances it  
3 would not be appropriate for this Tribunal to allow amendment of the grounds of appeal  
4 beyond those which have already been canvassed and which were clearly contemplated by  
5 the Tribunal at its last hearing as being the sorts of matters that should be dealt with in the  
6 revised notice of appeal. I would refer the Tribunal, if I may, briefly to tab 28 of the second  
7 core bundle – it is the tab that has been handed up. This is just the copy of the 15<sup>th</sup>  
8 November Judgment. I just refer to this finally to confirm that the approach in dealing with  
9 these matters under 11(3) is correct. At p.26, para. 80. (After a pause) That is echoed  
10 again at para.98 – it only deals with one of the issues specifically, but the sentiment is clear.  
11 Unless I can assist the Tribunal further in relation to those matters?

12 THE CHAIRMAN: There was an additional point that you had raised with regards to the new  
13 evidence as to market shares based on advertising revenue?

14 MR. BEARD: Those are simply new matters that have not been put forward at all. They appear  
15 to be attached to the allegations of collective dominance, but they go further than that.  
16 Again it is difficult to see why those matters could not have been raised previously,  
17 particularly in circumstances in which the basis on which they are raised is an assessment  
18 carried out by Mr. Brannigan, as he says, on the basis of his own rough assessments. There  
19 may be various points to be taken in relation to those substantially, but it is very difficult to  
20 see why the matters that are raised there should continue to be pursued in these  
21 circumstances, and why they were not raised previously. Indeed, it was interesting, simply  
22 as Mr. Green was reading through the statement of counsel, it was noted that in counsel's  
23 opinion, which was taken some time ago, there was a reference to the fact that she did not  
24 have any advertising revenue data, she only had readership figures. So even back at that  
25 point it was at least being canvassed that that might be a different way to cut this particular  
26 cake. We are not making any submissions whether or not that is appropriate in these  
27 circumstances, we will leave those sorts of matters, if necessary, for the defence. All I  
28 mention is the fact that to suggest that this had never come across the consciousness of  
29 those involved on the other side would perhaps be putting it a little high. Miss Howard  
30 helpfully points out the paragraph, it is para.24 of that opinion, p.39, tab.3 of the first core  
31 bundle – it is only a passing reference, nothing more than that, and I would not want to  
32 make more of it.

33 I will continue on to the other matters, unless the Tribunal has further questions? “The  
34 likely issues and nature of relief”, as I understand it Mr. Greene helpfully I think agrees,

1 broadly speaking, with the nature of the issues that we come to deal with in this matter, and  
2 so unless the Tribunal has particular comments on the way they have been put together,  
3 that appeared to us to be a logical way of dealing with these issues. Obviously, quite how  
4 they are presented will depend to some extent on how the case is opened by either Mr.  
5 Brannigan, or whoever acts for him. I am not for a moment suggesting that these issues  
6 should constrain the way that he operates.

7 On documents and disclosure, again there does not appear to be any great issue here in  
8 relation to documents. Mr. Brannigan and his representatives have all the relevant  
9 documents, and there is therefore no issue on disclosure. We will not be seeking any  
10 documents from Mr. Brannigan, I assume he has provided them to us. Mr. Greene this  
11 morning canvassed the notion that he may well – I maybe putting it too high – or at least  
12 may be considering the possibility of seeking disclosure from third parties, whether by an  
13 application for non-party disclosure, or by witness summons. Of course, we do not want to  
14 keep anyone from making applications to this Tribunal. We would, however, ask that any  
15 such application is done on notice to us. I am sure that would come as a matter of course –  
16 but in the circumstances where issues may arise for the office which may be more  
17 significant than simply whether or not a particular person turns up, or is ordered to turn up,  
18 we would ask that we be given 14 days notice of any such application in order to give us  
19 time properly to prepare for it. That is not a matter that I have raised with Mr. Greene, he  
20 may have no objection to that, it is simply something I think the Office needs in these  
21 circumstances.

22 THE CHAIRMAN: I am sure Mr. Greene will pass that message on to Mr. Brannigan; I do not  
23 think he can necessarily give any commitment on Mr. Brannigan's behalf but it seems to  
24 me eminently reasonable.

25 MR. BEARD: Well, madam, of course, given the nature of the relationship – or lack of  
26 relationship, it depends on the perspective one takes on these things – between Mr.  
27 Brannigan and Mr. Greene, obviously I would not be seeking to ask Mr. Greene to bind Mr.  
28 Brannigan since he is not on the record. It would be open to this Tribunal simply to order  
29 that any applications be made on 14 days' notice. Of course, there can be residual liberty to  
30 apply, but that would send a very clear message that these matters should be properly  
31 trailed so that we can answer them.

32 In relation to confidentiality we are as one with Mr. Greene on this, at present we do not see  
33 any issues of confidentiality. In relation to oral evidence the position of the OFT has been  
34 made clear. It is not considered necessary that any oral evidence is put forward. Obviously



1 there will be reference, probably frequent and extensive reference, particularly at  
2 attachment F, which is the reasoning going to the way in which the OFT has approached  
3 this matter for the purposes of a non-infringement decision, however there is no need for  
4 the OFT to go further in these circumstances.

5 In relation to Mr. Brannigan, again, of course, we would not wish to prevent him from  
6 providing a witness statement. We would like to place a very clear marker at this stage that  
7 the OFT would object if Mr. Brannigan saw this as an opportunity at another round of  
8 submission of material that was more extensive than the material that had previously been  
9 put forward. In those circumstances the OFT will, of course, have to reserve its position in  
10 relation to the admissibility of such material. It is perhaps instructive to note that at least in  
11 one proceeding, which may be relevantly similar, in the football kits' litigation, Mr. Mike  
12 Ashley, who was in those proceedings the "whistle-blower" produced a number of  
13 documents that were then relied upon, put forward a witness statement that simply verified  
14 the authenticity of the documentation that was put forward and said "That is the basis on  
15 which I have presented to the OFT and those are the facts that I rely on". He made himself  
16 available for cross-examination, of course. But in these circumstances it would perhaps be  
17 that sort of witness statement which would be appropriate for Mr. Brannigan to verify what  
18 it was that he had put to the OFT, not a more wide-ranging excursus on his concerns about  
19 any parts of the industry with which he has been involved, or his further dealings with the  
20 Office. We are concerned that that matter should be properly dealt with. We do not make  
21 an application for any such order. We do not see precisely how one could properly be  
22 given, but it is something that we would wish to flag at this stage, because it goes to our  
23 more general concern about how it is that this matter should be dealt with by this Tribunal  
24 at the final hearing, and what it is that is material for this Tribunal to consider in an appeal.  
25 Finally, turning to timetable, I think that is probably covered. In the circumstances there  
26 seems to be consensus there is no need for further hearings, and the Tribunal has set out  
27 dates for defence and serial exchange of skeletons. Mr. Greene expressed no objection to  
28 that in the course of his submissions. That would seem a sensible way of dealing with  
29 these matters, it gives Mr. Brannigan an opportunity to set out his responses to the defence  
30 and the OFT will hope that it needs to put in very little by way of skeleton following on  
31 from its Defence, but must have the opportunity to deal with any matters arising.  
32 Unless I can assist the Tribunal further in relation to any of those matters? If I may just  
33 turn and check there is nothing further from those behind me? (After a pause) There is one  
34 further matter that Miss Howard has very prudently raised, which is if there is to be a

1 witness statement provided then equally a date might sensibly be set for the provision of  
2 that witness statement. We are conscious of course that if we do not receive any witness  
3 statement before we serve our Defence, then we will not be able to deal with it in the  
4 Defence. Equally, it may be that the witness statement can properly be served thereafter, in  
5 which case the OFT will have to make submissions in relation to its content or its  
6 admissibility insofar as those transpire to be necessary at some subsequent date, but I leave  
7 that matter in the hands of the Tribunal. But perhaps it would be prudent to set a date to  
8 avoid the risk that it is interposed at some point which is not envisaged by the timetable at  
9 present. Thank you.

10 THE CHAIRMAN: Mr. Greene, have you anything that you would like to say in reply?

11 MR. GREENE: Can I just make two points: first, in relation to, as I understand it, the Office of  
12 Fair Trading has taken up the points made by the Tribunal in its letter of 16 January. That  
13 letter is predicated on the basis that the only appeal in front of the Tribunal is the appeal  
14 against the Decision of 9<sup>th</sup> June, so that as I understand it the Tribunal is looking at the  
15 appeal notice that related to the subsequent Decision rather than the original appeal notice  
16 with all the material attached to it; that is my understanding.

17 Secondly, as far as issues being raised with the OFT I would submit that a lay person, or a  
18 complainant (a small company), makes a complaint to the OFT, the OFT in its statutory  
19 role may or may not investigate that complaint, but in that investigation it, itself will be  
20 looking at material that relates to the complaint. I take as an example, which is relevant, is  
21 that if we look at the assessment of complaint that was before the Tribunal on the last  
22 occasion, this is the assessment by the OFT, consequent upon the April hearing, and this  
23 was actually a replacement document – I think it came out in one form and was then  
24 replaced – I am not going to be very good on giving you a reference for it.

25 MR. BEARD: There are obviously two key parts to the assessment, they both appear at tab.24 of  
26 the additional material. The first part is the material dealing with the decision not to  
27 proceed with any detailed investigation. I imagine since this is going to be the focus of the  
28 appeal that Mr. Green is going to want to refer to the second document, which was  
29 previously known as attachment “F” – clearly issues to do with whether or not the OFT did  
30 or did not investigate or should or should not have investigated are rather aside from the  
31 issues in these Appeals now.

32 MR. GREENE: If one looks at para.12 of that - I am looking at **this**?

33 MR. BEARD: That is the discrete ring bound Decision, that is fine, it is in two parts. The first  
34 part is the assessment saying the OFT will not be proceeding with the investigation and the

1 substantive material is in attachment F, which is where that reference that I have been  
2 making comes from.

3 MR. GREENE: I only make a point about it in support of the points I was making that at para.12  
4 there was a reference to the work of the Competition Commission in relation to local  
5 newspapers, and it there talks about the shares nationally of regional and local pay, free and  
6 free titles by volume of circulation and of course brings in Trinity Mirror and DGMT. My  
7 only point about that is that that indeed was there, that was something not coming from, as I  
8 understand it.

9 THE CHAIRMAN: I do not seem to be looking at the same para.12.

10 MR. BEARD: I think, madam, that Mr. Greene is referring to para.12 of the element of the  
11 assessment that deals with whether or not there should be any further investigation of this  
12 matter, which is the first document. If you are looking in tab 24 if one turns through it is on  
13 the fifth page, I think.

14 THE CHAIRMAN: Yes, I have it.

15 MR. BEARD: It is not the OFT's case that the OFT has not referred to these matters.

16 MR. GREENE: Well I think that is my point made, that here was the OFT indeed looking into  
17 these matters and looking into market share nationally and, of course, there had been a  
18 Competition Commission view on the regional and local papers, and I think it would be fair  
19 to say that that sort of information would not necessarily be available to a litigant in person  
20 making their complaint. One would expect that the regulator would take up those points  
21 effectively on behalf of the complainant. Unless I can help you any further on any other  
22 points?

23 MR. BEARD: Madam, if I may? I realise I am speaking slightly out of turn, but it should be  
24 made clear since Mr. Greene has only raised this in reply, that statement does not refer in  
25 anyway, or contemplate any existence of collective dominance between any of those parties  
26 – certainly not between the four of them at a national level. It is in that context that  
27 obviously the issue has now really arisen, but I make that passing observation. It is  
28 obviously also material to refer to the fact that the reference there is not to attachment F,  
29 which was the part dealing with non-infringement. Thank you.

30 THE CHAIRMAN: We will now rise for 10 minutes and decide how to take this forward from  
31 today.

32 (The hearing adjourned at 12.35 p.m. and resumed at 12.50 p.m.)

33 THE CHAIRMAN: We have listened very carefully to the submissions of Mr. Greene and  
34 Mr. Beard. We take the view that the revised notice of appeal does go beyond what was

1 put in the various letters of complaint from Mr. Brannigan, and hence what was included in  
2 the Decision, which is the subject of this challenge – a Decision of the OFT. Therefore we  
3 do not wish the OFT to have to plead to those matters in the Defence. The matters I am  
4 referring to, in terms of the OFT’s submissions for today’s hearing, being: the addition of  
5 the National geographic market definition and the allegations of collective dominance  
6 against Trinity Mirror and DGMT in the national market, and the involvement of those  
7 extra two publishers in the regional East Sussex Market. The head of abuse based on the  
8 alleged exclusion of Brannigan from the newspaper printing services: in our view that was  
9 raised in the complaint, but only as evidence of intention – exclusionary intent on the part  
10 of Newsquest, not as a separate head of abuse. Finally, the challenge to the OFT’s alleged  
11 practice in dealing with disputed facts, and in determining its administrative priorities.  
12 As far as the evidence of market shares is concerned, we regard that as another way of  
13 putting the dominance allegation which does not go beyond the scope of the original  
14 complaint.

15 We intend to include a direction to that effect in the order that comes out of today’s  
16 hearing, but not to issue any formal reasoning in order not to disrupt the timetable that we  
17 have floated and which both sides have expressed their agreement with in order to ensure  
18 this matter is heard as expeditiously as possible. Therefore we will draw up an order in the  
19 course of today (or the next couple of days) dealing with the various points that have been  
20 raised, including the point about the consolidation of the bundles which the OFT have  
21 undertaken to carry out. We propose that the witness statement from Mr. Brannigan should  
22 be served at the same time as his skeleton argument.

23 Mr. Beard, if we wanted to set a date for the lodging of the consolidated bundles at some  
24 point before the hearing on 27<sup>th</sup> March, assuming that takes place as we envisage at the  
25 moment, could you take some instructions as to when we could do that?

26 MR. BEARD: (After a pause) Madam, the suggestion from those behind me, which seems  
27 eminently sensible, is that we endeavour to prepare these bundles to be served with our  
28 Defence in the hope that our Defence can then cross-refer to these bundles. Now, we  
29 recognise that space will have to be reserved for skeleton arguments and for any witness  
30 statement Mr. Brannigan chooses to serve, but beyond that it seems to us sensible to deal  
31 with it in that way, and then the Tribunal should have these bundles early, and hopefully the  
32 defence will be co-ordinated by reference to the documents – if that would assist the  
33 Tribunal?

34 THE CHAIRMAN: That would be very helpful, Mr. Beard, thank you. Mr. Greene, we assume

1 that you will be in touch with Mr. Brannigan to explain to him what has happened today?

2 MR. GREENE: Yes.

3 THE CHAIRMAN: As far as his witness statement is concerned, I should make clear we do not  
4 wish, in any way, to limit what he wants to put in that witness statement, although you will  
5 have heard the points made by Mr. Beard. The purpose of the witness statement is so that  
6 we have the matters which have been set out in the original letters in the form of formal  
7 evidence for us to take into account at the final hearing of this matter rather than just as  
8 assertions. That is the purpose from our point of view of producing a statement of truth but,  
9 as I say, we would not wish to limit in any way the evidence that Mr. Brannigan wishes to  
10 put before the Tribunal.

11 MR. GREENE: Indeed.

12 MR. BEARD: I am grateful. There is one matter in relation to the Tribunal's ruling in respect of  
13 the revised notice of appeal if I might raise that, unless there were other matters the  
14 Tribunal was going on to deal with?

15 THE CHAIRMAN: No.

16 MR. BEARD: It is simply a matter of practicality. Is the sensible way of dealing with the order  
17 that the Tribunal has made simply for there to be deletion of the relevant paragraphs of the  
18 revised notice of appeal that have been referred to by the Tribunal in its letter of 16<sup>th</sup>  
19 January, simply to make absolutely clear what it is that OFT is pleading to. Obviously we  
20 have the order that has been made, but given that it is in the context of what has been put  
21 forward here, would that be a sensible way forward?

22 THE CHAIRMAN: We will make it clear in the order that comes out of today which passages of  
23 the notice of appeal we do not expect the OFT to plead to in the Defence that it is to serve  
24 by the time limit set in the order.

25 MR. BEARD: I am most grateful, thank you.

26 THE CHAIRMAN: Thank you very much to the parties for their very helpful submissions.

27 (The hearing concluded at 1 p.m)